Children as Witnesses - Legal Aspects

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The topic which the Institute has chosen for examination at this seminar is a timely one of fundamental importance. During the past three or four years the people who live in the countries which are nearest to Australia in terms of their social and cultural backgrounds have been forced, because of a barrage of publicity on the subject, to pay much closer attention to children in the criminal justice system. The main thrust of that publicity has been coming from one source and it has been headed in a single direction. This paper will make some remarks which question the direction which the debate has taken. There is a need to restore some balance to the debate in order to guard against the destruction of legitimate institutions of fundamental importance which seem to be threatened by the hysteria generated over the issue of child sexual assault in particular.

The seminar is timely because it provides an opportunity to ask some basic questions about recent developments in this area at a time when people are questioning their value. Through the seminar the achievements made so far can be assessed, continuing problems identified and some guidance given as to the direction which future reform should take. In addressing these questions, it should be kept in mind that the specific topic for discussion is 'children as witnesses'. That is, however, but one aspect of a much larger issue and in examining it, some consideration of the more general topic of children as victims of sexual assault cannot be avoided.

If the achievements of the publicity of child sexual assault are examined, it must be recognised that its most valuable contribution so far has been to make the topic of child sexual assault a public issue. Child sexual assault has been brought out of the closet in the same way that publicity campaigns and the implementation of new laws concerning domestic violence and drink driving have raised public awareness and probably changed public perception of the conduct involved. The impact of these latter campaigns can be assessed. If their primary objective has been to reduce the incidence of the activity concerned, they have probably been successful.

One of the means used to achieve this objective has been to draw attention to the serious nature of the conduct in question and to seek to change previously existing attitudes of tolerance towards people who indulge in such behaviour. Because domestic violence and drink driving now carry a greater social stigma than they did before the campaigns began, people are discouraged from behaving in a manner which is likely to attract that stigma and the conduct in question is considerably less likely to occur.

Where does child sexual assault fit in with this scheme of re-ordering of social values? How many people have stopped interfering with children because they are now persuaded that it is not acceptable behaviour? It is impossible to estimate even this. Nobody would say that they considered the sexual assault of children acceptable conduct before these

campaigns but have now changed their minds. The thrust of a campaign of this kind needed to be different, as it properly has been. It was directed essentially towards the victims of child sexual assault. Their plight has been publicly recognised and services improved. Potential victims should be better equipped to resist offences because their sense that it is wrong is given support of a tangible kind. More importantly, victims are given greater encouragement to report an assault, and people who come into contact with children are obliged to take a more positive role. The consequence is that child sexual assaults are now more likely to be discovered. Because a greater likelihood of being caught is the most effective deterrent, and this has been clearly demonstrated by the results of the use of random breath testing, the incidence of the crime will decrease. Unfortunately we cannot be sure that this will be the result, but such logic as can be applied to predicting the results of the recent publicity and legislative reform would imply that child sexual assault offences should decrease, perhaps dramatically.

The fact that this has become a political issue has undoubtedly created serious problems in the assessment of the results. In the first place, there is a perception engendered in the mind of the community that this crime is widespread. In order to be seen to be making progress, there needs to be a larger number of cases reported, and where there is a large number of reported cases, the number of convictions needs to be proportionately large. The vast amounts of money being spent on the problem need to be justified to the public. The confidence of the public in the administration of justice, a concept which has been cultivated to correspond with the maintenance of law and order, is believed to be enhanced by an increase in the activity of agencies of law enforcement and its apparent effectiveness. This creates pressure of various kinds. One response to that pressure has been to expand the definition of 'child abuse' to include huge numbers of cases that were previously defined as child neglect or misconduct of another kind falling short of child abuse.

Another response has been motivated by an apparent desire to increase the number of convictions for the crime of child sexual assault. Investigations are being conducted in zealous disregard of the overriding need to maintain an acceptable standard of fairness and justice. Australia should have learned from the *Chamberlain* ([1984] 51 ALR 225) case that the purpose of criminal investigation is to discover the truth and not merely to gather evidence which points to the guilt of an accused person. In a system which is fair, it is as important for investigators to find and disclose material which suggests that the accused person is innocent as it is for them to obtain evidence of guilt.

The Primary Objectives of Reform

Any change in the manner in which children are treated as witnesses must be consistent with the maintenance of two important objectives within society generally. Firstly, the preservation of the general well-being of children in the community, and secondly, the maintenance of an acceptable standard of criminal justice. Any reform designed to protect children from unfair treatment must be thought through thoroughly so that its wider ramifications are considered and unintended consequences are foreseen and avoided.

My own practical experience satisfies me of two things. In the first place, psychologists have correctly warned that an exaggeration of the risk of child sexual assault may lead to an unhealthy deterioration in the general quality of life enjoyed by children and adults alike. The impact on human relationships, far from eliminating the unwelcome aspect represented by child abuse, may be so profound as to deny children their legitimate right to receive both affection and protection from adults. Although this would be an unintended result of the so-called 'war' against the sexual abuse of children, it is one which can be foreseen if the issues are carefully considered. This conclusion is based on the practical application of utilitarian principles. The preservation of the right and the means of all children and all adults to be free to enjoy genuine mutual affection free from unjustified suspicion and mistrust is a more valuable social achievement than the elimination of the sexual abuse which occurs in a small minority of relationships between adults and children.

In the second place, lawyers have properly emphasised that the need to preserve as universal the basic principles on which our system of criminal justice is based far outweighs the apparent advantage which might flow from abandoning those principles when it comes to a case of child sexual assault. Whilst it is legitimate and humane to have concern for the plight of the victims of crime and to recognise the ordeal they suffer when they are called upon to appear in court, one fundamental fact should never be forgotten. The purpose of a criminal trial is, and the purpose of criminal investigation should be, to determine whether the crime alleged has been committed and if so, whether it was the accused person who committed it. Against this background, it is deeply distressing to hear people say that when it comes to a criminal trial 'the only people with any rights are the offenders'. We must never lose sight of the fact that the purpose of the criminal trial is essentially to determine the ultimate issue in dispute - that is, whether the person charged is an offender. Quite proper standards have been put in place to guard against such a conclusion being made without adequate justification. This is because the consequences of reaching a wrong conclusion are so damaging not only to the individual involved but to society generally. Again, an example is the recent experience of the *Chamberlain* case.

The characterisation of the argument as being the resolution of the competing interests of 'the offender' and 'the child victim' is a common approach of those advocating an extension of prosecutorial powers and a drastic curtailment of the traditional rights of a person suspected of a criminal offence. It is an argument which, because of the terms in which the question is posed, cannot be lost. It is more accurately and validly represented as a comparison between two community interests, one ensuring the fairness of criminal trials and the other, the fair treatment of children who have been, or may have been, sexually assaulted.

The Recent United States Experience

There has been a dramatic increase in the reporting of cases of child sexual abuse since 1983. It has become a national issue but questions are now being asked about the capability of the criminal justice system to cope with the problem. Several highly publicised cases have foundered, including most of those charged in the *McMartin* preschool case in California and the entire prosecution of 24 people allegedly involved in a 'Child Sex Ring' in the tiny township of Jordan, Minnesota. Inquiries into the conduct of those prosecutions, have revealed some of the reasons for and the impact of these failures. In *McMartin*, one of the conclusions drawn was that 'repeated interviewing and discussions about abuse undermine the credibility of witnesses - children may interpret repeated interviews as demands for more or different information'. In a report on the Jordan case it was observed that 'the tragedy of the case goes beyond the inability to prosecute individuals who may have committed child sexual abuse. Equally tragic is the possibility that some were unjustly accused and forced to endure long separations from their families'.

In an article published in *The Age* newspaper Bettina Arndt (1988), writing from the United States of America, describes some of the unwelcome, and frankly frightening, consequences of the increased attention being given to the topic of child abuse in that country. She reports that lawyers' estimates suggest that 30 per cent of all United States contested custody cases now involve allegations of sexual abuse and that 60 per cent of these allegations have proved to be unfounded. Howard Davidson, the Director of the American Bar Association's National Legal Resource Centre for Child Advocacy and Protection, lends some support to these figures. He is quoted in the Association's journal as saying that 'the best research suggests that only 5 to 8 per cent of allegations of child sexual abuse are fictitious'. Only 5 per cent! That is a high figure and it demands that careful scrutiny be made of any such allegation before serious interference with the liberty of any person can be made in reliance on it. That scrutiny should be infinitely more careful where the allegation is made in the context of divorce proceedings.

Bettina Arndt observed in her article that an allegation of sexual abuse is a powerful weapon against a divorced father. In order to protect the child, the courts in the United States tend to respond to such charges by taking the 'safer course' of restricting contact between the accused parent and the child. The father is often presumed guilty and then has to fight to reverse the court's decision and restore his parental rights. Allegations of this kind are identified as 'the latest tactic in a nasty divorce', and their motivation is explained by one American divorce lawyer in this way:

> If you wanted to hurt your ex-husband before, what would you say? He has affairs? He cheats on his income tax? He's a homosexual? Big deal. Who even cares about that stuff anymore? But this is the ultimate weapon. I don't care how liberal society gets, it will never be okay to molest your own children.

The conclusion which Bettina Arndt makes is a compelling one, all the more so since it is made by a person widely acknowledged to have a sound understanding of human relationships. She said this: 'Sexual abuse does occur and far more often than we like to believe. There is a need to teach children to take care of themselves, to report abuse, and to know they will be believed and protected in such circumstances. But equally it is crucial to protect men from false accusations and to avoid poisoning children's minds by teaching them to be afraid of close, loving contact with men who care for them. Children have a right to feel safe with their fathers - let us not destroy that precious security'.

The Recent English Experience

The most celebrated case in England has concerned the conduct of a doctor who practises at the Middlesborough General Hospital in Cleveland County, Northeast England (Inquiry into Child Abuse in Cleveland 1988). After she began working there, the number of children diagnosed as victims of sexual abuse is said to have increased by over 300 per cent. Many of the parents involved have complained that their children were not sexually abused and that they were taken away from them without adequate investigation of the case, immediately destroying the family, perhaps irrevocably. In at least one case a judge has blamed the doctor's incorrect diagnosis of sexual abuse for ending the parents' marriage and accused her of gross negligence and incompetence. As a result the government ordered a judicial inquiry to examine 93 cases of suspected child abuse cases in which children had been put into the custody of the Cleveland authorities from May to July 1987. In the previous year only 30 similar cases were reported.

The doctor's work has been described as a 'terrible overreaction' to the panic generated over child abuse. The horror of innocent parents caught up in the mire of sexual abuse accusations should not be lightly dismissed. One couple who took their seven-month-old daughter to a hospital for a chest infection were told after a five-minute examination that the father had sexually abused the baby. The couple's other two children were examined and kept in the hospital for the same reason.

One mother described her ordeal:

> When they took the children I could have gone hysterical. They told me to wait upstairs so the children wouldn't have to see how upset I was. Dr Higgs said she was definite it was sexual abuse. The more we protested the more she stuck her heels in. The social workers then enforced a policy of rigid separation. They gave us no access; they said it was not appropriate. We didn't see the children for three weeks. There was a policy of complete alienation of the children from their family, their

> grandparents, the school, the health visitor and their regular doctor, everyone. The social workers never contacted any of them to see what the family was like.

This suffering it should be remembered, was inflicted on parents already deeply concerned about their child's illness.

The Health Authority responsible for the area has refused to deny reports that 90 per cent of the diagnoses of sexual abuse made by the doctor have now been overturned by the second opinion system introduced after her methods were called into question.

A judicial inquiry in England has also been ordered in Hereford and Worcester following the dismissal of a case of alleged child abuse in which the judge said that the parents were entitled to be completely exonerated. This followed the father's enforced separation from his children for a period of six months. In Hereford and Worcester, the number of cases of suspected child sexual abuse increased from 150 in 1985 to 383 in 1987 following the appointment of a doctor who used a method known as the anal dilation technique to diagnose sexual abuse. The same method had been used by the doctor in the Cleveland case.

There is at least one case in New South Wales where a similar experience has been suffered by the parents of a young girl who was wrongly thought by officers of the Department of Youth and Community Services to be a victim of child abuse. There is no comfort to be gained from thinking that what has happened in England is peculiar to that country.

As a postscript to these comments on the recent experience in England, and in support of the comment made above about some of the dangers of overemphasising the problem of child sexual assault the following observation may be of interest: 'the commonest form of child abuse in England is children who've never been kissed and held and made to feel lovable'. This statement was made by Dr Germaine Greer during a recent interview.

The Unintended Consequences

The experience in both the United States and England should be sufficient warning to guard against the same thing occurring in Australia. The level of the panic is dangerous. A preoccupation with sexual abuse of children may create something that is much worse than the problem which it seeks to overcome. It could damage not only the individual families affected by false allegations but the general ability of adults to show their affection towards children in a physical way. Perfectly natural and harmless behaviour could become so overlaid with uncertainty and suspicion that spontaneous expressions of physical affection between child and adult will be replaced by an attitude of anxious withdrawal.

As Nicholas Tucker (1985), an English psychologist, has pointed out, the present direction taken by some of the campaigns against child abuse are at times as alarming as the abuses against which they are directed. The suggestion in these campaigns that parents are the most likely potential assailants, however valid it may be in a small minority of cases, may be more than most children are psychologically equipped to deal with. Whilst such campaigns have the virtue of discouraging and possibly revealing sexual abuse where it does occur, they also have the potential to cause radical and unwelcome changes in the natural development of the sense of trust and security which a child should enjoy in the company of its parents.

The Problem of False Allegations

It is frequently claimed in the literature on child sexual assault that children do not tell lies about sexual abuse. This statement is of course incapable of proof but such evidence as exists would appear to suggest that it is wrong. There is a long list of cases which could be cited to show that children do sometimes exaggerate and fabricate and this is particularly so

when they are influenced by suggestions made by an adult, whether a malicious party to a custody dispute or an overzealous investigator seeking to extract from the child a version of the facts which corresponds with the investigator's own conception of the truth.

Even if it is true that children do not usually lie about sexual assault, it is, as Professor Richard Harding (1987) has pointed out, facile and dangerous to construct a legal process on the assumption that all children are innocent and truthful. The result would be the abandonment of the traditional principles on which our system of criminal justice is based. Far from being a recognition of the right of victims, a system of criminal procedure based on such a notion would serve only to create more victims in the form of people convicted of very serious crimes who are in fact innocent of any wrongdoing.

Recognising that the offender against children is almost universally despised within the general community should emphasise the need to ensure that a person who is merely the subject of an allegation of child abuse is given a fair hearing before they are 'branded' as a child molester. Because the crime is so seriously regarded a person in that position needs and deserves, if anything, a greater level of protection against being wrongfully convicted. There is simply no chance of any adequate safeguard against wrongful convictions if the legal process is based on a presumption that children always tell the truth when they make allegations of sexual assault.

Specific Issues Concerning Child Witnesses

Interviewing children

The manner in which children are questioned about sexual abuse is a crucial issue. There are several important facts to bear in mind. If the questioning of the child is conducted properly the true facts of the case are more likely to emerge and a sound conclusion can be made about the following action which should be taken. On the other hand, where questioning is improper and unfair, either to the child or to a suspected person, there are considerable and dangerous risks involved. They range on the one hand from causing additional distress to a child victim, compounding the injury suffered and creating the likelihood that evidence obtained will be so unreliable that it will not be admitted in legal proceedings. An otherwise supportable case is destroyed. On the other hand and at the other extreme is what can be regarded as the most serious risk of all, the possibility that a person who is innocent of any wrongdoing will be convicted of a serious crime.

When police interview a suspected person their conduct is governed by strict rules, based on propriety and fairness and designed to ensure that the evidence to be presented to a court is both reliable and relevant. These rules have been developed over the years by the desire to ensure that people charged with criminal offences are not subjected to unfair methods of questioning contaminated by deception, oppression, intimidation and rank dishonesty. Whilst the rules have developed slowly and the courts have taken time to respond to the need for altering the rules where unfairness and injustice have been demonstrated, there is much that can be gained from the experience we have had with rules governing the conduct of police questioning of suspects.

It should be acknowledged that the function of the police when interviewing a suspected person is different from that of the police interviewing a person who claims to be the victim of a crime, who is for that reason probably the most important of potential witnesses in the case. Nevertheless, it seems that the kind of problems which have confronted courts in dealing with interviews between police and suspects can also be present when the victim of an offence is interviewed. If a suspected person is intimidated or threatened, or some inducement is held out by the interviewer there is a risk that the suspected person will say what they think the interviewer wants to hear. For that reason confessions obtained in such a manner are regarded by the law as being unreliable and for that reason inadmissible as evidence in court. In the same way, perhaps less subtly but for not dissimilar motives, namely to obtain a conviction, a child can be intimidated into giving the answers which the interviewer wants. More dangerous potentially is the risk that a child

will respond to an inducement held out by the interviewer by saying what they think the interviewer wants to hear.

There is an additional aspect which comes into play where the person interviewed is said to be the victim of a crime, and it is something which must be very carefully watched in the case of interviews with children. That is the risk that the nature of the questioning will suggest to the child that a particular statement is desired. The use of leading questions is not permitted in evidence in chief in court because the answers have little value. For the same reason leading questions, suggesting that the person interviewed should answer in a particular way, should not be used in an interview with a witness conducted out of court.

There needs to be strict control over the process of questioning witnesses to ensure that the conduct of the investigation has two features which are both essential characteristics of an acceptable system of criminal justice - reliability and fairness. This control might be established by the formulation of guidelines to be followed by interviewers. Prominent among them should be the prohibition of coaching, the use of suggestive and leading questions or any manner of questioning which might be seen as a form of inducement or intimidation to obtain a particular answer.

There is one proposal regarding the questioning of children that should be given further consideration. That is the suggestion that the accused person should be entitled to representation at the time the child is interviewed. They would not be in the company of the child, and would not be permitted to speak, but the lawyer could ask questions with a view to determining the appropriate plea. It would help the child to the extent that the cross-examination may be over and done with without the need to take the case to court.

Videotape Recordings of Interviews

The goal of protecting the child victim from the ordeal of repeatedly having to recount details of a sexual assault and protecting the child victim from the ordeal of court proceedings is a desirable one and there is a clear need to examine alternative procedures.

The techniques used to obtain relevant evidence in child sexual assault cases can undoubtedly be improved by the use of videotape equipment. The advantages of having a videotaped record of the child's statement in relation to the offence are:

- the use of videotape allows the child's evidence to be preserved whilst recollection of the events in question is still fresh;
- it would spare the child witness the ordeal of having to recount the facts on a number of occasions;
- the videotape recording is a valuable aid to both the prosecution and the defence in the preparation of a case for trial;
- the use of the videotape recording will, in many cases, convince an accused person of the fact that the child has made a complaint and encourage an admission of guilt and the consequent avoidance of distress for all those concerned in the trial process;
- from the point of view of the accused person, the videotape recording can be used to check whether the child's version of events was unfairly prompted by improper questioning; and
- if the interview is conducted by a properly trained examiner, a complete record of relevant material in a form which may be acceptable for use in court proceedings could be obtained.

It has been proposed in New South Wales that videotapes be used to take statements of witnesses, but that there should be an absolute bar to their admissibility as evidence. This proposition was sought to be justified on the ground that one of the disadvantages of the use of video was that in an interview 'the child may volunteer information that is detrimental to the case and cannot be excised'. This attitude represents a perversion of the interests of justice. It promotes the concealment of evidence that may be of assistance in reaching a

decision as to the guilt of the accused person. It is inimical to the concept of fair trial being based on all the relevant evidence and displays an attitude which is contemptuous of the pursuit of genuine justice.

Inducement of guilty pleas

The need to examine this aspect of the criminal justice system is based on a simple and unassailable proposition. The best way to overcome the problems of children as witnesses is not to require children to be witnesses. This occurs where the accused person pleads guilty. There are various means of encouraging pleas of guilty. The use of videotaped statements is one which has already been mentioned. Pre-trial diversion schemes are another.

There is also the question of the 'discount' to be given to accused people who plead guilty. This has been debated at some length and one prominent judge has suggested that there should in effect be a 'flat rate discount' of 25 per cent for people who plead guilty. The courts in New South Wales have generally recognised that it is legitimate to take into account the fact of a plea of guilty in reducing the penalty that would otherwise be imposed. This is done on the ground that a plea of guilty, particularly in the case of sexual offences, spares the victim the ordeal of giving evidence. The fact that an accused person pleads guilty must be taken into account in their favour on the question of sentence, but it would not be workable to determine the amount of discount by legislative decree. That must depend on the particular circumstances of each case and the motivation of the individual offender.

Procedures designed to induce a plea of guilty have been properly criticised on the ground that they may be so attractive to an accused person that they result in innocent people pleading guilty. This is always a risk and one which must be carefully watched. In the case of offences of child sexual assault, the risk that an innocent person may plead guilty in order to obtain a favourable penalty of disposition of the case is probably less serious than with other criminal offences.

Accelerated prosecution

In a recent Discussion Paper on the subject of procedure between charge and trial, the New South Wales Law Reform Commission has recommended that there should be time limits placed on the prosecution of criminal offences. In the context of offences of sexual assault against children, these proposals would, if implemented, mean that if an accused person is held in custody, the trial of the offence must commence within six months of the time of that person's arrest. Where the accused person is on bail, the trial of the offence must commence within 18 months of the arrest. If these time limits were met, it would result in a considerable reduction in the delays currently experienced by people awaiting trial. These delays are not only of concern to the accused person. Unreasonable delays naturally prolong the trauma caused by having to remember incidents and events which witnesses would rather forget. Their removal would lead to more effective prosecutions and would reduce the suffering of child witnesses.

Courtroom atmosphere

The courtroom atmosphere should be less intimidating. There should be greater flexibility in procedural rules when children are required to give evidence. The wearing of wigs and robes and other aspects of court ceremony should be dispensed with if it is thought that they might be likely to intimidate a young child. The courtroom itself should be less intimidating.

The child victim should be entitled to be accompanied in court whilst giving evidence. Any suitable person, provided that they are not a witness in the case, could fill this role.

Consideration should also be given to the design of courtrooms. The cathedral-like structures that were built in the past are not necessary for the proper functioning of a court of law.

It is also said that there is a need to properly prepare children for the experience of giving evidence in court - not by coaching them in the answers that they should give, nor in prompting any kind of response, but by telling them honestly about the nature of the experience. They must be sensitively, but realistically, prepared for court by having time to develop a relationship of trust with those who have the responsibility of looking after their interests in court.

Presentation of evidence

The comments already made about the desirability of videotape recording of the statement of children are again relevant to presentation.

One of the difficulties faced by children when giving evidence in a sexual assault case is their inability to express themselves in terms which are acceptable as proof in a court. The requirements of proof in child sexual assault cases may be quite precise and involve concepts which are completely foreign to the understanding or experience of a young child. Apart from problems of comprehension, there is a significant problem that a child, particularly in the company of adults in a formal and in some senses hostile atmosphere, will be unable to say what has happened because of a sense of embarrassment or fear.

The use of anatomically correct dolls has been tested in America and it has been shown that children are able to explain what has happened to them not only in a much more realistic way when taken from their point of view, but also in a manner which can be better understood and perhaps better appreciated by the adults who are involved in deciding the issues which arise in the case.

In this context the use of closed-circuit television procedures must also be examined. A system of closed-circuit television has been upheld by the Supreme Court of the State of New York as satisfying the essential elements sought to be guaranteed by the confrontation provision of the United States Constitution. The opportunity of the accused person, the judge and the jury to observe the demeanour of the witness is not impeded. The procedure also enables the right to cross-examination and it impresses upon the witness the seriousness of the occasion. It must be acknowledged that other courts have taken a different approach by holding that the Constitutional provision required that there be face to face contact between the witness and the accused person. The resolution of this conflict will have to wait for an authoritative decision on the question by the United States Supreme Court.

In England, legislation has been passed permitting the evidence of a witness under the age of 14 to be given in court proceedings through a live video link. This system enables children who are alleged to be victims of sexual assault to give evidence in an environment which is generally free of intimidation but which is sufficiently formal to impress upon the child the seriousness of the exercise. The child victim is not required to confront the accused person in court. The accused person, the judge and the jury can see the child give evidence on a television screen in the courtroom. The child is questioned in a different location in the presence of a '

supporting' adult. The accused person cannot be seen by the child although the child will see on a television screen lawyers and perhaps the judge who may ask questions. The systems which are to be installed in English courtrooms would cost about $100,000 each.

The likely prejudice caused to an accused person by procedures of this kind are their greatest drawback. If such a procedure is to be considered here, and this can only be done after a careful examination of the available equipment, it should be used in all cases and not restricted to those where the child is considered to be at risk. The fact that the procedure is a standard one should reduce the prejudicial impact its use may otherwise have.

Oaths

The traditional method of giving sworn evidence in court is particularly inappropriate in the case of children. It is both unrealistic and unfair because it means that if a child does not understand or cannot adequately describe the concept of divine retribution, the child cannot give evidence on oath.

The important features of the child's evidence are that firstly, the child is possessed of sufficient intelligence to give a rational account of what they have seen or heard and understands the duty to tell the truth. Secondly, the child should understand the importance of the occasion of giving evidence in a court.

By amendments passed in 1985 these concepts have now been incorporated in the *Oaths Act 1900* (NSW). When a child satisfies these requirements, their evidence may be received by the court upon the child making a declaration in the following terms: 'I promise to tell the truth at all times in this court'. The importance of this procedure must be seen in the light of the fact that the making of a declaration marks the child's real introduction to the court process. If that first stage is complicated by unnecessary formality and anxiety, it threatens everything else which may follow. The New South Wales law is apparently causing no problems in practice.

Corroboration

Corroboration is evidence which is independent of the complainant and which tends to establish not only that the offence in question was committed but that it was committed by the accused person. There is a general trend towards the abolition of corroboration requirements. In New South Wales, a provision which required that a conviction could not be obtained unless the evidence of a child was corroborated by some other evidence was abolished in 1985. Similar proposals are under consideration in England and Canada. The problem with such a provision was that whilst it denied the possibility of a conviction in the face of compelling evidence, it permitted a conviction to be obtained where the evidence of the child was less than compelling but was, perhaps fortuitously, supported by some item of corroborative evidence which may be entitled to very little weight.

Rather than concentrate on arbitrary rules about independent evidence, it is preferable to have regard to the overall substance of the prosecution case. In England, the move towards abolition of the corroboration requirement has been accompanied by a proposal to establish a safeguard for the accused person in the form of a duty in the judge to stop the case if they think that a conviction on the totality of the evidence would be unsafe and unsatisfactory. That seems to be a much more sensible approach to the general problem of dealing with cases in which the evidence is so tenuous that it would be contrary to the principles of justice to convict the accused person.

Hearsay

One of the most difficult problems with the prosecution of child sexual assault cases is the inability of the child to recall the event in question at the trial. This is a particular concern with very young children because the rules of evidence do not enable the out of court testimony which they have provided, to be given at the trial. The current position in New South Wales, where there are very long delays between the time of arrest and trial, exaggerates the difficulty experienced in presenting this evidence before a court. Lapses in memory are more likely to occur because of the time between the offence and the trial.

Earlier testimony given out of court cannot be admitted at the trial because it breaches the rule against the admission of hearsay evidence. There are, however, many exceptions to the rule against hearsay which allow for the admission of otherwise inadmissible evidence. It could be argued that there should be an additional exception created so that when a child

gives evidence that an earlier statement was recorded, then the earlier statement should be received as evidence.

In sexual assault cases there is already one well-known exception to the rule against hearsay which holds that evidence of a complaint is admissible to show the consistency and therefore support the credit of the person who gives evidence of being sexually assaulted.

There does not seem to be any argument of logic or fairness which should prevent the statement of a child which has been recorded on videotape equipment being admissible in later court proceedings. This general rule should be subject to certain conditions, namely that the statement was reasonably contemporaneous with the event in question and was not induced by improper interviewing techniques. It is also necessary in the interests of fairness that the admissibility of the videotape recording should be conditional upon the child being called as a witness so that they may be cross-examined.

This proposal is consistent with the general line of reasoning adopted by the Australian Law Reform Commission when it tentatively recommended that if hearsay evidence is the best evidence available and can be shown to have reasonable guarantees of reliability, it should be admissible. This proposal would permit hearsay evidence to be received if it was made when the facts were 'fresh' in the memory of the child making it.

In some jurisdictions in the United States, revisions of the hearsay rule have eliminated the testimony of the child as a necessary part of the prosecution case. As a result, a person to whom the child has told the story may substitute for the child in court and explain the child's version of events. A similar procedure exists in Israel. It has been suggested that there is a risk that the person giving evidence will seek to perform a therapeutic or advocative role on behalf of the child victim. To counter this, it is proposed that the court should limit the evidence of the witness so as to exclude any assessment of the validity of the child's complaint. This procedure presents a dramatic alteration of the current law in Australia, but it is put forward on the ground that it enhances the ability of the criminal justice system to respond to the needs and rights of the child victim.

Children as accused

A further issue which this seminar should examine is the position of a child who is required to appear in court to give evidence as an accused person, as a witness for the defence. In general, the same rules and procedures which apply to adults in this capacity should also be applied to children.

There is certainly room to improve the operation of the criminal justice system in cases where children are called upon to be witnesses, but any suggested change to the current procedure must be carefully examined to ensure that it does not breach fundamental rules designed to ensure that the criminal process serves the ends of justice.

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Gathering Evidence from Child Witnesses: A Police Perspective

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This paper will address some of the practical issues facing investigators in the area of child abuse. These range from the initial investigation to the court hearing and concern not only police but other professionals working with child victims in the criminal justice system.

Research on the extent of sexual abuse occurring in the general community, clearly indicates that only a small percentage of cases are being reported. Reliable estimates suggest that one in four girls and one in ten boys will be sexually molested by an adult at some time in their childhood. Up to 80 per cent of these children will know the offender and in 50 per cent of these cases the offender will be their natural or substitute father.[1]

Initial Investigations

Initial investigations of complaints of abuse can often be hampered by the investigating officer's acceptance of various community myths. For example, until recently it was accepted that children fantasise about their sexual experiences. A further myth is that children are often provocative in relation to sexual activity and are eager participants.

It is of vital importance that all professionals involved in the investigation of child abuse be specially selected for their aptitude and empathy as well as their investigative ability. Special training in the area of child development is essential for relating to and successfully interviewing children. It is also essential that all investigators operate on the premise that children are presumed to be telling the truth, and bear no responsibility for their involvement regardless of time or circumstances (Godfrey 1983, p. iv).

Multi-disciplinary training will not only provide a basis for greater understanding and awareness of child protection issues but also allow networks to be established which will considerably assist successful investigations.

Initial investigations can be likened to a jigsaw puzzle - each piece of information obtained, be it a complaint from a neighbour, a school report, a medical assessment, a

previous notification, or a social welfare record allows a clearer picture to be established with a more accurate assessment of the actual situation and the risks to the child. In many instances the approach adopted in these investigations can have critical long-term effects for the child. If the approach adopted is to accept at face value the initial complaint without any subsequent check or investigation, then the probability of ascertaining the full facts in relation to the family is severely limited.

The provision of a central register to record all reports or notifications of suspected child abuse has proved invaluable in assisting workers involved in initial investigations.

Interviews

One of the most critical aspects of any suspected child abuse investigation is the interview with the child victim. It is crucial that such an interview be conducted in an appropriate setting and that the interview be prepared as soon as possible. Such preparation should include the ascertaining of relevant information from parents or guardians and, if applicable, the caseworker, about the child's developmental status, age, grade, ability to write, read, tell time and remember events. The family terminology for genital areas should also be ascertained. The circumstances of the abuse should also be reviewed where previously reported by the child: what, where, when, by whom and to whom reported.

The Interview

Setting

The setting for the interview can seriously affect the outcome. Experience has shown that the more comfortable and relaxed the child, the more information they are likely to share. The child should be allowed to move around the room, explore and touch, as well as sit on the floor or on an adult's lap.

The use of drawing materials can often be very useful, as can the use of aids, such as anatomically correct dolls, which can do much to allow the child to describe fully the actual event without the embarrassment of finding words and terms to describe the activity. It is essential that all workers using such aids be instructed in the proper procedures and use of the aids prior to their use.

Interviews are very time-consuming and should be conducted free of interruptions and at the child's pace, with appropriate breaks and pauses.

The person conducting the interview should ascertain all the information required and it is imperative that the child is not subjected to further abuse from repeated interviews by a variety of professionals who may each have a legitimate interest in the case. Otherwise it is possible, that in the space of forty-eight hours, the child may have been interviewed by a teacher, community health nurse or social worker, police officers, medical personnel and welfare officers. Faced with constant re-telling of their stories, and quite possibly conflicting reactions and advice, it is not surprising that many children retreat into silence or deny their original report.

From the child's perspective, there may be a tremendous amount of fear, shame, guilt and secrecy surrounding the sexual activity between the child and the offending adult. It is customary for an offending adult to swear the child to secrecy and to transmit to the child the adult's own guilt, demonstrated by the furtive nature of the encounter, the adult's demands on the child, the use of threats of or actual violence and the use of bribes. Ensuring secrecy on the part of most children is not difficult, since children are taught to respect and obey adults. How much greater then is the pressure brought to bear on a child by an adult upon whom that child has come to depend for love, affection, understanding, guidance, food, clothing and shelter? The more the child's physical and emotional security is bound up with their relationship with the adult, the greater the pressure.

Once the child has divulged the secret the pressures on them to retract the allegations are enormous. The non-offending parent or guardian is upset, disbelieving or rejecting and punitive. The alleged offender often calls the child a liar, and seeks support from other adults close to the child. The child is usually taken from the home and all that is familiar and secure. In the absence of special support for the child, it is not surprising that a retraction of the complaint sometimes follows. It is crucial that all child protection workers are aware of this possibility and take action to ensure that the child is protected and supported. The Bureau has accepted the philosophy that in intra-familial abuse, every effort is made to remove the offender from the home rather than the child. This is done by utilising arrest and/or bail conditions.

The statement obtained from the child may be either oral (tape recorded) or written. Recently, a number of attempts has been made to videorecord the child's initial complaints. Whilst as yet there has been no legislation to allow these to be used in the court system, they have proved invaluable for allowing all professionals involved in the case to see and hear at first-hand full details of the child's story, thus reducing the necessity for the child to be repeatedly interviewed.

Recently the Juvenile Aid Bureau has utilised specially designed Sexual Offence Kits, containing all requisites for a thorough forensic examination and appropriate instructions for use by the examining medical practitioner.

In our experience the child's right to protection is paramount and if there is any doubt it should be resolved in the child's favour.

Giving Evidence

The Director of the US National Institute of Justice, James K. Stewart, (Whitcomb 1985, p. i) suggests that 90 per cent of all child abuse cases are not prosecuted. In many of these cases, the decision not to proceed is due to concern about the child's possible performance on the witness stand or the impact of the court process on the child victim's recovery. Both community members and professionals are increasingly concerned about the need to improve their effectiveness in this area.

All professionals have a fear of testifying in court. This applies to police as well as doctors, social workers, and others. For the child victim it is even more awesome.[2] Preparation prior to the court appearance can do much to relieve this tension. The time spent in preparing the child is time well spent. Such familiarisation can include seeing the interior of the court, sitting in the witness box, reading the oath, seeing the Bible, meeting the prosecutor, and explaining where each person is placed in the court. All of this assists in removing the unknown aspects of the court.

Having a supportive adult in the court during the child's giving of evidence is also important. Recent innovations using screens to prevent a child witness being intimidated (Rockett 1987, p. 1817) are a move in the right direction whilst awaiting the court's acceptance of closed-circuit television to reduce a child's trauma.

Two further initiatives to assist professionals to better present their evidence in these cases are:

- The appointment of specially selected and trained female prosecutors attached to the Office of the Director of Prosecutions who are automatically assigned to any case where the complainant is a child. These prosecutors in many instances become involved in the initial prosecution and continue

until to the final trial. Their sensitivity, empathy and specialist knowledge of the issues involved in child protection make this a much needed innovation.

- The use of forensic experts in child abuse cases to assist the court to understand such diverse factors as child development, and age-appropriate hand pressure.

Our experience supports the view of the Canadian Committee on Sexual Offences on Children (Badgley 1984) whose research refutes suggestions that the allegations of young sexual victims are intrinsically less trustworthy than those of older victims, and argues against the need for special corroboration requirements where young children are concerned. A fundamental change in the law is needed to permit children to speak directly for themselves at legal proceedings. Whilst recently the truthfulness of victims of sexual offences has been regarded with less scepticism than in the past, the law still regards children's evidence with suspicion. There should be no special rules with respect to the child's legal competence to give evidence in court. A child's evidence should be received and considered in the same light as that of an adult. Young children are no more prone to giving vague accounts to the police than older children and are capable of speaking effectively on their own behalf. To make a child's testimonial competency contingent upon a child's age fails to take into account the cognitive and developmental differences among children of the same age.

Conclusion

If society believes that the abuse of children is a serious crime, then special techniques must be adopted within the criminal justice system which not only encourage the cooperation of child witnesses, but at the same time acknowledge the inherent limitations of a child's performance.

It must be ensured that the criminal justice system not only provides protection for the child from abuse but also provides protection while within the system.

Endnotes

1. These general estimates are drawn from the results of five major surveys, conducted between 1940 and 1978 including: C. Landis (1940); A. Kinsey (1953); J. Landis (1956); J. Gagnon (1965) and D. Finkelhor (1978). Their findings are also supported by the experiences of the Harborview Sexual Abuse Treatment Program in San Jose, California, which, together, have treated over 10,000 sexually abused children in the past decade. Informal surveys in Canada suggest a similar incidence.

2. Some professionals have found an article by D. Carson (1984) a help in addressing these issues.

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The Child as a Witness - The Use of Aids

DISCUSSION GROUP A

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The investigation of sex offences committed on children is a matter which always causes a deal of anxiety, hurt and frustration to the victim, the families and investigators involved.

This paper will discuss the current laws relating to children giving evidence, methods currently in use by the Child Exploitation Unit and new ideas that may be used in the future in the ever-increasing struggle against paedophilia.

At the present time, Section 23 of the *Evidence Act 1958* (Vic) states:

> (1) Where, in any legal proceedings, any child under the age of fourteen years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
>
> (2) No person shall be liable to be convicted of any offence upon any evidence admitted by virtue of this section and given on behalf of the prosecution unless that evidence is corroborated by some other material evidence in support thereof implicating him.
>
> (3) If any child whose evidence is received by virtue of this section gives false evidence in such circumstances that he would if the evidence had been given on oath, have been guilty of perjury he shall be guilty of an indictable offence.

Having this section in the statutes can, and indeed, does cause many cases against persons who have committed sex offences on young children, to escape prosecution.

Experience shows that children do not lie to get into trouble - they lie to get out of trouble. Corroboration of a child's story is often difficult if not impossible to find. Offenders know what they can do to a child without leaving any physical trace of their actions. They are also well-versed in the law relating to a child's giving evidence and, therefore, can operate with a degree of safety. It is for this reason that Victoria must review s. 23.

Interviewing Methods in Use

A child who is the victim of a sexual assault suffers a great deal emotionally. This emotional distress occurs not only at the time of the offence, but continues through the court case and beyond.

For a child of tender years to relate their account of events to a stranger is a most harrowing task. For this reason certain measures prior to obtaining the statement from the child must be adopted:

- the interview should take place in surroundings in which the child feels at ease. Ideally this would be in the child's own home and may even extend to the child's own room;
- the interviewer should be dressed in a casual manner so as not to intimidate the child;
- the interviewer must obtain the child's confidence at the outset. This can be done by playing a game with the child or having the child tell a story;
- clear simple language should be used when speaking to the child, not jargon such as 'offender' or 'perpetrator'. It is also advisable to ascertain from the parents of the child what names the child uses for the male and female genitals. It is imperative that the words used by the child are recorded accurately by the interviewer. If the child calls his penis his 'doodle' then this must be used and not replaced by the word 'penis' because the interviewer thinks it more appropriate;
- the interview should take place at a reasonable hour. It is of little value trying to talk to a child who is falling asleep;
- it is usually advisable that the interview take place in the absence of the parents. Experience has shown that victims can talk more easily about the event when the parent is not present. It also prevents the parent from answering questions on the child's behalf.

Use of Counselling Services

In most cases the victim will probably require some sort of counselling from a psychologist, paediatrician or social worker. The degree of counselling will vary from child to child, but the investigator should ensure that the parents are made aware of what counselling services are available.

It should also be remembered that counselling services can be of benefit to the investigator. It may well be that the child has blocked out the events of the molestation from their mind and it will only be after counselling by qualified persons that the child will be able to relate to the investigator the details of what occurred.

The counsellor and parents should prepare the child for the subsequent court case. The child must be made aware of the procedures that will take place and the questions that are likely to be asked.

Prior to the hearing the child should be taken to the courtroom so that they may be shown what actually happens inside. It is also imperative that a conference between the counsellor, parents, child and prosecutor takes place prior to the hearing.

When the child finally does give evidence a parent or the counsellor should be present in the courtroom to give support.

Videotaped Evidence

The use of videotaped evidence of a complainant is not yet admissible in Australian courts. The matter is under review by the Law Reform Commission and it may well be that Victoria will soon have legislation allowing children of tender years to give their evidence through a video.

> . . . People remember what they hear better when visual displays accompany the spoken word; after 72 hours people remember only 10 per cent of what they are told, but 20 per cent of what they are shown. When graphic displays are used in the courtroom, however, the retention factor is 65 per cent! (Weis-McGrath).

In a recent investigation by the Child Exploitation Unit a videotape was made of a four-year-old male relating his account to a paediatrician of sexual assaults committed on him whilst he was being looked after by a child minder. The doctor's room was set up with a small table and chair for the child to sit at and several puzzles were placed on the table for the child to play with. Prior to the child arriving at the consulting rooms a remote video camera had been set up. This enabled the interview to be taped without the camera operator being present in the room and without the child's knowledge. The doctor commenced the interview by gaining the child's confidence and then proceeded to questions regarding the suspect. The child described to the doctor what the offender had done to him. After this the doctor introduced an anatomically correct doll into the session and asked the child to describe, using the doll, what had occurred. After the session the doctor stated that he had absolutely no doubts that the child had been abused as described and that he (the doctor) was prepared to give sworn evidence of this fact. In the subsequent interview with the offender, the offender admitted his crime to the police. When he was shown a copy of the video recording he was shaken by the way the child described in detail what had occurred.

A pilot scheme being run by the Metropolitan Police in Bexley, England showed that many offenders admitted their involvement in the offences after being shown a videotape of the initial interview with the child (*Police Review*, 9 October 1987, p. 2001).

In Colorado, USA the following events occurred. A three-year-old girl was abducted and, after being sexually abused, was dumped through a mountain toilet into the cesspit beneath. After being rescued, the child was treated by a Mr David Jones, Consultant Child Psychiatrist, Park Hospital for Children, Oxford. Mr Jones provided evidence to the court that the child was psychiatrically disturbed as a result of her experience and recommended that her evidence could only be given under special conditions. A videotaped deposition was ordered by the judge. The prosecutor, defence barrister and judge's representative were present at the videotaping session, but were hidden behind a one-way glass. Mr Jones had a microreceiver in one ear to enable the prosecution and defence barristers to ask questions of the child through him. He also had authority to veto any questions he considered harmful to the child (Jones 1987).

This system is an excellent method of putting the child's evidence before a court. It is fair in that it allows the defence to ask questions of the child through the doctor, but it protects the child from having to give evidence in a courtroom full of strangers.

Screens

Another method that has been used in England is the use of a screen positioned to enable children to give evidence without having to face the defendant. An English judge, Judge Thomas Piggot, stated that: 'The court must do what they can to protect young witnesses who are giving evidence. The court has a duty to reduce the distress and fear they may experience' (Jespersen 1987).

If screens are to be used a visit to the courthouse is essential to work out the best position for these to be set up. To be fair to the defendant the screens should be placed in such a way that all parties to the proceedings can see each other except that the defendant cannot see the child and vice versa (Rockett 1987). Judges and barristers have also removed their gowns and wigs in an effort to put children more at ease.

Uncorroborated, Unsworn Evidence

At the present time in England, the Government proposes to allow juries, in cases of child sexual abuse, to convict defendants on the uncorroborated, unsworn evidence of a child (*Police Review*, 9th October 1987, p. 2001).

This is pure commonsense. If a jury is satisfied beyond reasonable doubt that the defendant has committed the offence alleged, even though the child has not given sworn evidence, he should be convicted. There is no difference between this evidence and that of a person uttering the words of an oath.

Anatomically Correct Dolls

Anatomically correct dolls have been in use in the United States from the late 1970s (White 1987). Since then the number of manufacturers of the dolls has increased from four to fifteen. Originally Australia had to import the dolls from America but they are now being manufactured here.

Use of the dolls is not as simple as it sounds and indeed, has been the subject of lengthy debates in the United States on their use and effectiveness. Anyone using the dolls in interviews should have the background and training to do so. They should have basic child interviewing experience, know the field of sexual abuse, understand child witness issues and be conversant with the applicable statutes relating to the offences (White 1987).

The behaviour of two groups of children were observed and recorded in their play with anatomically correct dolls. One group had been victims of sexual abuse and the other group had not. The findings showed that significantly more children who had been victims of sexual abuse demonstrated sexual behaviour with the dolls than the group who had not been exposed to abuse (Jampol & Weber 1987).

It can be seen from this that anatomical dolls can play an important part in the investigation of child sexual abuse. The dolls are an excellent aid during an interview in that victims can demonstrate to the interviewer exactly what took place between the offender and themselves without having to use complex explanations. Although it would be difficult for a psychologist to prove to a court that their observations of the victim playing with the dolls was proof that the child had been sexually abused, it does provide further evidence of the allegations being made by the child and could prove to be the necessary piece of evidence for the jury.

It is a common experience that the more stressed and nervous a child is during an interview, the more difficult the interview becomes and the higher the anxiety level of the interviewer. Most children relate well to dolls. Dolls often have a calming effect on them, which creates a more relaxed atmosphere with less strain on everyone. It is also easier to demonstrate rather than explain what happened and more information is gathered in less time

and with fewer tears. In addition, if dolls are visible as the child enters the room, they can create a softening effect and give the area a 'child-oriented appearance' (Freeman & Estrada-Mullaney 1987).

Dolls, properly used, reduce stress and aid in establishing rapport, help establish competency and reduce vocabulary problems (Jampol & Weber 1987).

Conclusion

Child sexual abuse is a worldwide problem which must be fought with all available weapons such as the video recordings, screens and dolls mentioned.

New ideas must be tried and tried again. If a technique does not work in one case it should be tried in another one, and other techniques adopted. It is only with sustained and combined effort by police, social workers, doctors and the judiciary that the war against child abuse can be won.

Summary of Group Discussion

Although the theme of this discussion included dolls, drawings and robots, the use of video recording was the subject that commanded the attention of all participants in the group. Intense discussion took place on this subject and could probably be a topic of its own seminar.

All persons in the group took an active part. Some of the issues to come out of this discussion were:

- Will the use of videos increase ammunition available to the defence thereby increasing the trauma of the child?
- What is to happen to the videos after court? Who is going to have access to them?
- Should videos used in therapy sessions be used in court?
- Would videos effectively spare the child an appearance in court in practice or would the defence be continually recalling the child to further cross-examine?

As can be seen from these points, there was a lot of negative response to the use of videos in court and to quote a social worker in the group: 'They do have benefits but obviously they also cause dilemmas. They are not the ultimate answer they are cracked up to be. We should not rush headlong into it.'

It is also interesting to note that there are three distinct areas for the use of videos, these being:

- for use in an interview situation with the suspect;
- for use as evidence in court;
- for therapeutic purposes.

The use of a video in these three areas is different, but the problems already mentioned exist for each area.

A point that raised a deal of discussion was 'Should the child be entitled to either give or refuse consent for a video recording to be made?' The group was somewhat divided on this issue, and even after much discussion there were still two schools of thought on this matter.

It is obvious that problems already exist with videos and more shall no doubt come to the fore as we progress. However, videos can play an important role in the area of investigation and prosecution of child sexual assault. Obviously, care must be taken in the

use of videos and persons using them must be properly trained. But remember, videos are a powerful tool when used in an interview with a suspect and if the results of other countries using videos can be achieved here, there will be many more pleas of guilty, thereby keeping the child out of the court - 'a victory in itself'.

A video recording is a statement in a different form and, as was clearly stated in the group, videos are not a magical answer to the problems of children giving evidence, but rather, simply an aid.

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The Value of a Joint Professional Approach

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The Benefits

The group considered that a multi-professional team (consisting of a medical practitioner, a child care officer and a police officer) approach offers the following benefits:

- it reduces the necessity for a multiplicity of interviews;
- roles and the developing of networks;
- it provides a structure for shared decision making, responsibility and accountability;
- it breaks down barriers between different professionals and agencies;
- it allows an acceptance of the goals of each profession/agency and a cooperative approach to achieve these;
- it supplies both moral and professional support for the professionals involved; and
- it allows for greater maximisation of resources.

What are the Difficulties?

Possible difficulties which could be encountered may include:

- the different approaches of professionals from various agencies;
- the unavailability of appropriate personnel in country areas;
- the absence of a commitment to a team approach from each department; and
- a constant change of staff which may limit team building.

Suggestions

It was suggested that:

- there is an urgent need for joint professional training of all personnel at both postgraduate and at a practical level. Team training should include, for example, information on child development, and communicating with children. The Bexley, United Kingdom, style of training was recommended (Child Sexual Abuse Joint Investigative Programme Bexley Experiment, 1987);
- a joint professional approach should be undertaken in conjunction with a concerted community education campaign;
- all professionals working within the criminal justice system, for example doctors, court personnel, teachers, social workers, need to be educated in the cognitive and developmental needs of children;
- adequate funding and resources are necessary if a joint professional approach is to be effective;
- all departments need to have a real commitment to preventing worker 'burn out' rather than accepting it as an inevitable occurrence after a period of time;
- all professionals must accept the importance of the child's needs as being superior to their individual egos;
- there is a need for a national networking of information and experience so that this can be disseminated.

The Use of Protective Behaviours when Dealing with Child Witnesses

DISCUSSION GROUP C

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Protective Behaviours is a program designed to empower children to protect themselves in difficult situations.

Being a witness in a courtroom is a very difficult situation for children to cope with. Whether or not the child is a victim of abuse, the experience is not easy. If they are a victim of abuse then the ordeal can be even more traumatic.

Protective Behaviours teaches children that they have a right to feel safe at all times and that nothing is so awful that they cannot talk to someone about it.

Three Key Concepts

The Program is based on three key concepts:

Safety

The child is taught to differentiate between situations when it is appropriate to feel scared (for example watching a horror movie) and those when it is not.

Early warning signs

The child is taught to recognise how they feel through their 'early warning signs' (that is their body's reactions to feeling unsafe) for example rapid heartbeat, sweaty palms or 'jelly legs'. Once the child has learnt to recognise their 'early warning signs' they can then identify when they are in an unsafe situation.

Networking

The concept of networking is used to encourage victims to prevent abuse actively and to seek the help they require effectively. The child is encouraged to identify and establish a network of adult contacts to whom they can confide or ask for assistance or help when they are feeling unsafe. These adults have to be the choice of the child.

If a child is going to be a witness in court they need to have an established network, mainly of professionals who are involved with the case. If the child has these adults then they will feel safer knowing that they are understood. The child will be told that if they have their early warning signs about the court hearing, they can contact their network people at any time.

To implement the core concepts of the program, five strategies are implemented:

Theme reinforcement: The two themes of the program: 'We all have a right to be safe all the time', and 'Nothing is so awful we can't talk about it' are continually reinforced throughout the teaching of the program.

Network review: The personal network list of adults selected by the child must be regularly reviewed to ensure that these persons are still available and suitable to assist the child.

It is particularly important to do this when the child has finished going through the court system, as the professionals who were involved with the case are no longer involved, and the child now needs to look for other people to whom they can turn for assistance.

One step removed: This strategy makes use of hypothetical questioning, in teaching the concepts, such as 'What could you do if . . . ' or 'My friend has a problem . . . what should they do?' It can be of use in preparing the child for the actual court procedure by brainstorming and exploring options and resources with the child for example 'Suppose you get asked a question that you do not understand - what can you do?' The child should explore the options.

Protective interrupting: This strategy is mainly used in group sessions rather than just with a child witness alone. It is the process of preventing the child self-disclosing in an inappropriate context. Although the child has been protected in one instance by interruption, it is important that the issues are followed up at a later stage.

Persistence expectation: This final strategy is used to encourage children who have talked to someone on their network list but still feel unsafe (perhaps due to inaction on the part of their network contact), to keep trying other people on their network until they feel safe again.

Conclusion and Resolutions

The Protective Behaviours Program can be adapted to prevent children from becoming victims of abuse and also to empower them to come forward if they are in an abusive situation. It is also of use for children who are witnesses in a court of law.

To assist child witnesses overcoming a child's automatic responses to authority through the use of protective behaviours program, the group resolved:

- that children should be educated about their rights and how to exercise them;
- that children should be empowered to protect themselves both in and out of court;

- that prevention programs should be introduced to children through the education system or other professional organisations;
- that all children need a network of people to whom they can go if they are not feeling safe.

Reference

Brown, V. 1986, 'Protective Behaviours: The Victorian Community Program', in *Child Abuse*, ed. Ron Snashall, Seminar Proceedings no. 14, Australian Institute of Criminology, Canberra.

Protocols after Disclosure of Abuse

DISCUSSION GROUP D

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Protocols are difficult to devise and usually must be prescriptive. Most states have a clear step-by-step medical protocol for physical examination, but have inflexible prescribed methods for other forms of assessment. These methods are proving to be impractical and too complicated to standardise children's responses.

There is a general lack of understanding of the differences between the initial inquiry or investigation of a complaint and the evidentiary phase of assessment. A protocol can only be used when a child has disclosed abuse to a professional appropriately trained in working with children. Even then it is preferable to have a standardised structured interview process rather than set instructions.

The problems in developing protocols for finding out from a child what has happened to them, can depend on the way in which the complaint was made and the often competing interests of the key players.

In the case where the child or a family member has complained and the intention is to protect the child and investigate proceedings against the offender, a protocol could be used. Where someone else has made the complaint and the child is unaware that it has been made, other procedures will often be required. If the child will not or is unable to make disclosures, for example a pre-verbal child or a child who is intellectually disabled, then other methods will also be necessary.

Conflict about who should assess the validity of the complaint and how best that can be done with the least trauma to the children can increase the confusion.

The police will need to investigate the complaint to assess the possibility of bringing criminal charges. Their focus will be on collecting evidence. The statutory welfare authority will want to ascertain if the child is in need of protection and will need to determine if there is evidence for Children's Court actions. Doctors, psychiatrists, social workers, psychologists and others will often have a focus on the child's therapeutic needs.

A thorough assessment needs to incorporate all the competing demands from professionals, if the child is to be safeguarded and their future well-being ensured.

Procedures for disclosing children can therefore reasonably readily be devised. Procedures for non-disclosing children will be different and may require other intervention. For example, when there are lower level behavioural indicators the assessment should be for behavioural disturbance rather than for abuse. The need for standardised procedures is essential and must be agreed upon by major agencies. The goal should be for evidence

which will stand up in a criminal court and also be acceptable to other courts. Key elements in assessing a child should be knowledge of child development, training in interviewing and working sympathetically with children and knowing when to refer to someone else with specialist expertise.

It is also necessary to develop clear guidelines on dealing with alleged offenders especially juveniles who may also be victims themselves.

Protocols with flexibility should be developed for collection of evidence. For example, it is crucial to have clear standardised procedures in the use of videotaping.

Conclusion

The group discussion focussed primarily on the different stages of the investigation and the court process. It was emphasised that greater incentives should be found for offenders to make admissions and thereby lessen the trauma of the court for young witnesses.

It was agreed that clearer procedures for investigation must be found, with the roles of professionals not only defined, but when they become involved, clarified. It was concluded that guidelines on what not to do may be just as useful as guidelines on how to and what to do.

Reliability and Credibility of Children as Witnesses

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The question of the status of children's evidence has provoked intense public debate. At present, in most Australian jurisdictions the evidence of a child is not admitted unless and until the judge is satisfied that it is appropriate to do so (for example s. 23 *Evidence Act 1958* (Vic)).

In Victorian courts, the judge must first determine whether the child (if under fourteen years) understands the nature of the oath. If the answer is yes, then the child's evidence is admitted in the same fashion as an adult's. If the answer is no, the judge must then assess whether the child is intelligent enough to understand and respond to questions. If this answer is no, the evidence is excluded. If the answer is yes, the evidence is admitted but it must be corroborated.

With the increasing concern about the incidence of sexual abuse of children (where the child is often the sole witness as well as the victim), and about domestic violence (where a child is likely to be a principal witness) the status accorded children's evidence in our judicial system is coming under closer scrutiny. The status of children's evidence is of critical significance in our criminal justice system. Exclusion of children's evidence may mean, in cases where the only witness is a child or children, that an offender will not be prosecuted because there is little or no other evidence which can be led against the accused. This means that many criminal acts can be committed with impunity and that children are victims of repeated criminal acts. If, however, a child's evidence is inherently unreliable or a jury is unable to assess reliability of the evidence accurately then the admission of such evidence may well prejudice the outcome of the trial for the accused.

In this paper, research findings relevant to the reliability and credibility of children's evidence are examined. With respect to reliability of evidence two apparently contradictory conclusions have been drawn from recall and person recognition studies: adult's evidence is more reliable than children's; and children's evidence about certain types of events may be reliable. As to credibility, findings from studies suggest that no simple rule about age and credibility can be formulated. It depends on the subject matter of the material and the manner in which the evidence in question is presented.

Memory as a Function of Age

The literature abounds with studies which have investigated recall as a function of age. Typically, in many studies, lists of items, for example words, numbers, pictures or sentences, are presented to people of different ages to view or listen. Some time later, recall by these people is tested either by free recall or by cued recall. In a free recall test, the people who saw or heard the list of items are simply asked to recall as many of the list items as possible. In the cued recall task, at the time of testing a cue or clue for some or all the items is provided. The conclusion to be drawn from these studies is clear and unequivocal - recall steadily improves from three years of age to twelve years of age and sometimes beyond twelve.

However, recall of more realistic material by different age groups has recently been investigated. In these studies, people of different ages have been exposed to staged events or have viewed a brief segment of a videotape. The findings of these studies suggest that the relationship between recall and age is not a simple matter. Feben (1985) showed her subjects a three-minute videotape on firefighting and then tested the subjects' recall of details of the tape. Feben found that young children's recall of specific features of objects depicted in the tape, for example the colour of the fireman's buttons, did not differ greatly from that of adults, but the accuracy of their recall of the theme and the sequence of events was significantly lower.

Goodman and Reed (1986) attempted to examine recall by children and adults of their interaction with an unfamiliar adult. Six-year-olds and adults achieved a similar level of performance on their recall of events elicited by objective questions. However adults recalled much more information, both correct and incorrect, than children. Saywitz (1987) requested her subjects to listen to a description of a crime on audiotape and then gave subjects three different types of memory tests: free recall, recognition, and a number of questions about content that the subjects might not have considered pertinent to the crime for example. asking for a description of clothing or details of the weather. There were two findings of relevance. Firstly, eight and nine-year-olds embellished the story more than older subjects. Secondly, when directed to specific objects and events, for example clothing, young children were accurate in their recall of the features of these objects and events. This latter finding is consistent with the findings of Feben (1985) described above.

A number of quite ingenious studies have recently been reported which have examined the young child's age ability to recall events perceived under stress. These studies have tested the young child's ability to recall and recognise events occurring and persons present at the time the child visited the dentist (Peters 1987), or was receiving a vaccination or venipuncture (Goodman, Hepps & Reed 1986). These studies found that the stress experienced by children did not appear to result in impairment in recall of central events, but in recall of peripheral events. Unfortunately, none of these studies included groups of older children and adults which would enable an assessment of the effects of stress on recall as a function of age.

Memory can be conceptualised as comprising three stages: encoding or perception; storage or retention; and retrieval (Melton 1963). Failure to recall an event or recognise a person accurately may reflect a breakdown in any one of the three stages. An event cannot be remembered if it was not perceived, events cannot be recalled or persons recognised even if they were perceived but they were not retained in memory, and finally events of persons stored in memory may not be recalled or recognised because of retrieval difficulties.

Given that children's recall and recognition are inferior to the recall and recognition of adults the question arises as to how much of this inferiority can be attributed to each of the different stages of memory. The answer to this has great significance in relation to the questioning of children as witnesses. If the inferiority of children's recall and recognition is entirely attributable to encoding, then the only matter that needs to be considered is the manner in which courts should receive children's evidence. If, on the other hand, some or all the relative deficiency of children's recall and recognition can be traced to retention and retrieval, then appropriate techniques which minimise the deficiencies can be implemented.

Retention Interval

Although the precise function of the relationship between recall and recognition and retention interval depends on a number of factors, the general function of the relationship is clear: as the retention interval increases, recall and recognition declines. Findings from studies designed to examine the interaction of age and retention interval on recall and recognition are equivocal. Saywitz (1987) found that a five-day delay had little impact on level of recall and recognition and that the performance of eight-year-olds did not differ from that of one-year-olds. Goodman, Aman, and Hirschman (1987) found a similar absence of effects of age, retention interval, and their interaction in the performance of three and five-year-olds who were tested after a retention interval of three to seven days. However, other researchers have found a different effect of retention interval for different age groups. Thomson (in preparation) found that the decline in recognition was greater for children than adults when retention interval increased from a few minutes to one week. Despite the fact that there are contradictory findings the tentative conclusion can be drawn that children's memory performance is more likely to suffer than that of adults as retention interval increases.

Retrieval

By far the most frequently found errors in free recall studies are errors of omission. Findings for studies which have examined the incidence of errors of omission suggest that young children make more errors of omission than adults. Saywitz (1987) found that eight-year-olds omitted significantly more information in their recall of an audiotape of a story than eleven and fourteen-year-olds. A similar pattern of results has been obtained in traditional list recall studies, where age differences in recall were largely attributable to more errors of omission by the young. However, Saywitz found that the provision of relevant non-suggestive cues, successfully elicited accurate information from the children. An example of the successful elicitation of previously unrecalled information would be the provision of the cue 'clothing'. This cue elicits accurate information not previously volunteered.

The importance of the appropriate retrieval cue or clues has been emphasised by Tulving and Thomson (1973). They have proposed that cues are effective as retrieval cues, only if the cues provided have been encoded as part of the information to be retrieved. This formulation has been called the encoding specificity principle. The relevance of this principle to the recall of young children is that cues or questions posed by adults may be singularly inappropriate as the child has conceptualised the event or object very differently from the way an adult would. Further, the meanings the child gives to certain words and sentences may be different from that given by adults (Chomsky 1969). Indeed, failure to recognise differences in conceptual and linguistic systems may result in a child being unable to recall information available in their memory or, even worse, to give irrelevant and inappropriate information.

Suggestibility is another source of error which has been examined extensively in recall and recognition studies. Typically, these studies have three phases. In the first phase, subjects watch a series of slides or a videotape or listen to an audiotape. In the second phase, subjects are asked questions about the content of the slides, videotape or audiotape. Some of the questions asked in this phase are misleading, that is, the questions contain misleading information. In phase three, a further recall or recognition test is given, the object of this test is to determine whether recall of the information presented in the slides, videotape or audiotape has been distorted by the misleading information embedded in the questions asked in the second phase (Loftus, Miller & Burns 1978). Both recall, and to a lesser extent, recognition, have been found to be affected by the misleading questions (Bowers & Bekerian 1984; Ceci, Ross & Toglia 1987; Christiaansen & Ochalek 1983; Loftus, Miller & Burns 1978; Zaragoza 1987).

Whether a child's memory is more susceptible to misleading information than an adult's memory is currently the subject of fierce debate. In their review of the published findings,

Loftus and Davies (1984) concluded that there is no simple relationship between age and susceptibility to misleading information. The relationship depends on other factors, such as type of information to be remembered and the length of the retention interval. More recent studies, (Ceci, Ross & Toglia 1987; Saywitz 1987; and Zaragoza 1987) have done little to resolve the issue.

Children's Accuracy in Identification

The importance of distinguishing identification of familiar persons from that of unfamiliar persons has been stressed by the courts (*R v. Turnbull* [1976] 3 All ER 549; *R v. Burchell* [l981] VR 611; *R v. E.J. Smith* [1984] 1 NSW LR 462). The validity of the distinction has been supported by research findings of Thomson, Robertson, and Vogt (1982). In that study, context which included setting, clothing and activity of persons to be identified was manipulated. Thomson et al. found that changing the context at the time of the identification test impaired recognition of previously unfamiliar persons, but had no effect on the recognition of familiar persons.

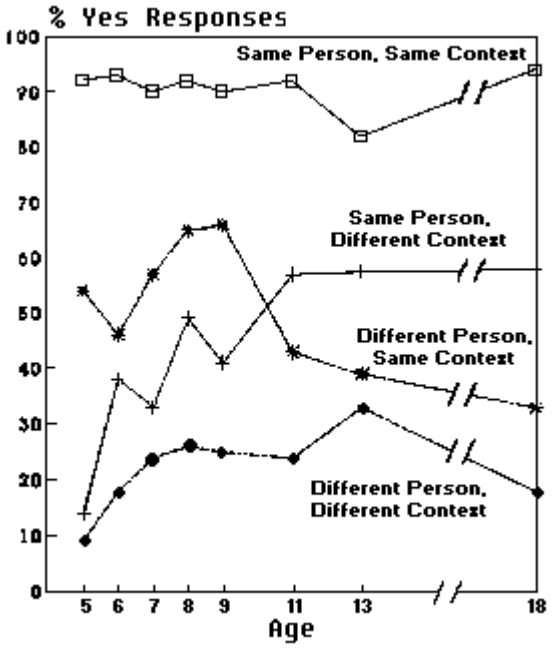
In most studies investigating developmental trends in person recognition, unfamiliar persons or photos of unfamiliar persons have been used as the 'to be identified' material. With few exceptions these studies have found that identification improves steadily from five years of age to eleven or twelve years with some further improvement from twelve to seventeen years (Benton, Van Allen, Hamsher & Levin 1978; Blaney & Winograd 1978; Carr, Sullivan & Bock 1981; Chung & Thomson 1985; Diamond & Carey 1977; Ellis, Shepherd & Bruce 1973; Flin 1980; Goldstein & Chance 1964; Thomson 1984).

Findings of another study (Thomson 1984) provide some insights into the manner by which children identify unfamiliar people. In this experiment, witnesses saw a series of slides of people and then were tested to find how many of these people they recognised. In the test phase, one quarter of the slides depicted a person seen in the earlier slide series in the same context as that person had previously appeared, one quarter of the slides depicted a person seen in the earlier series of slides but in a different context, one quarter of the slides depicted a new person but this person was shown in a context previously seen in the earlier series of slides and one quarter of the slides depicted a new person in a context not previously seen in the earlier series of slides.

The performances indicated several things. Firstly, when context is reinstated performance increases marginally from five years of age to nineteen years of age. Secondly, changing the context drastically impairs the ability of five, seven and nine-year-olds to recognise someone previously seen. Likewise context has a striking effect on false identification of five, seven and nine-year-olds. Compared to false identification rate of eighteen year olds, the false recognition rate of five, seven and nine-year-olds is 38 per cent higher. In contrast, the false identification rate of five-year-olds for new persons in new contexts is, if anything marginally lower than the older age groups. All age groups are seduced by the context, but these context effects are significantly greater for children under eleven years of age (*see* Figure 1). Diamond and Carey (1977) have reported similar findings.

Figure 1

Percentage of 'Yes' Responses in a Continuous Recognition Task as a Function of Age, Person and Context



Source: Thomson 1989

Yuille, Cutshell and King (reported in King & Yuille 1987) compared the performance of children aged nine, eleven and fourteen in an identification task when the face to be identified was absent from the photograph display. Yuille et al. found that the younger the child, the more likely someone from the display would be selected as the person previously seen (*see also* Goodman, Aman & Hirschman 1987).

There have been relatively few studies of identification of familiar persons as a function of age of the witness. One study by Diamond and Carey (1977) found no context effects in the recognition of five and six-year-olds when the persons to be identified were familiar persons. Unfortunately this finding is difficult to interpret as performance of all age groups was at ceiling. A more difficult task would have provided less ambiguous findings.

In contrast, there are two studies which have reported little or no difference in identification accuracy (Goodman & Reed 1986; Parker, Haversfield & Baker-Thomas 1986). In these studies children either viewed a live or videotaped incident. To conclude from these studies, as Hedderman (1987) has done, that age differences disappear when 'realistic analogues of witnessing' are employed is wide of the mark.

Firstly, the more recent study of Goodman, Aman and Hirschman (1987) which used a live incident found age differences led to both incorrect and false identification. Secondly, the conclusion to be drawn from studies, which used slides or photographs as the material to be recognised is not that children cannot recognise persons, rather, that children are more susceptible to things such as context.

Credibility of Children as Witnesses

There is little to be gained in leading evidence of children if members of the jury give little or no weight to that evidence. Yarmey and Jones (1983) asked a wide range of persons, including laypersons, university students, psychologists and lawyers to assess the reliability of the response of an eight-year-old to questions of a policeman or a lawyer. Yarmey and Jones found that most people viewed the responses as unreliable evidence.

Subsequent studies have investigated the relative credibility of children as witnesses. The paradigm typically employed in these studies is to present transcripts of trials or videotapes of trials to subjects to read or to view and to determine the guilt of the defendant and the credibility of the witnesses. The age of the key witness is varied across subjects. Goodman, Goldman, Helgeson, Haith and Michelli (1987) found that the credibility assigned to the evidence when it was purported to be given by a six-year-old was less than that assigned when it was purported to be given by a ten-year-old which in turn was less than that assigned to a thirty-year-old. However, the adjudged guilt of the defendant was unaffected by the age of the key witness.

Lizzie Hone, an honours student at Monash University, provided subjects with transcripts of a constructed coronial inquiry. The subjects were required to assess the credibility of the witnesses, decide whether the driver of a vehicle which killed a pedestrian should stand trial, and to recall all the relevant evidence. The recall requirement was included on the basis that the evidence thought to be important would be recalled first, and evidence omitted was considered unimportant. For half the subjects, photos of the witnesses were supplied, for the other half no photos were provided. As yet the recall data have not been analysed. However, in contrast to Goodman et al. (1986) she found no difference in the credibility of evidence as a function of age, nor of frequency of committal. These findings are consistent with those of Ross, Miller and Moran (1987).

In a comprehensive investigation of the credibility of child witnesses, Leippi and Romanczk (1987) carried out a number of surveys and experiments. They surveyed members of a parent-teacher association and university students. The results of the survey indicated that children were perceived as being as capable or more capable than adults in recognising a face, but more susceptible to suggestions by adults and peers. Leippe and Romanczk subsequently examined the effect of age on guilty verdicts when the key eyewitness was six, ten or thirty years old. When the other evidence was strong or ambiguous the evidence of a thirty-year-old produced more convictions than that of six and ten-year-olds. When the other evidence was weak, age differences disappeared, but was only rated low in credibility.

Earlier studies have shown that jurors' perception of adult evidence depends on the confidence exuded by the witness (Lindsay, Wells & Rumpel 1981; Wells, Lindsay & Tousignant 1981), and the witness' capacity to recall trivial matters (Wells & Leippe 1981). Whether or not children's evidence is assessed in the same fashion has yet to be determined.

Research into the credibility of the evidence of eyewitnesses has barely begun. Important issues as yet to be explored concern type of offence, witness as victim, sex of witness, and intellectual capacity of witness. It would be premature at this stage to draw any strong conclusions about the credibility of children as witnesses.

Implication of Research Findings for Judicial Procedures

The manner of dealing with potential deficiencies of children's evidence depends on the locus of the deficiency. If the deficiency concerns perception, then this deficiency must be addressed by the status accorded the evidence. The present laws of evidence are directed to this type of deficiency. Two approaches have been adopted: exclusion of the evidence unless the judge is satisfied that the child is a competent witness, or admittance of the child's

evidence and let the jury decide what weight to give that evidence. Both positions have difficulties. The former approach assumes judges are more accurate in their assessment of the reliability of children's evidence and a finding is made in the absence of the total evidence. To the extent that the credibility attributed to a person giving evidence may be based on irrelevant factors, the accused or the community may be seriously prejudiced.

The problems with respect to the child's deficiencies in retention and retrieval can be addressed quite differently. Interviews can be electronically recorded shortly after an offence has been committed. In a number of jurisdictions, including Australian ones, interviews with the accused are being audio or videorecorded and these recordings are being admitted by the courts. Recording the evidence of a child witness soon after the offence has been committed will reduce the loss of memory information and also minimise distortions of memory through repeated questions and discussions about the relevant events. However, it must be acknowledged that such a procedure is fraught with difficulties. Methods adopted in the investigatory phase are often incompatible with those acceptable in the evidentiary phase. In the evidentiary phase, leading questions can have no place. Thus, to a large extent, interviews of children which are electronically recorded must conform to evidentiary rules. This means that considerable care must be exercised by the interviewer.

Provided the interview is conducted skilfully, the questions asked of the child are simple and objective, then the reliability of this evidence should improve immeasurably. Of course, the introduction of electronic recording of the evidence of a child witness does not necessarily mean the child is not cross-examined in the courtroom.

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The Right to Remain Silent - The Interrogation of Children

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It is the wish of all reasonable people to protect children from being the victims of crime, unfit parenting and from victimisation by the legal system. The underlying theme of this paper is that society's concern begins too late. The best protection is prevention. However, the state is committing fewer of its resources to preventive child and family services and emphasising protective, corrective and punitive programs. If state welfare agencies cannot, on the available evidence, guarantee or even assure a degree of probability that intervention is likely to provide an appropriate remedy for a particular child then society should hesitate to require that children participate in what could be a re-abuse - this time by the state.

Between January and June 1987 in Cleveland,[1] England, about 165 children were medically examined, questioned and subjected to 'disclosure work' before and after social work intervention arising from 'diagnoses' of sexual abuse in the Middlesborough Hospital. Some of them were removed from their homes and separated from their families for months. The Official Solicitor, who represented those children at the Inquiry, submitted that many of them:

> . . . have been victims of precipitate and unplanned response to a suspicion of sexual abuse, have suffered separation from their families and have undergone detailed and unsettling investigations by a variety of people (Childright 1988).

Some of the children were adamant that they had not been abused, and others arguably were too young to communicate what social workers were convinced had happened to them.[2]

The Official Solicitor commented that:

> There is a belief that such is the pressure on the child not to talk that a comparable amount of pressure the other way is justified. The Official Solicitor does not accept that. There is a further belief that the ultimate therapeutic benefit of 'disclosure' is so great that it is justifiable to persist, even through a child's distress, to achieve it. Even

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* The views expressed in this paper are personal views and are not the views of the Law Reform Commission of Western Australia.

> if this were true, it makes no allowance for the child who had not in fact been abused and whose denial is a true one.

In some circles it seems almost trite to say that children should be 'believed', in the context of a complaint or disclosure of abuse. In Cleveland it would seem that children were believed if they said they had been abused, and disbelieved if they did not. Some were repeatedly interviewed and medically examined by a number of professional people using a variety of intrusive techniques. Within those professions individuals squabbled about their degree of expertise in 'diagnosing' and responding to suspicions of, sexual assault: the police surgeons disagreed with Drs Wyatt and Higgs (the Middlesborough paediatricians) and family doctors with all of them. Some parents brought their children in for medical examination voluntarily and found they were detained in hospital and not allowed to see them while they were examined and re-examined. The children, it would seem, were not consulted: fifty-one of them were aged eight or over in August 1987 when the Inquiry commenced. One child, a witness alleged, was held down by nurses for medical examination in a hospital cubicle while he shouted his protests, in the hearing and to the distress of other patients.

Hollis J sitting in wardship proceedings involving some of those children commented that:

> None of these children have complained of having been sexually abused in any way. Those that can speak and understand, indeed, have denied it. All the children who can express their feelings wish to go home.

One of them, a teenage boy, in foster care and desperately unhappy about it, was told that he might not be allowed to return home unless he said what happened to him, and simply responded; 'Why don't you believe me?' The judge said:

> If, eventually, under those circumstances[3] a child admitted something had taken place, one wonders what evidential effect such admissions would have. In all probability I should have thought nil (Re Cleveland County Council and Others High Court Family Division, Leeds, July 30. Unreported).

It seems incredible that a desire to protect children can be transmuted into a more sophisticated form of actual cruelty because sight has been lost of the essential rights of the child, especially one who has been abused in any way, to exercise some degree of autonomy. No matter that we may believe ourselves to be acting in the best interests of a child, that very belief may deprive adults, especially the most powerful in the legal, medical and social work professions, the police and the judiciary, of the capacity to hear what a child is really saying. Sometimes, a still small voice is saying 'No'.

The Children's Legal Centre submitted to the Cleveland Inquiry that though everyone involved believed themselves to be acting in the best interests of the children:

> . . . individual and collective outcomes described in evidence to the Inquiry, and commented on by judges in related wardship proceedings, have undoubtedly added serious and in some cases probably permanent damage and 'professional' abuse to the suspected or actual sexual abuse. In those cases in which it has been accepted that the initial medical diagnosis was faulty, the only significant abuse the children have suffered has been at the hands of professionals (Childright 1988).[4]

If these criticisms are made out to any degree in the Cleveland Inquiry Report, it would appear that the damage to the children happened not in a courtroom but in the investigation process. If these charges are substantiated at all then there would seem to be a similar abuse of authority and lack of respect for the child, by both the abusers of children and those who are consciously acting 'in their best interests'.

A Right to Respect

The child's right to respect is easily misrepresented and misunderstood. It does not mean a child does not have the right to be protected but rather that they have the right not to be overprotected. It does not mean that the child is a pseudo-adult burdened with the full range of adult responsibilities, but that they have the right to know what are the choices and what their consequences may be, and the right, in appropriate cases to make, and learn by, their own mistakes. The right to respect means, too, the right to impart a confidence and have it respected. It may be described as the right to be taken seriously (Veerman 1987).

Acceptance of this basic right underlies most good parenting practices. Courts adopting a parents patriae role should logically adopt a similar understanding (*R v. Gyngall* [1893] 2QB 232, 239). Where welfare and law enforcement agencies are involved, and where their involvement may result in intervention in the life of the child and the family, they too should adopt a 'consultation and respect' approach.

At all stages of decision-making, if a child can 'speak and understand' the child's view should be sought, and heard. Sometimes it will not be possible to do what a child would want but it seems that otherwise well-intentioned adults fail to put the same energy into finding out how the child perceives the situation as they are prepared to invest in investigation and planning for the 'best interests' of the child.

Beyond consultation there will also come a point where the child who is 'mature' has the right to make their own decisions. The right to choose is not an obligation, and capacity to make choices and give or withhold consent depends on being able to make a voluntary choice between available alternatives. A child who is emotionally or otherwise dependent on an adult abuser is unlikely to be able to do other than assent to continuing abuse. A child who knows that if they disclose the abuse they will be separated from or punished by the family, or lose all contact with a delinquent, but important, parent or that an important person will not be helped to 'get better' but must be imprisoned, also has no real choice. A child who does not know the full facts and implications of the situation cannot make an 'informed' or real choice at all. Whatever the level of understanding, however, children have the right, and welfare and law enforcement and other legal authorities the responsibility, to give them the opportunity of expressing a view and have it taken seriously. A mature child has the right to say 'no' just as a rape victim has the right to refuse to make a complaint, knowing what is likely to happen to them during the prosecution process. It falls to the adults involved to look for and understand the level of comprehension and maturity of each child, in each case.

What children say and do has a legal significance in a number of different circumstances. Firstly, if they are thought to be the victims of behaviour which is an offence or calls for intervention to protect the child, and secondly when they may be witnesses to other events in civil or criminal proceedings. In the latter case this may be because their wishes and views are made legally relevant (for example s.64 (1)(b) *Family Law Act 1975*) or because they saw or heard something which must be proved in legal proceedings. Most child witnesses are victims in one sense or another before they get near a courtroom.

The Victim

Victims are asked to repeat their stories over and over again. The timing or sequence of the repetitions is affected by the way in which the child's 'victimhood' was established and whether the child is a manifest victim (for example from injuries or first-hand observations of the infliction of injury by an adult witness), a self-disclosed victim, or a suspected victim.

A disclosure is often made in an informal setting to another child or to an adult who has no training in responding to the disclosure, is not expecting it. One or more re-interviews follow once the implications of the first are appreciated. They may or may not be carried out by a professionally trained person. Their purpose is usually the confirmation of the

complaint (with or without expressions of belief or support) but sometimes is an attempt to invalidate it.

Next could be interviews with police, a medical practitioner, or other authority figures for investigative purposes. There may follow more interviews, intended to produce a statement on which the authority figure will decide to prosecute or to investigate further, or recorded to be used as evidence in its own right (such as a deposition) or as part of the brief to counsel for prosecution or protective action on behalf of the child. This last stage is properly the 'forensic' statement.

There is another purpose, loosely called 'therapeutic', in talking to children. This was highlighted during the Cleveland Child Abuse Inquiry where 'therapeutic' techniques were used in interviewing children to obtain confirmation of sexual abuse, specifically anal penetration, which had been 'diagnosed' by medical practitioners on a single medical symptom, but of which there was little or no other evidence.

Disclosure Work

Disclosure work describes specialised interview techniques used with known or suspected victims of child sexual abuse. In Great Britain the techniques have been developed particularly in the child abuse clinic of the Great Ormond Street Hospital for Sick Children in London. The technique involves the use of 'anatomically correct' or sexually explicit dolls or drawings, leading and hypothetical questions, and videotapes. Sometimes the interviews are observed by an unseen observer, sometimes with others for example supportive adults or other therapists, present. In Cleveland and elsewhere some of those who used these techniques may not have been adequately or appropriately trained in the use of the aids. Videotapes are used as an aid for the therapists and have been produced in evidence in care, wardship and criminal proceedings. They have not, of course, been used as if they were a child's evidence in chief. But, on at least one occasion they have been used as the basis for the cross-examination of a teenage child in criminal proceedings (*The Times*, 10 October 1987). They are also used in wardship proceedings as part of the record of interview upon which a therapist has come to a conclusion.

Disclosure work is a rapidly developing science or art. The technique and the manner in which it is applied is clearly highly relevant when the disclosures made or implied are the basis of a professional opinion that abuse has occurred (Vizard 1987). However judges in the Family Division of the High Court in England criticised the techniques heavily in a series of wardship cases during 1986 and 1987. One of them, Latey J, summarised the problems as follows:

> One of the therapeutic tasks of the clinic - probably the most important - is to get a child who has been sexually abused to unburden himself or herself, to talk about it. As Dr Vizard said, the importance of this is at the very heart of the matter. If a child has been sexually abused, and goes on bottling it up, the consequences later in life are likely to be very serious indeed . . . But, in the case of children who 'clam up', it inevitably requires a persistence of questions, many leading and suggestive to the child of the answers to give, to break down the barrier. It is here, as I think, that the dilemma arises in the minority of cases which come to the courts.
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> There is 'an interface', as it has been described, between the needs of clinical therapeutic methods and the needs of the courts in legal proceedings. In doing what has been found so far to be best to meet the needs of the former, methods may be necessary which defeat or do not best meet the needs of the latter (In *Re M* (a minor) [1987] 1 FLR 293, 294).

Latey J suggested that there be a clear distinction between those cases where, from extant external evidence, abuse is already established; and those where there is a

'constellation' of alerting symptoms. In the second category he suggested that video recordings should always be made.

Disclosure work usually happens in the context of a medical examination to confirm or establish whether sexual abuse has taken place. Often there is a need to obtain consent to that medical treatment. Usually the custodial parent will, of course, consent on behalf of the child but there are times when the consent will not be sought or if sought will be refused because either the child has named or there is reason to suspect that a parent or family member is the perpetrator. In *Gillick v. West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 the House of Lords suggested that Department of Health and Social Security (UK) guidelines permitting doctors to treat children without parental consent were valid in so far as they were restricted to 'mature' children, or children of sufficient maturity and intelligence to understand the nature and implications of the proposed treatment.

If children under a statutory age of capacity, or the age of majority, are able to give and withhold consent to medical treatment and are 'of sufficient maturity and intelligence to understand the nature and implications of the decision', (which appears to be something less than full 'maturity' in the dictionary sense of completely intellectually and physically developed) then any doctor should satisfy themself of the child's capacity to consent before undertaking any form of treatment. This is especially appropriate where the treatment is intrusive, as medical examinations to determine sexual penetration may be, and disclosure work certainly appears to be. An adult has a right to refuse psychotherapy and other forms of treatment, and it would appear that a child has the same right if the *Gillick* preconditions are proved - even if a parent has a coexistent right (*J v. Lieschke* [1987] 69 ALR 647). The Official Solicitor, in his submission to the Cleveland Inquiry recognised that 'the reality is that young children have little say in the matter of medical examination. If the adult responsible for them arranges a medical examination then short of screaming or struggling, there is little the child can do but go along with it'.

Child abuse is an 'elusive truth' and of course it is difficult to balance the need to protect the child with the serious risks of making a wrong accusation of abuse which may result in the removal of a child from a non-abusing home. It is well documented that abused children may be under enormous pressure not to disclose, but also that many of them have some understanding of the likely outcomes of disclosure and prefer to come to terms with it in their own way: Esther Rantzen, the Chairman of Childline[5], reported in 1987 that more than 80 per cent of children calling the confidential service do not wish any action to be taken on their disclosure for fear of consequences including removal from the home and blaming of the victim by the remaining family.

But the child victim's testimony is often the most important evidence for the prosecution, especially where there is limited or no physical corroborating evidence of the abuse. One way to seek to provide that evidence is through the evidence of experts who have examined the child and formed an opinion based on their examination. The expert opinion based on a child's alleged reports of abuse may be adduced as primary or corroborative evidence of a need to invoke the protective jurisdiction.

The serious criticism of disclosure work arises from the nature of the assumptions made by those carrying it out. Because of its origins, as a therapeutic technique for children known to have been abused, the interview is predicated on an assumption that abuse has taken place. Its use as a diagnostic instead of a therapeutic technique has led to real criticism. Some practitioners drew conclusions from answers to hypothetical and leading questions which an objective or other observer was unable to draw. There was at times a considerable degree of pressure on a child leading to the risk that a child would say something had happened which had not, that is that the truth was not necessarily elicited. Some practitioners discussed allegations with the child beforehand and some lacked the skills to ask the 'right' questions with a necessary degree of exactness. Complaints during

the Cleveland Inquiry alleged that the anatomically explicit dolls had been used in a suggestive or leading way by people unskilled at their use, leading to a 'sexualisation' of the child and a diminished probability that the disclosure was a true one ([1987] 1 FLR 269-346). In *Re Amber* a Californian Court of Appeal recently held that testimony based in part on the information imparted and the demeanour and conduct of child with the use of anatomically correct dolls was no different from other forms of scientific evidence and could not be adduced until it was proved that the method was sufficiently reliable (Demchak 1987).

In *Re M* (supra) Latey J suggested that it was essential that a videorecording be made of the child's disclosure, to allow a judge to evaluate the effect of the questioning and the child's responses.

Videorecording of Disclosure Work

Videorecording of disclosure work has both a therapeutic and a forensic purpose. It can be used by therapists working with the child, to help the child come to terms with its experiences. It may have other benefits including reducing the number of interviews suffered by a child. Schwass (1986) claims that the first interview results, in most cases, in the fullest disclosure; this is debatable. It may persuade disbelieving family members and increase the likelihood of family support to the victim, help in encouraging or extracting confessions from perpetrators - reducing the number of criminal trials, and creating a permanent record of a child's allegations. Such recording is immediate in its impact, saves the interviewer from being distracted by taking notes and may be of help in dealing with the accommodation syndrome.

Videorecording may also have forensic uses beyond use in a courtroom as primary evidence. For example it may be produced in care proceedings (as Latey J suggested) to substantiate an expert's opinion (in as much as records of interview made at the time may be called for to substantiate the content and results of an interview).

In this respect there are doubts about the wisdom of relying on such records. Vizard (1987) identified a number of issues, relating particularly to the quality of the recording of the interview, and its capacity to be thoroughly misinterpreted by judges, or misused by lawyers. This last aspect should give cause to pause and re-examine our enthusiasm for this innovation, or at the very least ensure that its introduction is exactly managed. It would not be helpful, in our adversarial system to extend the opportunities by which the evidence of children, direct or indirect, can be invalidated.

On the one hand it is a useful record of assessment process for later reference; it can be used for training purposes (which surely raises the issue of confidentiality); and the tapes may be helpful in research.

On the other hand the demeanour of a child may be inadequately preserved on film. The quality of the film becomes of paramount importance. If it cannot be relied upon as a complete record - nuances, whispers and glances may be missed by the camera but picked up by the interviewer - its use as an evidentiary tool must be truly double-edged. It should not be viewed without interpretation by the interviewer, in which case it is not an objective record, as some would posit, and could be actively misleading viewed on its own. Dr Vizard says many of the criticisms levelled at such recordings in the High Court were based on extremely poor quality videorecordings.

These videorecordings may become available to opposing lawyers and used for, possibly 'unfair', cross-examination of the witness who takes part in them. If the interviews, as well as the recording, are flawed, a competent lawyer would have little difficulty in demolishing the reliability of the findings based upon them. Expert witnesses are renowned for wishing to avoid such public humiliations and may avoid using the available technology. Children who make statements recorded in this way may be cross-examined about inconsistencies in them with evidence in court proceedings. The recordings may not minimise courtroom stress, but exacerbate it. There are other drawbacks, not the least of

which is that the existence of such permanent records means a real risk that they may be viewed by others for a variety of purposes, misunderstood and misrepresented, or their contents discussed by 'trainees' or inexperienced or hostile witnesses.

Finally, the use of leading and hypothetical questions means that children may be led into giving answers to questions which may not be true and may lead to a false identification of perpetrators or inaccurate or incorrect allegations of abuse.

The Reliability of Child Witnesses

Before looking at more specific proposals it is necessary to refer briefly to the 'reliability' of children's statements, that is as truth of the facts contained or referred to in them. It is no longer as fashionable to assume that children (especially girls) either fantasise or maliciously invent accusations of sexual misconduct (Warner 1987; Law Reform Commission of Victoria 1988) though the old prejudices are there, barely hidden, from the early history of attitudes towards children's evidence (Goodman 1984). In some situations children are no better nor worse witnesses than adults, neither of whom can easily 'speak the truth, the whole truth and nothing but the truth'. Research shows that children's testimony may on occasions be quantitatively, but rarely qualitatively, inferior to that of adults (Davies et al. 1986). The state of knowledge about children's abilities as witnesses is imperfect. There is ongoing research, experimentation and debate about appropriate techniques for obtaining accurate evidence, the effect on children's memories of their state of development, the effect of traumatic or particularly emotionally laden events, the effect of different degrees of involvement on children's reaction to witnessing or being a victim of violence or other crime, the effect of repeated questioning (and its manner and content) and the degree to which children may be suggestible (Goodman 1984).

But there is common agreement among writers like Goodman, Davies, Dent and others, about questioning procedures, aids, cues and prompts. Their appropriate use may improve the quality of recollection and communication (Jones & Krugman 1986). But as Davies (1986; also Dent & Stephenson 1979) points out, research which establishes this arises from experiments where it was known beforehand what had occurred. This is not the case where abuse is suspected nor in legal proceedings where the determiner of fact (judge, magistrate or jury) is presumed to be ignorant of the whole matter. This factor must affect the questions and the environment in which they are asked. Davies states that:

> The spontaneous accounts of even the youngest of children tend to be accurate and these may be filled out through skilful questioning . . . and children are not uniquely suggestible, though their more limited, fragmented recall of events may leave them more open to suggestion than adults in circumstances which involve adult knowledge (1986).

Davies considers that the power of suggestion is likely to be limited to recall of detail not the main facts, and the effects of such suggestion are in many cases transitory.

Other writers acknowledge that children's evidence can be significantly influenced by the authority that the child assumes the questioner to possess, and their assumptions (Yates 1987) by inappropriate questions and by exceeding a child's attention span. Also, methods intended to reduce trauma for the child might in fact adversely influence the reliability of their evidence in court, for example, role-playing may cause a child to modify their statements because of the response they get, or because the child may gain some sort of insight or fear in the process (Bauer 1983). Knowing that these approaches will affect the child's disclosures and possibly invalidate them, should they be used at all? (Jones & McGraw 1987).

Davies, Flin and Baxter (1986) concluded that:

> It appears that children of below ten years furnish spontaneous accounts of events which are more fragmentary and selective than those of older children or adults.

> However, some research does imply that the gap may be narrowed, if not entirely eliminated by careful questioning, though the dangers of presuppositions leading interrogators to elicit the answers they expect are manifest. Suggestion is most likely to occur in complex situations involving events unfamiliar to the child.

This seems to be descriptive of some disclosure work practices and some courtroom examination and cross-examination procedures.

The picture depicted so far may not be entirely black. The Bexley Experiment has achieved a recognisable degree of success, and has not suffered the drawbacks feared for Australian legal systems unfamiliar with the degree of social work intervention familiar to the British community. Its final report (Metropolitan Police and Bexley London Borough 1987) specifically warns interviewers to avoid suggestions and techniques which might pressure a child to a particular answer and promotes a clear distinction between the identified and suspected abuse of children. If the warning has been effective this may be attributable to the high degree of commitment and cooperation between police and social workers, the one learning from the other about the needs of the legal and care systems respectively. A similar commitment of resources and cooperation between welfare and law enforcement agencies is needed before any similar success can be predicted.

The Protection of Children in Court

To this point the emphasis has been on the protection of children's rights in the first investigative stage. The underlying assumption is that immense damage can be done to a child's credibility and to the child personally by well-meaning adults who wish to protect them from harm. Underlying this is the principle that if a child does not wish to make a complaint, or to cooperate as 'clinical object' in medical investigations of whatever kind, after being fully informed of the possible outcomes, that child may and should be entitled to withdraw. In this part it is assumed that the legal process is properly under way in care, criminal or custodial proceedings.

Protections range from imposing restrictive bail conditions for the purpose of keeping alleged perpetrators in custody until the matter has been disposed of; injunctions or similar 'restraining' or 'intervention' orders made in summary jurisdictions by magistrates; apprehension of the child or care/protection orders in favour of a state welfare authority often accompanied by removal of the child from the home; and procedural and evidentiary protections to children whose evidence is in some way required for the purpose of court proceedings. The latter are addressed in this part.

Reforms which have been proposed include:

- amending the law of evidence about the admissibility of children's out-of-court statements;
- providing specially for the admission of videotaped testimony;
- providing for closed-circuit video evidence;
- changing the laws about competence of child witnesses;
- amending the law which in some cases requires the corroboration of the statements of child witnesses;
- providing conduct rules for the fair treatment of child witnesses by legal counsel; and
- altering the standard layout of a courtroom to diminish its formality and (assumed) intimidating atmosphere.

Is the courtroom a necessary trauma?

The first three and the last suggestions have the common aim of facilitating the child victim's giving evidence. This is particularly important in criminal cases because the law assumes that an accused has the right to confront the accuser. In some cases a child will not be able to speak at all. Though there is anecdotal evidence of these events, it appears that trauma is commonly attributed to the presence of the accused and to the unaccustomed formality and publicity of the experience, but there is little empirical evidence particularly of the latter (Davies, Flin & Baxter 1986). With inadequate evidence to establish the validity of this assumption, and at least a suspicion that the trauma is occasioned before the courtroom by the interrogation and examination process, perhaps exacerbated by familial response to the allegations and sometimes removal from the family of the child victim, it might be questioned whether some of the suggestions which follow ought to be adopted.

Generally the case is one where the child is the victim of an offence though sometimes the child will be the witness of an offence against another, often a sexual offence. There really is a risk of wrongful conviction and there are a very few documented occasions where children have told convincing stories which are not true. One reason can be that, over time, the child's story has been told so often that it has become either rehearsed or unreal to the child. There are, however, also grave risks of unjust acquittals. The damage to a child victim who is not believed in this context must be considerable. The strain of retelling a story, particularly of a sexual encounter, on many occasions to strangers must be there in some form.

Some have suggested that the child should not give evidence in the courtroom at all. One way of doing this is to exclude the child altogether and allow evidence (other than as to the facts) to be given by a surrogate witness. In Israel since 1955 a 'child examiner' (usually a social worker) gives evidence as a result of their examination of the child who is not called without their consent. It is difficult to conceive such a suggestion being accepted in Australia today even though such witnesses are claimed to be more successful than 'the most experienced police interrogators' in getting information out of the child (Glanville Williams 1987)[6]. The videorecording of that evidence is seen as an alternative means of achieving a similar result.

The rules against hearsay

The hearsay rule generally excludes from evidence any statement offered to prove the truth of the matter contained in the statement if it was made out of court. It is designed to ensure that statements are made under oath by a witness who is available to be cross-examined and to have their evidence tested for reliability. For example, in *R v. B* [1987] 1 NZLR 363 the Crown sought to lead evidence from a child psychologist who had interviewed an intellectually limited twelve-year-old child and had carried out a number of psychological tests. Though the expertise of the witness was not under attack, since the whole purpose of calling her evidence was to enhance the complainant as a witness of truth by the use of tests, the evidence was inadmissible because it was both hearsay evidence which asserted the truth of what the complainant told the psychologist and because it involved a judgment by the psychologist on the complainant's credibility which was a matter for the jury alone.

There are many exceptions to the rule. They include statements made in the course of treatment to a medical practitioner, spontaneous or emotional statements made as part of the *res gestae*, and prior consistent statements of a witness. They are sometimes admitted in care and custodial proceedings under legislative provisions which specifically permit the giving of what would normally be considered 'hearsay' evidence for example s.30 (3) *Child Welfare Act 1947* (WA).

There are already a number of situations where the criminal courts receive 'prepackaged' evidence. If a witness is too ill, out of the jurisdiction, dead, or was prevented from coming to court, evidence given by deposition in criminal proceedings may be admissible. A 'dying declaration' may be admitted when the statement is made by someone who is convinced that they are going to die.

Permitting a child's evidence in chief to be given by means of a videotaped statement does at least offer a possibility that the child will be interrogated less often. There are a number of ways of doing this. One involves taping a victim's testimony during committal proceedings or for use in the committal proceedings which may be used later at the trial. If it is recorded during court proceedings this may be done in the courtroom or out, or with or without closed-circuit video-link facilities, to avoid the need for a child to confront the accused.

Another method may not require recording at all, but allows the child to give evidence outside the courtroom during the trial with the closed-circuit facilities transmitting the live testimony in the courtroom. A variation of this would exclude the accused during the child's evidence, while the accused watches the proceedings from outside the courtroom.

Videotaping evidence: procedural safeguards

If there is to be a special rule about the admission of children's out-of-court statements then special consideration needs to be given to the conditions under which they should be admitted. Some proposals have been made by the National Legal Resource Centre for Child Advocacy and Protection (1986). There are some difficulties with the 'particularised guarantees of trustworthiness' referred to in their hearsay exception. They are vague, subjective, and necessarily impose a considerable degree of responsibility for the admissibility upon the expert testifying. There are similar difficulties with the use of 'scientific' means of detecting evidence of deception by witness statement analysis used in some inquisitorial systems (Davies, Flin & Baxter 1986). Since a child's evidence may lead to criminal conviction, or the removal of a child from its home, it is crucial that we learn how to ensure that a child's evidence is reliable. If adults were in the habit of listening to children this might be less difficult.

There are, of course, problems with any approach which excludes the direct evidence of any witness from the court. There is already a suggestion that children perceive 'television' as a different reality, and that perhaps a generation of jurors accustomed to 'The People's Court' may have different expectations of the actors on the small screen than they would of live theatre. Poor 'delivery' and poor technical quality may distort or fail to convey the tone of the evidence, especially of the child's demeanour, and may effect the court's assessment of the witness's credibility. Some US states have made it a precondition to the use of video technology that some expert opinion first establish that the child is not available to give evidence due to traumatisation (National Legal Resource Centre for Child Advocacy and Protection 1986). Others make it obligatory in any case at all, to minimise the prejudicial effect on any jury of the accused's exclusion (ss.23A-23C *Child Welfare Act* (WA)).

Glanville Williams (1987) suggested the statement to be videotaped could be made without undue stress to the adversarial system with a number of commonsense safeguards. For example, the interview could take place with the accused sitting with their lawyer behind a one-way mirror; the interviewer could be wearing a miniature microphone by which the defendant's lawyer could suggest supplementary questions. If the accused were not able to be present at the time they might be entitled to a subsequent supplementary interview using the same interviewer. It ought to be possible to call the child in any event to give evidence at the discretion of the judge. Though this will expose the child to giving further evidence the likelihood must be reduced by, for example, refusing to permit it if the accused declined the opportunity of asking questions during the original interview.

If the child were available to give evidence personally there would be no major difficulty in criminal cases about admitting the video interview as a piece of additional evidence where the child also gives evidence to the court in person. Previous statements are admissible as a complaint, where they were made 'recently' (at the first available opportunity, which is often

not the case where children have been sexually abused). At present if the child were to 'freeze' in court the tape would not be admissible at all (*Wallwork* [1958] 42 Cr AppR 153) and the law would not allow the tapes to be admissible where the child was too young to give evidence.

Videorecording of statements made by children (taken in therapy sessions rather than with the intention of substituting for the attendance of the child who is capable of giving evidence) have been used in wardship and family law proceedings because courts have accepted a general discretion to admit them in the interests of the welfare of the child. They have been used in some criminal proceedings[7]. If they are to be used as evidence there must be substantial safeguards in the training of those who do the interviewing, including their sensitisation to the need to avoid leading questions and the requirements of the law of evidence. These records may be deliberately or accidentally disclosed, to investigating police, trainee therapists and social workers, possibly to defence counsel in criminal trials and to opposing counsel in care or custodial proceedings (In *re S(Minors)* [1987] Ch.199).[8]

Other ways

Allowing videotaped statements made by children as either the whole or a part of the evidence they would otherwise have been required to give in person would require a statutory amendment to the rule against hearsay. Whether this **amendment** is actually required, if commonsense steps which are already possible under the existing procedural rules and within judicial discretions, are taken **and which might achieve the same benefits,** is yet to be proved.

Though the reduction of formality in courtrooms may also be a 'good thing' (not just for children) in fact there is a move away from this; the Family Court of Australia has recently retreated to the security of wigs and gowns, in the belief that this will add to its stature in the eyes of the community, particularly the dissatisfied litigant. In the context of Children's Courts there has been a move from informal and discretionary systems to more traditional court processes within which the participants seem more inclined to respect children's rights to 'due process' and natural justice. Is the elaborate (and expensive) provision of video technology, or attempting to tinker drastically with the rights of the accused, likely to be successful, more effective and less risky than other commonsense steps?

Summary

Though there is limited empirical evidence that a child is traumatised specifically by the courtroom experience there is evidence that children who have been the subject of welfare and/or police investigation as victims of inter-familial crime or neglect are traumatised by the experience.

That we are now asked to 'believe the child' who complains of sexual abuse is a belated recognition that children do tell the truth spontaneously and that insensitive or disbelieving questioning or responses to children may damage them. Given that one outcome of research into the reliability of children as witnesses shows that their spontaneous utterances tend to be reliable (within their communication and knowledge limits) and that this can be adversely affected by the assumptions and apparent authority of an interrogator, there seems to be a need for immediate reform of the way in which interrogators respond when children may be at risk or harmed already. There is a strong argument that the overall number of interrogations must be reduced. The means of doing this are not so clear. Cooperative and prompt investigation is an obvious avenue. The Bexley Experiment joint program actually minimises the need for repeated questioning and examination once either agency has been involved. The sharing of expertise between agencies must be valuable on

general principles. But it cannot be done on the cheap nor without substantial commitment from all agencies, and from the government.

The first and foremost rule must be that the child should, if at all possible, be fully informed of the plans to involve, and the likely results of intervention by, welfare and police authorities. The child must have a guaranteed right to be consulted and have their views respected. A 'mature' child, in the *Gillick* sense, (one who has sufficient intelligence and understanding to comprehend the nature and consequences of the decision) has the right to refuse to cooperate - that is, may refuse to be medically examined or subjected to intrusive questioning aimed at establishing the commission of an offence or grounds for care proceedings.

Costly and elaborate technological solutions are not necessarily a high priority: there is already evidence that the outcome of permitting therapeutic interview methods to be recorded and the results admitted as part of a case might be unfair to children, partly because of the manner in which the interviews have been conducted with children and partly because of the traditional licence given to counsel for an accused in the way in which the defence case may be managed.

There is merit in stretching to the full the present discretions and flexibilities in the legal system to ameliorate any perceived deficiencies in court procedures. There is no legal reason why an officer of the court, specially trained to do so, should not be responsible for familiarising child witnesses with the courts and the processes before they must appear. A special prosecutor could be available who has ongoing contact with a child victim or witness so they feel they have a friend in court. They can be kept fully informed by that person at every stage of the proceedings. A support person may be in court with the child and in the witness box if the judge thinks it appropriate.

Judges and counsel can take off their wigs without losing their aplomb: a judge may arrange a courtroom in an informal way and ensure that counsel and judicial officer sit on the same level as the witness. A judge has the power to allow evidence to be given from behind a screen (it is comparatively common in terrorist and underworld trials) or to screen the accused from the child's view while the witness gives evidence. Judges have always had the right to restrain badgering or improper conduct by counsel to a witness. If these discretions are not being used now that problem needs to be addressed. It may simply be that not all courts appreciate the research outcomes about the value of the evidence of children who have been properly treated during the investigative process.

Before any new technological means are introduced to protect the witness in court it is fundamentally important that every step is taken to protect misuse of that technology. If it requires legislation to limit the use of records, that should be addressed before it is begun.

The evidence given at the Cleveland Child Abuse Inquiry showed what chaos can be brought about by systems intended to protect children, under stress. In that process a great disservice was done to the medical practitioners and social workers who acted as best they might within their professional boundaries. Those limits may have been too narrow, the services under-resourced and the size of the problem just too great to be handled. But in the process a greater injustice was done to some of the children - those who were found to be certainly not abused - and to the parents of those children. Those errors stand to be repeated unless a coordinated national approach is adopted. But before all else the response must be based on listening to the child, and offering a flexible range of options. Children quite reasonably fear the cure to be worse than the disease. The approach must be based on the inalienable right of a child to consultation and respect.

Endnotes

1. One significant feature of the evidence at the Cleveland Child Abuse Inquiry showed that none of the paediatricians, the hospital, the social workers nor the juvenile court magistrate kept records of the number of children taken into care of the local authority as a result of Place of Safety Orders.

2. One counsel for parents whose child had been apprehended during the period said that she had been obliged to obtain an injunction from the judge in Wardship to restrain the 'disclosure work' interviews carried on with the subject child over a total of thirty hours.

3. The doctor had given evidence that in view of her clinical findings (based on reflex and dilation) she would not be satisfied until the children made some admissions about sexual abuse.

4. A significant number of children were returned to their homes, in some cases with strong judicial criticism of the way in which the intervention had been managed. For example in *The Times* (8 December 1987) a case was reported where three children (two boys aged twelve and one and a girl of ten) who were put in three foster homes after they had been identified as abused by their father in May 1987 were returned to the home. Eastham J. told the court that he was satisfied the children had not been sexually abused at all, and added: 'The relentless questioning of these children, albeit in good faith by social workers, has left psychiatric scars and they now need help'.

5. A confidential emergency telephone line for abused children which has been operating in the United Kingdom for eighteen months. As a result that service has developed a second, non-crisis line for children who may and do need ongoing counselling and support in their situation, which may lead to consent to, or the need to (because of a serious threat to the child's life) intervene.

6. See, however, Davies, Flin and Baxter, 'The Child Witness', op. cit. p. 94 where similar procedures have been used in Scandinavian and German inquisitorial systems, using psychologists trained to detect evidence of fabrication and deception.

7. In a trial of a number of accused charged with sexual abuse reported in *The Independent*, (10 October 1987). A videotape of a hospital interview with two children said to have been abused by their father and grandfather was used. It was stopped whenever defence counsel wanted to cross-examine the fourteen-year-old girl over differences between the tape and the evidence she gave in the witness box. It was introduced by Waley QC, the judge, at the request of counsel for the defendant grandfather, an indication that the videotaped recording can be a sword, not a shield for a child witness.

8. See In *re S (Minors)* (Wardship: Police Investigation [1987] Ch. 199, where a welfare authority's records were made available by the court to police.

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Preparing the Child Witness

DISCUSSION GROUP E

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A child witness in a criminal court is usually the principal witness - the victim of a personal assault. A child who has been abused invariably feels damaged and in many instances is treated differently by members of the family or community who may view the child with curiosity, hostility, pity or disgust. An almost universal response, in the child victim of sexual assault, is guilt. The response is multifaceted and arises from feelings of responsibility for the sexual activity, the disclosure of the 'secret' and the disruption to the lives of those involved and their families, particularly where the activity is incestuous. Victims of abuse frequently fear further abuse and retribution from offenders or their families and they are often depressed and sad that a trusted person hurt them and that other trusted people, for example a non-offending parent, failed to protect them from harm.

Child victims are usually extremely angry over what has taken place, even if their anger has been repressed to such a degree that it is not evident. Children who have been abused tend to have a low self-esteem, feeling that they must be of little worth to have been treated as they have. They are also likely to have difficulty trusting new people in their lives, this often being the result of broken promises by offenders for example 'I won't do this to you again'.

The initial approach to the prospective child witness must accommodate these feelings and, during the course of preparing the child, allowances need constantly be made. It should be borne in mind, however, that some of these responses, notably anger, can be utilised to great advantage in achieving the result of a strong, credible and fully prepared child witness.

Preparing the Child for Court

A professional preparing a child for court should concentrate on three key areas:

- informing the child;
- instilling confidence; and
- giving the child a friend in court.

Informing the Child

Role of personnel

It is essential that the child be informed of the professionals' particular roles in the process of child protection intervention. Many child victims, and their families, gain the impression that the people to whom they have previously related their story, perhaps police, social workers and/or doctors have failed them by not conveying details of the complaint to the other people who need to know. They feel they should be spared the trauma of repeating their story to yet another stranger.

Certainly it is desirable that the number of people to whom a child must relate their complaint be kept to a minimum. This is both in the interests of reducing trauma to the child and from an evidentiary point of view, so that discrepancies in the various versions are not used by the defence to prejudice the prosecution. However, it is important that the child understand that there may be five or six key people who each have a different role in helping them. Some of these people will be concerned with the substance of the child's complaint and others, whose role is more of a counselling nature, will not.

Professionals should explain their role in the helping process: the police officer should explain their investigative role, the counsellor their informative and supportive role, the doctor their medical role and the prosecuting solicitor their role in court. The child should also be informed what stage in the process has been reached and what other helpers will be involved at a later time.

Having been given this information, children and families are more inclined to cooperate because they appreciate that the mosaic of personnel involved is in the business of helping rather than harassing them.

The court process

The court process is mystifying to many non-legal professionals and is much more so for the victims of crime, particularly where they are children.

Although child victims may be involved in Children's Court proceedings (which are concerned with the protection of the child) and/or Family Court proceedings (in cases where the parents are disputing custody and access) they are rarely subjected to cross-examination in these courts. For this reason, court preparation is usually directed towards giving evidence in criminal courts.

The child should be told that the criminal case is against the accused person and that it is likely to be heard twice, once in a local court before a magistrate, who will decide whether there is enough evidence to go further, and once in a higher court before judge and jury, who will decide whether or not the accused is guilty.

In cases where committal proceedings will take place by way of tendering of statements without witnesses having to be called to give evidence (paper committal), the child witness should be told when and why this will take place and prepared for a single appearance at a trial court.

Where committal proceedings will entail the calling of all witnesses the child should be told from the outset that they are likely to be required to give evidence twice. If the child is not made aware of this eventuality before committal proceedings they will feel tricked, lose faith in the people who should have advised them and be reluctant to give evidence at trial for fear that will not be the last time they have to give evidence.

When a child is required to give evidence at committal as well as trial, the news can be conveyed in an advantageous way. The child can be told that the first time will be important, but because it is reasonably easy to convince a magistrate that there is a case to be sent to trial, the child's testimony is a good practice run for the harder part of convincing the jury that the accused is guilty.

The child can be told, quite truthfully, after committal that giving evidence at trial is likely to be easier for them because they will have had a practice run and be aware of all the issues

which will be raised by the defence (some of which will not be pursued a second time). The child can be reassured that the defence is not likely to be nasty (or as nasty, if committal has been less than pleasant) to the child with a jury present.

Before trial the child should be told that, if there is a verdict of not guilty this does not mean that people did not believe them, but only that the evidence was not enough to pass the very hard test that courts impose before they find someone guilty of a crime.

Giving evidence

The child should be told that there will be three people in court who will ask them questions.

The first will be the magistrate or judge who will ask the child a series of questions designed to ascertain whether they are of sufficient maturity and intelligence to understand the duty to tell the truth. Depending on the age and background of the child, the presiding judicial officer may also wish to discover whether the child has the capacity to swear an oath.

The magistrate or judge is likely to ask the child where they attend school, what class they are in and (notwithstanding the diminution of the notion that a lie on oath will send a perjurer straight to Hell), whether they have attended any religion or scripture lessons, or whether they know about God or the Bible.

It is sometimes useful, particularly for a prosecutor, to have a discussion with the child about these things and to prepare the child to answer simple questions about the difference between the truth and a lie.

As a general guide, high school age children are often required to swear an oath if they indicate knowledge of the Bible (for example it is a book about God) whereas younger children will usually only be required to promise (in the form prescribed by the relevant Oaths Act) to tell the truth provided they have been able to give an appreciation of it (for example if shown a book, answering in the negative when asked: 'Would it be the truth if I said this was a football?').

The second person who will ask the child questions in court will be the prosecutor who, ideally, will be known to the child before the hearing and who will have taken at least some part in the child's court preparation. This part of the evidence is where the child gives their story, prompted (where necessary) by non-leading questions (for example 'What happened then?'; 'How long did this continue?'). The child should also be prepared to have to identify the accused (if the circumstances of the case require it) and be reassured that a casual hand gesture in the direction of the accused, without eye contact, should be all that is required.

The child should then be told that the final person to ask them questions will be the defence lawyer who is being paid to do a job for the accused person. The child should be frankly informed that the defence will probably suggest to them that they are lying, making up the story, or imagining it. A child witness will often be asked whether they have ever told a lie and it is wise to prepare the child that a truthful answer to this question will not harm the case and that an explanation of why this is a different matter (for example because it is very serious or because I have promised to tell the truth) is quite appropriate.

Statements

There is no reason why a child should not have access to their police statement at any time prior to hearing. Some children are concerned that reading their statements shortly before court may be construed as a form of cheating. When questioned by the defence they look at support persons for guidance in deciding whether to admit that they looked over the statement shortly before court. Children should be prepared to state plainly: 'yes, I did look at my statement', and to give the reasons for example 'I had not forgotten the things in the statement - I was just reminding myself of the actual words I had used'.

Children should of course be informed that just because something is contained in their statements does not mean they do not have to mention it in their evidence. It is important that everything is described fully in court.

The court layout and personnel

The child victim will doubtlessly have never seen a courtroom before. In fact the child may never have heard of a court and the impressions the child receives from the professional will be their first impressions. (In this event the classic negative ideas about court are not present and need not be conveyed).

Ideally arrangements should be made for the child to see the court in which the proceedings will take place. If this is not possible, any other court will suffice, the layout tending to be uniform. Failing this a diagram can be drawn. The child should be shown that the judge or magistrate sits at the front of the court behind a raised bench. The jury (if it is a trial) sits usually along one side, the lawyers representing the prosecution and the defence sit at a table facing the judge or magistrate. The accused person sits either behind their counsel or in a dock area. There is a court constable or officer somewhere in the body of the court and a court reporter or monitor sits close to and in front of the judge or magistrate. The child should be permitted to sit in the witness box and given an indication of where their support person will be sitting and what direction to face so that the accused is out of their line of vision. The child can be reassured that there will be no 'audience' as it is usual that the court is closed if not for the entire proceedings, then at least for the duration of the child's evidence.

Instilling Confidence

Any witness of whatever age and whether civilian or expert is likely to be extremely apprehensive about the prospect of giving evidence in court. The younger the witness the more frightening the ordeal. Children frequently lack confidence when facing the ordeal of verbal confrontation with adults, a breed of person they have been brought up to respect and defer to. The child victim has the added stress of being at least the principal, and in most cases the only, witness. They are mindful of the fact that if they fail to come up to proof the prosecution will not succeed.

It is essential then that the child witness be given the court survival skills to fortify them for the experience of giving evidence.

The child victim is the most important person in court

In the majority of cases of assault upon children there is no corroborative eyewitness. This means that, in defended matters, only two people in the courtroom know what really happened during the incident in question and only one of these is prepared truthfully to relate the course of events. This of course is the child victim. The court wants and needs to know what this vital witness has to say.

The child victim is the most important person in court and should know it.

The child victim is the boss

The most important person in court also has the privilege of being 'the boss'. They can, during their evidence, ask for questions to be repeated, unfamiliar words or expressions to be explained or for counsel to slow down. They can ask to be excused if upset or in need of the toilet. They can pause to take a drink of water. They can write down any word or phrase they do not wish to verbalise.

Answering questions in court

The child should be advised, honestly that they will be asked hard and perhaps confusing questions in court. They should pause and think carefully about the questions and, if their meanings are clear, answer clearly and without going into unnecessary detail.

The child should be reminded that they should answer all questions honestly and cannot possibly get into any difficulty if this rule is observed.

The child's confidence should be boosted by reminding the child that whatever the defence counsel's attitude to their evidence (they may scoff, or doubt, or cut them short) the court really wants to know what they as 'most important witness' have to say.

Therefore it is important that the child knows they can give a detailed answer or an explanation even if the defence counsel attempts to confine them to a 'yes' or 'no'. They should be encouraged to be persistent in giving the answer they want to give and not just choosing between two answers suggested by the defence. The child can be told that, far from annoying anybody (except perhaps the defence,) the court will be impressed that they are taking the matter seriously enough to ensure that the correct answer is recorded.

The child should be reminded that they are there to tell the truth about what happened because they were there. The defence counsel was not. The judge, magistrate and jury were not. This will assist the child with the inevitable cross-examination questions designed to confuse or water down the evidence (for example 'What you really meant to say was, I suggest that happened on a school day and not in the holidays . . . ').

Preparation should also address the invariable defence practice of suggesting to the witness that the evidence (or part of it) is a lie, story, fantasy or dream. This is always an intimidating experience for a child witness, who would not realise that all witnesses are put to their proof in this fashion. The child should be reassured that a question of this nature does not mean that they are in trouble or that anyone disbelieves them, it is merely the defence counsel doing a job which they have been paid to do.

The child should be told that if they are asked a question to which they do not know, or cannot remember, the answer, it is perfectly acceptable to say so rather than merely to agree with a suggested answer of which they are not sure. In such circumstances the truthful answer is 'I don't know' or 'I can't remember' and that is the response which should be given.

The corollary of this advice is that the child should be encouraged, if they are quite sure of something, or cannot remember something vividly, to say so. The child can be advised, in such a case, to answer a question such as 'But you're not sure of that?' With a firm, loud and confident 'Yes, I am' or 'I am certain of that'. The child, of course, was there, the defence counsel was not.

It is useful to remind the child that the defence counsel has no right to cut a witness' answers short and that even if the lawyer looks annoyed, they should complete their answer. If the answer is going outside the court's interest, the judge will stop the witness.

The important thing is to build the child's confidence so that by reason of their superior knowledge of the evidence, they feel at least something of a match for the defence counsel and are sufficiently self-assured to answer questions confidently, consistently and persistently.

Giving the Child a Friend in Court

Most Australian jurisdictions have provision for an exception to be made to an order closing a court for certain evidence. The exception permits a person to be present to support a child victim of assault for the duration of the evidence.

Where the support person is seated is generally a matter for the discretion of the presiding officer but may be next to the child in the witness box or in the child's line of sight. This person's presence is often of fundamental importance to the child and can make the difference between a good witness and a mute one.

Better than one friend in court is, of course, two. The prosecuting officer should have taken the time to participate in the child's court preparation and to have built a rapport with the child. This is not only of great benefit to the child, but assists the prosecution to elucidate confusing matters arising from any idiosyncratic speech patterns which are common in children.

The child can be encouraged to look only at their friend(s) in court and not to make eye contact with the accused, something which could only result in them becoming more nervous and confused.

Conclusion

A child witness cannot be expected to be confident or self-assured if they do not have sufficient knowledge of the court process and the skills to employ while under cross-examination.

It is important for a professional involved in court preparation to endeavour to redress the imbalance between the victim's age, level of confidence and knowledge of 'The System' and the defence counsel's experience and maturity.

Although there is a school of thought which considers that it is counter-productive for children to endure the trauma of the court process, I am of the view that a well-prepared child witness derives therapeutic value from breaking down the secrecy involved in the assault and publicly stating how the accused has hurt them.

A child's age and frustration can be harnessed and alleviated by the experience and, even in cases where the accused is found not guilty, they did everything they could do in the interests of justice.

A well-prepared child is not only a better, more confident witness but is also more likely to find the experience of giving evidence in court a positive step towards regaining their control and self-esteem.

Summary of Group Discussion

The group compiled the following guidelines for preparing the child witness:

- **How does a court preparer assist the child to overcome the power imbalance between the defence counsel and him/herself?**

  Inform the child of the role of personnel, the court process, giving evidence (questions by judicial officers, examination in chief by prosecution, cross-examination by defence), the court layout and personnel.

  Instil confidence by reminding the child that they are the most important witness and 'the boss' (for example they can ask for questions to be repeated, for a drink, or to go to the toilet). The child's confidence should be boosted by reminding the child that the court needs to know what they have to say and that they should be persistent, need not only answer just 'yes' or 'no' and should be warned that it will be put to them that they are lying or making up a story.

  Give the child a friend in court, by telling them about the support person and where they will sit and by introducing the child to the prosecutor.

- **How can the number of times children have to be interviewed be cut down?**
  Interagency Model in Queensland: police and a team form a pool and should interview the child together. This requires consensus, and barriers and rivalries to be broken down. However, one disadvantage is that cooperative interviewing may often lead to delay by having to arrange for several personnel to be present contemporaneously.

- **Is giving evidence counter-productive for the child or in fact a therapeutic experience?**
  The possibility of assessing individual children as regards the benefits that may flow to them before they become 'caught up' in the system was suggested. At present the assessment as to whether to proceed is made on the power of the statement. Whereas police and prosecutors maintain that giving evidence is usually beneficial, social workers assert that they see long-term effects which, they say, are often deleterious. A successful prosecution should not be conveyed to the child as the only end. Other positive outcomes, such as saving other children from abuse should be emphasised.

Conclusion

It was concluded that a well-prepared child is not only a better, more confident witness, but is also more likely to find the experience of giving evidence beneficial and rewarding.

Sensitising the Court Players and Protecting the Child

DISCUSSION GROUP F

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With increasing frequency, children are being called upon to testify in Australian courts. Although various opinions have been expressed about the abilities of children as witnesses, their treatment in courts, and techniques for obtaining accurate testimony from them, there is a general consensus that child witnesses are more vulnerable than their adult counterparts to the rigours and abuses, potential or otherwise, in the Australian court systems. As such, they need some protection.

This paper, will examine the special position of the child witness, review the existing measures operating in courts to protect the child witness and the role of the court players in those measures, and conclude with a brief discussion on the effectiveness of those measures in protecting the child witness.

The Child Witness

In general, a witness 'can only give evidence of facts of which they have personal knowledge, something they have perceived with their five senses' (Byrne & Heydon 1986). The evidence of a child witness is therefore concerned with a fact or event or series of facts or events which were perceived in the past but are relevant to the present. In this way, a child's evidence is comprised of the following elements:

- original perception - which includes self-perception of their role in the events;
- memory or recollection - the child's recollection of the original perception at the time of the giving of evidence in court; and
- communication - the child's communication in court of their present recollection of that original perception (McCloskey & Schoenberg 1986).

Original perception

The original perception of an event by any witness, adult or child, can be affected by a range of factors (McCloskey & Schoenberg 1986). These factors may relate to the event itself

(for example significance of the event; duration of the event; and obstructions within the event); the witness who perceives that event (for example defects in sensory capacity caused by the physiological condition of the witness and temporary impairment of sensory ability caused by anxiety, fatigue, alcohol or drugs); and the surrounding environment at the time of the event (for example unfamiliarity or familiarity with the environment, obstructions or obstacles, positioning of the witness, weather and lighting conditions). For the child, however, the original perception may be further affected by their cognitive, physiological and social development at the time of the perception.

A child's perception of an event is principally affected by the mental processes surrounding the selective detection and interpretation of relevant environmental information (Turner & Helms 1983). Detection is related to a child's ability to distinguish differences in size, shape and space in their physical world, attention and attending skills, cognitive feedback from past experiences, and level of language ability at the time of the relevant perception. Interpretation, on the other hand, is related to the child's level of general thought processes, including their vocabulary, ability to use words and to understand their symbolic qualities, and ability to place an interpretation on the environmental information detected. Both detection and interpretation are limited in the early childhood years but improve with age. Egocentrism in young children may also affect size, shape and spatial concepts as young children often perceive their environment relative to themselves. Younger children are also not able to develop accurate quantity discriminations independent of misleading perceptual cues logically. Time and date concepts also develop with age, and even when young children have a rudimentary understanding of time, they may still relate time to certain routine events (for example breakfast) which involve them.

The perception by a child of an event may also be affected by their level of physical development (Turner & Helms 1983). A child's size and motor-skill abilities, when combined with their cognitive level, may affect the perception of an event. For example, a child's smaller size may increase or decrease their abilities to see certain details in an environment surrounding an event. During childhood, especially the younger years, visual and hearing acuity, including the ability to see certain details and hear different pitches and tones, may be adversely affected. Visual and hearing acuity increases with age.

A child's perception of an event, including the perception of him/herself relative to the event, may also be affected by the level of social development (Turner & Helms 1983). Body awareness is age related, as is sex-role typing. The emotional developmental level of a child (including their emotional response to an event), which changes with age, may affect their perception of an event, particularly the significance of the event in terms of memory. The moral developmental level of a child may also affect perception and the significance of an event. Morality in early childhood is particularly characterised by the classification of behaviour patterns into good or right (sometimes reward) and bad or wrong (sometimes punishment), whereas morality with an older child is more likely to encompass a complex set of ideas, values and beliefs.

Another aspect of social development is the role of play. The use of imagination and make-believe play, especially in the early childhood years, helps a child to resolve inner conflicts and develop a better understanding of people and events. Imagination or fantasy, however, usually originates from real-life experiences. Moreover, children from about the age of six years appear to be able to distinguish their own thoughts from another's actions (Goodman 1984). It is still not clear whether they can or cannot discriminate their own thoughts about another's actions from that other person's actual actions. Even adults, however, may project their own thoughts into their perception of the behaviour of others and thereby alter that perception.

Recollection or memory

A recollection or retrieval from memory of past events by a witness, child or adult, is affected by such factors as time lapse, memory capabilities, and influences during the intervening period between the original perception of the events and the recounting (Turner

& Helms 1983). The length of the interval between the occurrence of the event and the time of recall in most cases progressively adversely affects memory, regardless of age. Studies (Melton et al. 1985; Loftus & Davies 1984; Davies et al. 1986; Goodman & Helgeson; and Cameron & Smyth 1987) on memory, however, indicate that children as young as four or five appear to perform as well as adults on memory recognition tasks but have limited abilities in the free recall memory situation. It appears that younger children may need direct cues or questions to stimulate recall. Most of these studies, however, do not appear to have considered the effect on memory of real-life events (especially traumatic ones), interest value, differences in delay intervals and language and thought sophistication. Several studies (Davies et al. 1986) on the memories of young children (three to six years) suggest that the stress in events with moderate trauma (receiving inoculations or dental treatment) does not enhance or reduce the quality of a child's memory of the event but may ensure that it is preserved longer and better in memory than more mundane experiences. Overall, the above studies tend to suggest that memory for detail appears to be knowledge dependent as opposed to age dependent and children may, in certain situations, because of a smaller knowledge base, take in fewer details of an event for later retrieval from memory.

Any influences during the intervening period between the event and the recall can adversely affect memory in both adults and children. Loftus and Davies (1984) on the effect of leading questions on memory, concluded there was nothing to support the view that children were more susceptible to such memory interference than adults. Children appear to be no more suggestible than adults. Moreover, the memory of adults may be altered after an event if they overhear conversations about it, or are asked leading questions, or receive new information about the event (Loftus & Davies 1984). Suggestibility in adults and children may also be affected by the social relationship of the suggester to the witness, significance of the original event, and the relative authoritative position of the suggester as perceived by the witness.

Communication

The communication of the event by the child in court may be affected by the child's emotional state, attention and attending abilities, language abilities, and the abilities of other court players (the receivers of that communication) to understand what the child is saying. If a child is upset or distressed by the courtroom setting or the conduct or mere presence of other court players, the child may become confused and in extreme cases unable to testify further. Depending on a child's age and developmental level, it may have a limited attention span and become confused or distressed after a prolonged time on the witness stand or after repeated questioning.

Giving evidence in court is about communicating one's perception of a past event to create an image in another person about that event. For children, this ability is limited by age-related factors such as vocabulary and the ability to use words and understand their symbolic meanings and qualities. Still further, it is related to a particular child's ability to conceptualise past events and order them in terms of space and time. For example, a younger child may not be able to systematise complex multiple environmental stimuli received during the past event, nor understand about the times and dates relevant to the event.

Just as adults give different meanings to the same word, adults may give different meanings, than children, to words used by those children. In the courtroom setting, the other players - the lawyers, jury or judge may adopt a meaning for a word which was not intended by the child who uttered the word. Still further, children often do not understand the 'niceties' in language (for example, the distinction between a 'hit' and 'push').

Adults may also view a situation or perceive an event through their eyes rather than the eyes of a child. In one case involving a ten-year-old child on a receiving charge (jewellery) who was being represented by the writer, the prosecutor attempted to argue that the child must have known the jewellery was stolen because the money paid by the child for the

jewellery was well below its value. The child, however, perceived the amount paid for the jewellery as a reasonable and fair sum.

Generally

The above discussion about the special situation of the child witness must be approached with caution. It is not intended to form a basis for attempting to disqualify a child witness from testifying but rather as a means to sensitise the courtroom players to the special characteristics of the child witness. The available research suggests that if children are given the appropriate support and asked simple and supportive questions in the courtroom setting, they can be accurate and truthful witnesses. However, in some situations and particularly with younger children, there may be on occasion a quantitative rather than qualitative inferiority in their evidence. This inferiority may be related to the level of cognitive, physical or social development of the particular child witness either at the time of the original perception or its recall. Notwithstanding this shortfall, however, young children can be competent, accurate and truthful witnesses and may even benefit therapeutically in certain situations from giving evidence in court (Cameron & Smyth 1987).

Existing Legal Measures to Protect the Child Witness

The principle legal measures existing to protect the child witness are contained in the legal rules of practice and procedure relating to evidence and the Codes of Ethics and Conduct controlling the courtroom players. Apart from the child witness (and in some cases the adult accused), the principal players in the courtroom setting are the presiding judicial officer (usually a judge or magistrate), the lawyers, the jury, and possibly support persons for the child.

Before looking more closely at the above measures, when and how children are permitted to give evidence will be briefly examined.

At common law, a child may give sworn evidence in court if they are capable of understanding the nature and consequences of an oath and are competent to give evidence. Competency is not an issue related to age but understanding. If a child cannot be sworn, all Australian states and territories permit the reception of unsworn evidence from that child in both civil and criminal proceedings. Although some states and territories impose upper age limits for the reception of unsworn evidence from children, the court is still required to be of the opinion that the child is possessed of sufficient intelligence to justify the reception of their evidence and understands the duty of speaking the truth.

Once the child is accepted as a witness, they are in the same position as an adult witness and subject to the same laws of evidence and protective measures applicable to an adult witness (Byrne & Heydon 1986).

Codes of ethics

All solicitors and barristers are subject to a Code of Ethics and Conduct (for example Professional Conduct Rules, The Law Society of Western Australia, October 1983). Any breach of those ethics may result in punitive measures being imposed by the appropriate controlling body and in some cases even the court. The rules governing courtroom conduct in such Codes, however, are mostly phrased in general terms. For example, most Codes state that a lawyer shall act with due courtesy to the court (including a witness), avoid unnecessary expense and waste of the court's time, guard against being made the channel for questions which are only intended to insult or annoy a witness or any other person, exercise their judgment as to the appropriateness, substance and form of questions or statements put to a witness, and not to put questions affecting the credibility of a witness by attacking the witness' character unless there are reasonable grounds to support the imputation conveyed by the questions. In practice, such rules are difficult to enforce and usually require a

complaint to be made before any action is taken. In reality few complaints are made by witnesses about the conduct of a lawyer.

Rules of practice and procedure relating to evidence

The legal rules of practice and procedure relating to evidence in the courtroom setting are found in the common law and statute law.

The principal rules of practice and procedure relating to the course of evidence are as follows:

- the lawyer calling a witness should not ask leading questions of that witness, but asking a leading question only goes to the weight to be attached by the arbitrator of fact to the answer given to the question - in practice, the courts tend to allow leading questions on undisputed facts;
- a cross-examiner of a witness can only ask questions relevant to the proceedings and questions intended to discredit a witness (for example questions tending to show exaggerations, improbabilities, inconsistencies and omissions in the evidence of the witness) - certain methods of discrediting a witness are controlled by statute; (s.21 and s.22 *Evidence Act 1977* (WA); s.98 and s.99 *Evidence Act 1910* (Tas.); s.61 and s.62 *Evidence Ordinance 1971* (ACT); s.28 and s.29 *Evidence Act 1929* (SA); ss.34, 35, 36 *Evidence Act 1958* (Vic.); ss.17, 18 19 *Evidence Act 1977* (NSW); ss.53, 54, 55 (1) *Evidence Act 1898* (NSW));
- leading questions can be asked in cross-examination but the court has a discretion to disallow them, especially if the question contains a premise based on a disputed fact;
- irrelevant questions are generally not permitted because they may prejudice the outcome of the proceedings and waste the court's time;
- improper, vexatious, oppressive or offensive questions are generally not permissible - these would include a question which is 'annoying, hectoring, insulting, abusive, browbeating, badgering, intimidating or bullying, or which causes needless embarrassment, shame, anger, harassment, or confusion in the witness' (s.26 *Evidence Act* 1977 (WA) - there are equivalent statutory provisions in all states and territories);
- any questioning of a witness which is motivated by a desire to punish is improper and not permissible;
- repetitive questions or unduly lengthy or prolonged cross-examination of a witness by a lawyer may be oppressive and not permitted by the judge or magistrate to continue;
- third parties such as a child's parents may not be needlessly implicated in questions put to a witness by a lawyer - the court has a duty to ensure fairness to third parties as well as the parties to the proceedings;
- indecent questions are generally not permitted but swear words may be used depending on whether they were used in the original event and are therefore part of the evidence, or assist the witness to describe details of the event;
- questions of a complainant witness, which pertain to certain sexual matters, in cases involving specific sexual offences are generally not permitted in the courts of most Australian states and territories (Byrne & Heydon 1986), - some offences relating to the sexual abuse of children are not covered by such legislation; and
- unless there is legislation to the contrary (for example in New South Wales) an accused generally has the right to be present during the testimony of a witness.

The Roles of the Courtroom Players

The presiding judicial officer

The presiding judicial officer (usually a judge or magistrate) in most courts controls the practice and procedure in the court and is the decision-maker on questions of law arising during the course of the proceedings. In civil and summary court matters, they are also the decision-maker on issues of fact. They arbitrate and decide on all issues relating to the competency of witnesses and conduct of the lawyers during the court proceedings, including the appropriateness or otherwise of questions asked of a witness and the sufficiency of answers given by a witness. They may intervene on their own accord or at the request of counsel, or even at the request of a witness. Third parties are generally not permitted to ask the judge to intervene on behalf of the child witness. The decision by the presiding judicial officer to intervene is generally a discretionary one and as such will seldom be interfered with on appeal. The appeal mechanism (if any) applicable to a particular court is the only way (apart from having legal argument in the courtroom at the relevant time) of contesting a presiding judicial officer's decision.

Lawyers and police prosecutors

Apart from their Codes of Ethics and Conduct, lawyers and police prosecutors are subject to, and have a duty to observe, the rules of practice and procedure relating to evidence outlined above. An opposing lawyer or police prosecutor has a responsibility and duty to monitor or control the conduct of the other lawyer in the proceedings, especially the latter's conduct towards the former's witness. Control is effected by asking the presiding judicial officer to intervene and stop any breach by the other lawyer of the evidential rules of practice and procedure. A lawyer also has a duty and responsibility to assist and support their child witness. The other lawyer not calling the child, however, has a duty to their client to test the veracity of the child witness, lead evidence relevant to their client's case, and put their client's case fairly but strongly to the court.

The jury

The jury's role in criminal proceedings (they are seldom used in civil disputes) is to determine questions of fact, and the guilt of the accused. They hear the evidence of certain facts, make a decision on those facts, and apply the law as described by the judge to those facts. They are to ignore any evidence which during the course of proceedings has been excluded by the judge. In practice, objections to the nature or type of questions asked of a child witness are determined by the judge in the presence of the jury. On the other hand, major disputes over evidence such as the admissibility of a confession, are usually determined by the judge in the absence of the jury.

A jury is also required to exclude any sympathies and prejudices when determining a question of fact or guilt of an accused person. Studies (Goodman et al. 1984), however, have shown that some jurors may have preconceived ideas about, and biases against, child witnesses. Jurors (and lawyers) may think that children fantasise or are more suggestible than adults and therefore require some kind of corroboration before they believe the child witness. The criteria used by jurors for assessing the credibility of an adult witness such as consistency and confidence may be applied by them to the child witness. Given the special characteristics of the child witness, this would appear to be inappropriate. Such studies indicate that both judges and lawyers have an important role to play in sensitising the jury to the idiosyncrasies of the child witness.

Support players

Support players such as parents, police officers, psychologists, doctors and social workers involved with the child do not appear to have a directly active role in the court proceedings (Cameron & Smyth 1987). However, their presence in the court may assist the child witness (for example to overcome fear or nerves) and also provide a readily available resource person for the lawyer who has called the child witness.

Are Existing Measures Adequately Protecting the Child Witness?

The existing legal measures available to protect the child witness are adequate and no further codification of them is necessary. However, it appears that the measures do sometimes break down in practice because of the lack of awareness or sensitivity by courtroom players to the plight of the child witness. This breakdown can be avoided through the proper education and training of the players, adequate warnings or instructions to jurors, and increasing the specialisation of judges, magistrates and lawyers (including, Crown and police prosecutors) who participate in cases involving child witnesses (Stevens & Berliner 1982). Some legislative reform, however, may be necessary in some jurisdictions to ensure the removal of the child witness from the presence of the accused (or vice versa) in sexual abuse matters and to extend the protective measures in the criminal jurisdiction relating to the limitations on questions on sexual matters to cover all sex offences involving children and all cases involving allegations of sexual abuse.

Summary of Group Discussion

The group considered that the principal courtroom players such as judges, magistrates, lawyers, police prosecutors, support persons and jurors are not sufficiently aware or sensitive of the special position of child witnesses.

Abuses relating to child witnesses appear to be more prevalent in summary courts as opposed to the superior courts. The jury was perceived to be the controlling factor in the latter courts.

Resolutions

- Lawyers and prosecutors (including police) should be made more accountable for improper conduct relating to a child witness (or any other witness). Some participants thought that an independent body (which included non-lawyers) or possibly an Ombudsman could receive, investigate and impose sanctions on any complaint against a lawyer or prosecutor. There was a consensus that a dialogue should be started with law societies and appropriate controlling bodies in the respective states and territories about the improper conduct of lawyers and prosecutors towards some witnesses, especially children (including children as accused).
- The possible use of a 'child interpreter' in court to translate questions put to a child witness should be investigated further. The parameters of the translator's role would need to be clearly defined and the translator would need to be specially trained in the relevant social science and legal matters.
- A pre-trial conference system in criminal trials was also a viable option, especially for superior courts. This system would allow facts to be agreed upon

and any identifiable disputes on the permissibility of certain aspects of a child's evidence to be argued before the child is called as a witness.

- Committal proceedings could be changed to avoid a child appearing as a witness in a criminal case at that stage (by way of depositions).
- Some participants thought that all offences involving the sexual abuse of children should be tried in a superior court.
- Legislation should be enacted to allow support persons for the child. These persons are not witnesses and must be present and near the child during the child's evidence.
- Legislation should be enacted to protect all child witnesses against questions on unrelated sexual matters and even on factors relating to the symptomology of child sexual abuse (for example offences committed by a child). A comparison was made with existing evidential legislation protecting most sexual assault victims in criminal trials.
- Not all participants were convinced that audio-visual technology was the appropriate method for receiving the evidence of children. Panels or partitioning may be appropriate in some cases. In any event, children should be given the option as to whether they wish to give evidence in an open court or not. The discretion should rest with the child.
- All courts in which children give evidence should be closed courts and not be open to the public. The discretion to exclude strangers from the court which operates in some jurisdictions should be reversed and the judicial discretion be to permit strangers entry (for example the press). The press should not be able to report court proceedings in any way which, directly or indirectly, identifies the particular child witness.

Specialisation and training - sensitising the players

- All courtroom players, especially lawyers, judges, magistrates and police prosecutors, should receive as a part of their training a general understanding of the cognitive, physiological and social development of children (and adults) and the special position of the child witness. The latter would include training for lawyers (and police prosecutors) who call a child witness, in protecting that child from the rigours and abuses existing in Australian court systems.
- Although most participants agreed that prosecutors, support persons, and lawyers representing children in criminal courts should be specialised, there were differing views for and against the specialisation of judges and magistrates. Some participants thought that such specialisation in presiding judicial officers was necessary and would help accelerate to trial, cases involving child witnesses, especially given the effect of time lapse on the memory of children. 'Burn out' could be overcome by rotating the position of 'special' judge or magistrate amongst presiding judicial officers. Other participants thought that specialisation tended to restrict the knowledge about child witnesses to a few presiding judicial officers who may become isolated and burn out. They perceived a need to inform all presiding judicial officers about child witnesses. Some participants believed that, given present court resources, such specialisation was unrealistic. Yet other participants believed that the specialisation of prosecutors, support persons and lawyers representing children presently operating in some states and territories has been effective and a similar specialisation in judges and magistrates would also be effective.
- Support persons should also be trained in legal matters, especially the law relating to evidential matters.
- Manuals should be prepared to assist judges, lawyers, prosecutors and support persons participating in court cases involving child witnesses.

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Legal Aspects

DISCUSSION GROUP G

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The group discussed three broad topics: the interivew and preparation of child witnesses; court hearings and the child presenting evidence in court; and diversion of child sexual abuse cases from the criminal justice system.

Topic One - Consider the Protocol for the Interview and Preparation of Child Witnesses

Chair - Allison Gray
What safeguards need to be in place to protect the accused and what methods need to be introduced to reduce the trauma for the child?

- The accused should be given proper versions of the initial interview;
- videotaping of the child's statements should be used with attempts made to have the video adopted by the accused - a recognition resulting in a plea obviates the need for any evidence;
- time limits should be placed on the length of interviews. The participants need to be sensitive to the age and maturity of the child. Every effort should be made to maintain the child's routine (for example meals) - more than one interview may be essential;
- consideration should be given to the possibility of a legal representative acting on behalf of the child and or a support person who could be present during the court interviews;
- the time of presentation should be considered. If late at night, the immediate need for a medical examination should be accommodated, but it is then necessary to enable the child to rest so that they are fresh the next day;
- the necessity to have explained to the child, in every case, the nature of the court proceeding including an explanation of the layout of the courtroom; and
- at least two people (police or welfare) should be present during any interview.

What legislative amendments are necessary to give effect to the safeguards alluded to above?

- In considering the necessity for legislative amendment, the group considered that commonsense and a spirit of cooperation between the various disciplines obviated the need for legislative intervention.

What measures have already been taken on these lines in the various states?

- The group considered that to their knowledge, no legislative amendments or measures had been taken in the states consistent with the foregoing.

Topic Two - Consider the Protocol with Respect to Court Hearings and the Child Presenting Evidence in Court

Chair - Lindy Powell

What safeguards need to be in place to protect the accused and what methods need to be introduced to reduce the trauma for the child?

- No formal proposal or consensus was reached on this topic other than the necessity for training at all levels;
- it was generally felt that it was the function of the magistrate or judge concerned to protect witnesses from inappropriate questions.

What legislative amendments are necessary to give effect to the safeguards alluded to above?

- Legislative provisions in the various states were discussed, particularly with respect to the use of video technology and various state practices as to victim's giving or not giving evidence in committal hearings.

What measures have already been taken on these lines in the various states?

- The group highlighted the Victorian experience of a reduction in guilty pleas as a result of legislation in that state. Similarly, there seems to have been only one case in South Australia in the last year where a magistrate has ruled that special reasons existed to call the child at a committal hearing;
- the group endorsed the use of video technology where children are called as witnesses but expressed the view that the use of such equipment needed to be fully investigated;
- fruitful discussion took place with respect to the rights of the accused to face an accuser, with the relevance of matters such as body language and communication and the obligation or appropriateness of the court recognising the welfare of the child as the paramount consideration. This discussion highlighted the respective roles of the civil and criminal jurisdictions of the court and the need alternatively for retribution and/or regulation;
- the group felt the dynamics of the courtroom in criminal proceedings had the accused in a powerful position with the child victim powerless. In this regard, the group discussed the ways in which the child could be given more power,

including the presence of a support person and giving the child a higher physical position in court;

- the group considered that the right of confrontation by an accused of the accuser needed to be analysed. In this regard, the use of screens was discussed. It was generally felt that the accused should have access to all relevant information;
- aspects related to body language and the view that a witness is less likely to tell a lie in a face-to-face situation than in a removed situation or conversely, to say nothing at all were discussed with reference to the use of video technology and screens;
- it was agreed that language used in the court needed to be simplified;
- court delays were discussed, with the main difficulty being experienced in New South Wales;
- it was felt by the group that court procedures should be orientated towards its participants - witnesses, jury and the accused. It is also necessary that witnesses with special characteristics (such as children) be recognised. In essence, it was considered that the court needed to be more sensitive and more flexible in its day-to-day protocols;
- the need to train judges and lawyers to talk to children was discussed. The point was made, however, that an advocate can be charming and still confuse and traumatise a child - general communicative skills were highlighted;
- the role of prosecutors in regulating inappropriate cross-examination was discussed;
- the concept of a children's lawyer was discussed as were the consequential issues relating to the rights of the accused in criminal proceedings. The empowerment of the child through the use of a children's lawyer was considered inappropriate in criminal proceedings. It was considered that an expert to advise counsel on how to ask questions would be more appropriate.

Topic Three - Consider the Diversion of Child Sexual Abuse Cases from the Criminal Justice System

Chair - Alan Moss

- The group highlighted the respective roles of the criminal and civil jurisdictions and the different standards of proof applicable in each, noting that an absence of evidence at the criminal standard 'beyond reasonable doubt' would not preclude from satisfying the civil standard 'on the balance of probability' to ensure that a means of protection or regulation could be achieved where a criminal prosecution could not be sustained. As a large number of abusers are not prosecuted for various reasons, the use of the civil jurisdiction can be utilised to ensure an adequate level of protection. In this regard, the criminal and civil jurisdiction were considered to be concurrent.
- Decriminalisation, de facto or otherwise, does not diminish the crime of child sexual assault. The use of alternative proceedings merely highlights the difficulties of the criminal justice system in view of the evidential standard to be applied in such proceedings.
- The concept of diversion fell essentially into two categories:
    - sentencing options; and
    - civil proceedings.
- With respect to the former, any form of diversion must be based on a plea of guilty with appropriate incentives and sanctions attached to any diversion program to ensure compliance and rehabilitation. The effects of rehabilitative

programs need to be assessed. Diversion does not necessarily mean decriminalisation.

The sentencing process could be suspended in lieu of an order coercing the abuser into treatment.

- The need for the child to give evidence exists only where there remains a contest as to the alleged facts.

  An admission by an abuser is essential in reducing the trauma of the child by obviating the need for any evidence. It was considered that the education of lawyers in clearer guidelines on sentencing options would enhance the likelihood of pleas. Similarly, overt rather than covert 'plea bargaining' was considered.
- The sentencing process should include a 'victim impact statement' to assert and influence the court in imposing a penalty and/or the imposition of treatment.

  Treatment should be undertaken concurrently with any form of imprisonment.
- It was felt that consideration be given in child protection orders to placing an abuser on a bond with or without conditions.
- A greater range of dispositional options was considered necessary to address the special circumstances which arise in cases of child abuse.
- The absence of adequate resources:

  - leads to prioritising, resulting in the need to redefine the particular problem with detrimental effects.
  - needs to be overcome to enable adequate training and education to prevent the abuse of children.
- The difficulties appear to be attitudinal rather than structural. As a consequence, few legislative measures are considered necessary.
- The establishment of the Children's Trust Fund should be supported as creating a diversionary option for the support of the child victim where family support is not available.

The Use of Clinical Evidence

DISCUSSION GROUP H

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Clinical evidence, in the context of this discussion, refers to the information that is able to be gathered by clinical methods. These methods include such techniques as interview, psychological testing and physical examination.

For the proper documentation of a suspected case of child maltreatment, the gathering, recording and reporting of clinical evidence is an essential part of the process of assessment.

Traditionally, physical maltreatment was the main type of abuse investigated. The result of the clinical examination of a suspected victim of physical abuse was a critical part of the evidence available to child protection agencies for presentation in court. Frequently no other clinical information was sought, for example physically maltreated children were not often interviewed.

As sexual maltreatment has become more frequently reported a much greater reliance has had to be placed on other aspects of the clinical evidence, particularly interviews conducted with the suspected child victim.

The 'clinical interview', carried out with children who are suspected victims of maltreatment, does not have the same evidentiary value as a physical examination which may confirm that maltreatment has occurred. With suspected victims of sexual maltreatment the physical examination is not often abnormal, and therefore may not be useful as court evidence.

As a general and guiding principle any child suspected of being a victim of maltreatment should be assessed from three broad perspectives, if at all possible:

- the account that the child gives of the allegations of maltreatment;
- the accounts available from other individuals who may have information relevant to the suspected maltreatment of the child; and
- the results of a physical examination of the child.

Generally speaking, some information is available in each of these areas and it is important that proper emphasis is given to each facet in the investigation of every case of suspected child maltreatment, whatever the type. Such an investigation is the best way of producing information which is able to be used in the initiation of legal proceedings for the protection of child victims or the prosecution of suspected perpetrators of maltreatment.

There is considerable controversy surrounding the interview of young, suspected victims of child maltreatment. The debate centres around such aspects of the interview as: the reliability of children's memory, the suggestibility of children, and children's tendency to fantasise. Any interview with a child should be conducted by an experienced person using

an interview which follows a standard format and contains for example, inbuilt checks of the child's memory and reliability. Those interviewing children should only report factual material gained from the interview. For the purpose of court proceedings speculative interpretations or opinions which are presented as facts are not acceptable and form the basis for many of the problems which have previously been put forward as limitations of interviews.

The traditional physical examination of children suspected of being victims of physical maltreatment is well established. However, it could be developed further by the careful study of various patterns of non-accidental injury, particularly burns, the healing rate of various injuries and the changing appearance of various non-accidental injuries over time.

Much clarification of the physical concomitants of sexual maltreatment is necessary. It is unlikely that physical abnormalities, the result of sexual interference, are present in more than 10-20 per cent of victims of sexual interference. Generally speaking, by the time the average suspected child victim is examined there is nothing specific found. To help in the clarification of what minor changes may result from sexual interference careful documentation of the changes seen in those children who are able to be examined soon after interference has taken place should be made. If possible, examination of these children again, as the physical signs change and any injuries present heal, will further provide useful information about the physical changes to be expected with sexually abused children. Adequate recording of the examination findings by contemporaneous notes and clinical photographs of the genitalia of suspected victims should always be undertaken.

The group discussion was limited to the clinical evidence that might be available from children who had either alleged maltreatment or who were suspected of being victims of maltreatment. Practically speaking, most consideration was given to issues of evidence related to actual maltreatment.

Because of the size of the group it was divided in half. The two sub-groups discussed the same three questions for the first hour. For the remaining half-hour the views of the two groups were brought together.

What is Clinical Evidence?

Ultimately, what is evidence is defined by the court. Ideally 'evidence' in the context of the framework of child maltreatment should include: the child's story of maltreatment; the physical evidence of maltreatment; and the psychological and behavioural evidence of maltreatment.

Clinical material should only be considered as possible evidence if it is collected in an appropriate clinical environment by appropriately trained and experienced clinicians.

More than one clinician may be involved in the collection of clinical material. To ensure the best possible return of suitable material, close liaison must take place between those involved in the gathering of the information. For instance, the clinician performing the physical examination needs to discuss the nature of the child's story with the professional who obtained the child's story of actual maltreatment.

What Factors influence the Reliability of Clinical Evidence?

Reliability can be maintained if:

- only trained and experienced people gather information from the child;
- assessors adopt an objective approach to the gathering of evidence, thus ensuring that validity and credibility testing of a child's allegations can be ascertained from the interview procedure;
- appropriate means for recording a child's story (video recording of interviews should be considered suitable) and the tests of credibility and reliability are used; and

- the multi-disciplinary approach to gathering evidence should be used.

How and by whom should Clinical Evidence be collected and presented?

Clinical evidence should be collected and presented by appropriately trained and experienced professionals. Those who give evidence should expect to have to justify the accounts of the child's story they give ensuring that the interview addresses the credibility and reliability of the child's story. This is best done by the incorporation into the interview of internal checks, as well as demonstrating the consistency and reproducibility of the child's allegation.

T.V. or not T.V. - The Question of the Use of Technology in Courts where Children are Witnesses

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The issue of 'Children as Witnesses' is one of widespread concern throughout the community with various groups often taking conflicting, extreme and emotional viewpoints. These conflicting interests need to be balanced with an appropriate level of understanding after proper and appropriate community discussion.

To consolidate the range of issues into three categories is probably an oversimplification. However, in assessing the relevance and appropriateness of technology in the courtroom, three factors need to be considered: the need to protect the child from trauma caused by the legal process; the rights of persons affected by allegations of child abuse; and the need to enforce the criminal law and maintain social standards.

The Need to Protect the Child from Trauma Caused by the Legal Process

It is difficult to assess with accuracy the degree to which children are affected by the obligation to give evidence, particularly where the person who is placed in jeopardy by that evidence is a close relative or a person who has had a longstanding association with the child. It is clear that the effect on some is profound and immediate. The courts have frequently encountered the spectacle of children called to give evidence being unable to utter a word. It is generally believed that this results from the child's sense of fear and intimidation at the task which they are called upon to perform rather than from a reluctance to make a false complaint.

The Need to Protect the Rights of Persons Affected by Allegations of Child Abuse

This factor could be expressed simply by the statement that 'justice must not only be done, but must also be seen to have been done'. As Murphy J stated:

> The fact that the complainant is a witness satisfies one of the most important rights of an accused which is, that in the absence of satisfactory cause such as death or incapacity, the accused is to be given the opportunity of testing evidence against him. The right of confrontation is one of the fundamental guarantees of life and liberty . . . long deemed to be essential for the due protection of life and liberty (*Whitehorn v. The Queen* [1983] 57 ALJR 809).

In this context it is suggested that the use of video technology usurps two basic principles:

- As proceedings are adversarial it is the parties who seek out the evidence, call the witnesses and examine them, not the court. As the court does not examine the witnesses from a neutral position, it is essential for properly testing the evidence that each party has the opportunity of examining its opponents' witnesses.
- The rule against the admission of hearsay evidence. This principle permits a party to prove something happened by calling A, who did not see it, to testify that he heard B, who did see it, describe it; either B must be called to describe it to the court, or the incident must be proved by some other means.

The view has been expressed that:

> The hearsay rule is defensible in so far as it forbids the use of a second-hand account of an incident when a more reliable first-hand account is available. But in so far as it prevents second-hand accounts being given when they are likely to be more reliable than first-hand accounts, or when no first-hand accounts are available, the hearsay rule is hopelessly irrational and there can be no sane reason for refusing to make an exception to it. Suppressing such evidence not only makes it harder to convict the guilty, it also makes it easier to convict the innocent. Let it never be forgotten that the case which established that the hearsay rule prevents anyone repeating a child's account of an indecent assault to the court was *Sparks v. R* [1964] AC 964 where a white man was prosecuted for indecently assaulting a little girl of three, and the court refused to allow her mother to say that immediately after the incident the child told her that the man who assaulted her was black (Spencer 1987).

In civil proceedings involving children, the hearsay rule would not prevent the use of videotaped interviews. In such proceedings the courts have already accepted that there is a general discretion to admit hearsay evidence where the judge considers that the interests of justice require it.

The Need to Enforce the Criminal Law and maintain Social Standards

The distinction between the roles of the criminal justice system and the civil jurisdiction of the courts is often confused. A crime is committed against the community as well as against the victim. Any criminal case is in essence the prosecution by the community of its standards - the enforcement of society's rights and obligations. The civil jurisdiction exists to enforce private rights - 'personal actions'.

This factor also raises the issue of how to deal with allegations of child abuse legally and the interrelationship between the civil law, the criminal law and the law of evidence. The criminal law provides that where allegations are made against an accused person, the accused is innocent until proven guilty, with guilt to be established beyond reasonable doubt for a conviction to be sustained. This principle conflicts with the principles of the civil law (in

Family Law, Domestic Violence and Child Care proceedings or proceedings for injunctive relief) to ensure the protection of the child, with the welfare of the child as the paramount consideration at an evidential standard on the balance of probability.

The problematical interrelationship between civil and criminal law is exacerbated by deferring procedural rules, different rules of evidence and a multiplicity of process and players which presently are not as coordinated as they could be in protecting both the child and the accused - thus highlighting the necessity for a protocol in dealing with the victim of abuse involving:

- a special set of rules for children in court for their protection; and
- a multi-disciplinary approach to avoid a multiplicity of interviews not only for the protection of the child but to protect and preserve evidence and its evidentiary weight.

It is not proposed to deal in detail with these factors but merely to raise them as issues relevant to an assessment of technology in the courtroom. Any changes to be effected will undoubtedly be opposed for varying reasons. As has been said:

> How (can) any rule or tradition sensibly be dignified with the title of a basic principle of British criminal justice unless it furthers one of the following three objects: (i) the conviction of the guilty; (ii) the acquittal of the innocent; and (iii) the conduct of the trial in a humane fashion which inflicts no greater pain or indignity on the participants than the seriousness of the case makes necessary. Any so-called basic principle which does not further one of these objects is bogus . . . seeking to turn the serious business of criminal justice into an artificial game, amusing and enriching for lawyers, but detrimental to the general public for whose help and protection criminal justice supposedly exists (Spencer 1987, p. 250).

Problems in Prosecuting Offenders

There is nothing new in the revelation that the present rules of criminal procedure and evidence make it extremely difficult to prosecute child abusers. Briefly, the problems are these: firstly, the child victim, however young, is expected (like an adult) to tell the embarrassing tale in open court in front of a judge, jury, court officials, barristers and the alleged attacker, and be submitted to a possibly bullying cross-examination. This is a terrifying ordeal for older children, and in the case of very young children it is impracticable even to consider it. Secondly, if the child can be induced to tell the story to the court there can usually be no conviction on this evidence without 'corroboration', which is a highly technical and restrictive legal concept. And thirdly, what the child told parents, doctor, social worker or the police about the incident is usually inadmissible in evidence because it amounts in law to 'hearsay'.

Various proposals have been formulated to allay these difficulties. It has been suggested that the corroboration requirement should be curtailed or abolished. It has been suggested that child psychologists should be permitted to give their expert opinion on the child's mental state and the credibility of its evidence. The use of child examiners to take evidence has also been suggested. Child examiners are used in Israel in lieu of the child giving evidence. It is submitted that such a system is a total abrogation of the criminal justice system and amounts to nothing more than trial by social worker. Child 'interpreters' are used in Canada and have been suggested here.

Video Technology in the Courtroom

The proposal for the use of video technology in court is two pronged. Firstly, the initial interview or complaint by a child to a police officer is to be fully videotaped. Secondly, the

child's evidence in court is given via a video link up whereby the child giving evidence in a separate room can be seen by all the parties in the courtroom, with the child seeing only the respective legal representatives and the judge or magistrate.

The videotape of the original interview is presented to the child under oath in the proceedings and adopted as being true. The child is then cross-examined via the video-link with total communication, both sound and picture. This procedure has been adopted in the United Kingdom through the 1988 Criminal Justice Bill. It is of particular relevance to note that the foregoing procedure is dependent upon the leave of the judge or magistrate in each case subject to specific legislative criteria. The United Kingdom provisions are detailed in a paper prepared by the Home Office (8 May 1987, London).

With the cooperation of the Datapoint Corporation who were involved in the introduction of the procedure in the United Kingdom, a demonstration videotape was viewed in the Australian Capital Territory in December 1987. The viewing received enormous support. It is submitted that the video technology option is justified as the best available option given that there are great difficulties in ever getting viable evidence from a child in a normal courtroom context. This same equipment has been demonstrated at this conference.

By video recording the crucial initial interview, a permanent record is made of events and relevant facts whilst they remain fresh in the child's memory. Of course, care needs to be taken to ensure that the video recording is capable of presentation in court. In this regard, appropriately trained personnel are essential, again highlighting the need for a multi-disciplinary approach to such matters so as to maximise the evidential weight of the video recording free from suggestive influences, whilst minimising the trauma of the child.

Care needs to be taken that the interview in full be presented (subject to admissibility arguments) and that precautions are taken as a safeguard against any suggestion of coaching young witnesses. The option of using a child interpreter should be given active consideration at this stage of the process as well as during any subsequent court proceedings. The people involved in the interview team need to have experience in investigation, criminal law and evidence as well as qualities gained from dealing with matters of this type.

The most important aspect of the video recording of the interview, is the preservation of the child's statement so that the child is not required to repeat the process for the various people who need to be informed of the facts. The recording may be accessed at any time thus affording the defence legal team the opportunity of assessing the evidence against it. As a result the incidence of guilty pleas would be increased, reducing the need for the child to give evidence at all in some cases. However, should it be necessary for the child to give evidence the video recording may, subject to the discretion of the court, be adopted by the child as its evidence in chief. As previously indicated the proposed system obviates the need for the child to 'perform' in giving evidence in chief whilst through the use of video-link for example, rights of the accused are recognised and preserved. Similarly, the common law rule that the admissibility of evidence is subject to its probative value exceeding its prejudicial effect is preserved by reserving for the court the discretion to admit such evidence. Whilst the video recording generates more light than heat, its value in reducing the traumatic effects of the legal system upon children are immense. It is also submitted that any reduction of the rights of the accused is justified, for the ACT experience indicates a singular lack of success in getting past the committal stage in criminal proceedings.

Discounting the advantages discussed above, the use of video technology in the courtroom is only relevant and necessary where the abuser pleads not guilty. There are wider issues arising from the difficulties of the present procedure in that incidents of child abuse are not disclosed or simply dealt with in an alternative manner such as in the Family Court or through the courts' civil jurisdiction. This de facto decriminalisation that has resulted highlights the inadequacies of the current system and exemplifies the need for urgent reform.

Pre-Trial Diversion Program

Where no issue arises from the guilt or innocence of the abuser it is relevant to consider that in incidents of intrafamilial abuse, punishment of the abuser may conflict with the need to protect the child and will certainly affect relationships with the family. In effect, the allegation will result in the removal of the child or the abuser from the home with the child ultimately having to reconcile responsibility for the resultant stress and potential break up of the family. In sentencing an abuser, it is often a difficult task for the court to reconcile the need for the treatment and rehabilitation of an abuser against the retribution effected by a term of imprisonment. In this regard, the New South Wales Government in June 1987 announced a rehabilitation program involving pre-trial diversion where the abuser in an intrafamilial child abuse charge has pleaded guilty and shown a genuine desire for rehabilitation.

The two-year program will attempt to modify the abuser's behaviour. The participation of the offender, non-offenders, parents and in some cases the victim, may be sought. The program will also provide expert assistance and support for the family and victim in coping with resultant traumas. It is submitted that the success of such a program is dependent upon a plea of guilty in a binding form with any disobedience toward the program resulting in the abuser being returned to the court for sentencing. Genuine research into the effectiveness of such diversions is essential.

The pre-trial diversion program highlights the de facto decriminalisation of child abuse through non-criminal alternatives. The relevance and diversity of these alternatives highlights the need for a legislative package consolidating criminal, civil and evidential aspects so as to enable an appropriate legal response to the facts and circumstances of each particular case. In the ACT, it is possible to identify up to eight forms of non-criminal process available to regulate child abuse. The use of pre-trial conferences and various provisions of the *Magistrates Court (Civil Jurisdiction) Ordinance 1982*, have proven effective in ensuring the protection of the child. It is unfortunate that these procedures are seen as an alternative to the criminal justice system. Any consolidating legislation as proposed should contain a multiplicity of options available to the court and act as a catalyst for the modification of community attitudes towards child abuse.

Conclusion

As a consequence of the foregoing, various protocols need to be established and recognised nationally relating to:

- the investigation and interrogation of children with the object of minimising trauma and maximising reliability by avoiding 'coaching' of the child;
- the treatment of children in court with particular reference to:
    - the competency of the child to give evidence on oath;
    - the need for corroborative evidence of the child's evidence in some material particular by other evidence;
    - increasing the power of the court in proceedings where children are involved to regulate its procedure, specifically the examination and cross-examination of the child witness;
    - the use of video technology following a wide community involvement and discussion preceding any necessary legislative reforms; and
    - formal and experienced training for people at all levels including lawyers, social workers and the judiciary.

We actively support the concept of a Children's Trust Fund being established and funded to enable care to be given to children who are the victims of child abuse and who

cannot continue to have normal family support - both material and emotional. The concept has been fostered and encouraged by the National Association for the Protection of Child Abuse and Neglect (NAPCAN). That organisation is endeavouring to obtain federal and state government support.

A group of professionals representing a cross-section of people have made a submission to the Attorney-General that the whole question of 'Children as Witnesses' be the subject of the Law Reform Commission involving full Commonwealth participation. It is our view that this process must occur before the appropriate changes are introduced. We are hopeful that our submission will bear fruit.

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The Appropriateness of the Court as a Forum

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I have been asked to speak on the strengths and deficiencies of using the court for a hearing. No doubt, you are all familiar with the advertisement for Tip Top bread where the judge sits there in his wig and says, 'Would all children who like Tip Top bread move to the right' and, of course, everyone moves to the right and everything tilts. The same one-sidedness arises in evaluating the use of the courts for hearing evidence from children. The majority would be of the view that it only has deficiencies.

Strengths of Using the Court

As to the strengths of using the court, it is difficult to find many.

The uniformity of rules and procedure do provide some measure of protection for the child. They ensure that those who are within the system remain within those same rules. It prevents cases from unnecessarily expanding into an inquiry into which matters are not relevant to the very issue that has to be determined. It is in that area where the judicial officer has the ability to rein in the transgressing lawyer.

Does the solemnity of the occasion encourage a child witness to tell the truth?

Deficiencies in the System and Reform

Firstly, from the perspective of reform of the system, it must be understood, that judges are not law-makers. They are bound by the rules of evidence and procedure. It is for the legislature to alter the law and to provide the statutory exceptions to the various rules of evidence and procedure. If judges were to attempt to alter the law and try an experimental approach without doubt there would be an appeal, the decision would be overturned and it would be back to the start again. Though the objective may be that the child be exposed as little as possible to the court - yet, if you invite the judge to be experimental, there is the risk the child will have to come back to court again.

Views on a judge's duty to act in the interests of justice have often been expressed. In the criminal sphere, it is the provision of a fair hearing within the rules. It must be done so that not just the public but also the litigant (including the child) perceives it to be unbiased and impartial. This is the judge's duty and all judges try to carry it out. Certainly there are failures, as in the examples that have been brought forward at this conference. Judges are all

human, but, it is doubtful that any of them consciously sets out not to assist the child as much as possible.

There is the need, therefore, to balance the interests involved, (those of the accused against the child - if there is an accused) to ensure a fair trial. In seeking to balance those interests today, one of the emerging fields of interest is that of victims of crime. The point is being brought home, to those who have the responsibility of administration and to the bench, that the victims of crime need to be considered.

However, it must be remembered that there are substantial limitations in the court environment. The court is bound by the rules and by the inherent conservatism of lawyers. That results in slow reform. Another problem is not just inherent conservatism, but rather that judges are chosen from a narrow field. Judicial training is limited. There is an inadequate number of judges in all jurisdictions. Therefore, the possibility of taking them out of the court for training in areas such as the topic of this conference, is not viable. Unfortunately, there are just not the financial resources in the community for this training, though they certainly need it.

Another question that must be addressed in respect to reform is: do we really want a complete upheaval of our present judicial system, or is it better that we seek, by time, experimentation and proper means, to change the present system?

It is unlikely that the community will accept a complete upheaval of the system. It must therefore, be in the realms of slow change. The bench, in all its spheres, welcomes the changes that are being made. It welcomes the input that is coming and recognises that it is too conservative.

Changes that have been mentioned, such as videotaping evidence, taking in camera evidence, using closed-circuit television, and of using support persons are all improvements.

There is no doubt that a court is overwhelming and confusing and the child perceives everyone as a stranger. It is also most difficult to talk about the particular subject that brings a child to court. But there are limits on the bench's ability to balance those concerns and to look to the well-being of the child because, in the minds of all involved, there has to be a fair hearing. There is a particular difficulty with a jury matter, where the judge must not be seen to go so overboard to look after the child witness so that the child's evidence receives a greater degree of credence than it otherwise should. A child's evidence is simply evidence to be weighed up with all other evidence. If the judge appears to endorse everything the child says, or appears to stop all of the useful cross-examination, then the defendant, in our adversarial system, does not perceive of justice.

The legal mumbo jumbo of the courtroom procedure, such as the oath and the setting, is a problem even for adults. Anyone who has ever had to give evidence would embrace that. This problem is compounded for the child. Before embarking upon this 'take the Bible in your right hand', a child is often in a voire dire proceeding (a preliminary inquiry to determine whether the child is competent to give evidence). Problems arise if the child is then questioned by the judicial officer on matters which the child did not know were going to be asked. Rather than discussing the particular subject there are questions such as: 'Do you believe in God?' 'Do you go to Sunday School?' 'Do you know what an oath is?' 'Do you know what the Bible is?' 'Do you know what a liar is?' This does nothing but further confuse the child. Regretfully, however, it is an essential tool which the court must have to determine the competence of the child. Perhaps the support persons engaged in training children as to how to give evidence, should prepare them for that kind of questioning.

There are also problems with objections on questions. The child is sitting there when suddenly somebody jumps up and there is then a debate between bench and bar table further confusing the child who is then after a long period of time asked, 'Do you remember the question and can you answer it?' Of course, that is where the well-trained judicial mind ensures that the child is not placed in that position.

There are also the problems of language, which were dealt with so adequately by the Brennans (Brennan & Brennan 1988). There seems to be a strong belief that there are a large number of very clever cross-examining people out in the community. Frankly, they are

rare. Rather the problem is as perceived in the Brennans' publication that it is our simple lack of good English rather than cross-examiners attempting to confuse and trick.

Legal delays have been touched on and are obviously a problem. They are really a creature of New South Wales.

Use of video to take the child's evidence early will avoid the problem that currently exists where the child's evidence is recorded in adult language and not necessarily in the terms that the child itself perceives. When the child is placed in the witness box and asked if they remember everything and they do not, the child then reads the statement to refresh his/her memory and of course, the statement is in a language that a child in that strange environment cannot understand. A video recording should be used to refresh evidence for the child in a more meaningful fashion.

Of course, it is up to those engaged in the litigation to tell the court if there is a young person involved in a list. It is not always apparent from the charts that a child of any particular age is going to give evidence. The only information given is that someone might be charged with assaulting Fred Smith. The assailant may turn out to be a six or seven-year-old child. If those involved tell the court then efforts may be made to expedite the matter so that the child is not kept waiting. Unfortunately there are a large number of matters in all jurisdictions that require expedition. In our crowded legal system the problem is one of trying to find all the checks and balances and these will not always fall in favour of the child as a witness rather than the incarcerated defendant who wants to get out.

Reference

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Children and our Courts

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This paper has been deliberately confined to a consideration of court procedure as it affects children. It ignores the fundamental question of whether to subject a child to that procedure. Other speakers will better deal with that vexed issue.

Once the choice is made and the child is likely to be required to tell of their experiences in a relatively formal manner, then the matters discussed below come into play. The evidentiary issues have been well canvassed of late, particularly in the reports of a number of inquiries into child sexual abuse and notably in the Australian Law Reform Commission's 1985 Interim Report on Evidence. A surprisingly high degree of agreement appears to exist within the Australian community. One can only wonder why the changes have not occurred more speedily.

Presumptions

The bias of this paper is simple. Courts must remain in control of criminal justice procedure. If it is sought that the community intervene in a person's life (be they a child or not) or that the community punish an offender for breaking its expectations, then the legal system must be involved. The need for intervention must be clearly explained to the participants, and explicable to the community, in a way which is open to challenge. Those who wish to intervene must bear the onus of showing why, and those affected and those accused have a right to know and understand what is going on, particularly where offences viewed by the community as very serious, carrying with them massive periods of imprisonment as maximum penalties, are tried. An accused must be allowed to test fairly what the evidence against them is and to have the prosecutor prove strictly what is alleged.

It is important that a trial not be compromised by procedures which beg the question of the accused's guilt. There can be no benefit to any community which denies its accused people a fair trial. Without adopting its conclusions one can adopt the issue propounded by the Californian Court of Appeals in *Hochheiser v. Superior Court* (161 Cal. App. 3d at 786) when considering the legitimising effect on the evidence of children given through closed-circuit television.[1]

The Abused Child Prior to Giving Evidence

It should be noted that a child suspected of being abused is more often than not likely to be first introduced to the court not at a committal or summary hearing into the guilt of an alleged offender but at protective proceedings, for example child care proceedings in the ' Court. It is also probable that the child may be the subject of civil proceedings in the form of domestic violence applications, civil injunctions, and, of course, Family Court proceedings.

Those care proceedings play a crucial role in a child's appreciation of the legal system. The proceedings offer an opportunity for the child to see a court in operation, to develop a familiarity with its procedure, and to easily obtain access to legal advice. That advice, prior to the High Court's decision in *J v. Lieschke* (1987) 162 CLR 447 carried with it an independence from the interests of other people which allowed a child to trust what was said. The opportunity was there for the child to be prepared for any evidence at a criminal trial by having their involvement explained and by being shown the courtroom where the proceedings would occur. Much of the useful work suggested of an independent representative by Patmalar Ambikapathy fits within this framework. Accordingly, the need for legislative amendments following *Lieschke* is a matter worthy of discussion.

Giving Evidence

The oath

Historically the force of the oath rested on the Christian knowledge of the dire consequence of failing to answer truthfully. Most jurisdictions in Australia have relevant statutory provisions. In the ACT s.64 *Evidence Ordinance 1971* allows a court to hear unsworn evidence of children of less than 14 years, after explaining to the child that they 'are required to tell truthfully' what they 'know about the matter to which their evidence relates'.

The provision leaves open the possibilities of taking sworn evidence from a child of less than 14 years, and that choice must be made, it seems, on the common law test from Willis CJ (*Omychund v. Barker* [1774] Welles 538 at 545) that 'nothing but the belief in a God, and that He will reward or punish us according to our deserts is necessary to qualify a man [sic] to take an oath.' The inference may (only may) be made that a child must have sufficient cognition, before unsworn evidence can be taken, to understand the court's explanation.

The effect of the distinction between sworn and unsworn evidence is important. The court cannot allow, as a matter of law, a fact finder to accept the unsworn evidence of a child without corroboration. Where a child gives sworn evidence a jury should, as a matter of proper procedure, be warned that there is a risk in acting on the uncorroborated, but otherwise reliable, evidence of young children. Of course, if a fact finder is convinced that a child is telling the truth, then the uncorroborated sworn evidence will properly found a conviction.

It seems that an appeal against conviction where the judge did not warn the jury may only be successful if the appellant can show that a miscarriage of justice had, or might have, ensued as a result of the failure to warn (*Kelleher v. R* [1919] 27 CLR 13). The situation is, however, far from clear. It would appear that most judges ensure that the warning is given.

Discussion

The Australian Law Reform Commission suggested that the oath test is unsatisfactory because it 'does not appear to meet directly the real issues of psychological competency' (Vol. l, p.129).

It does seem that the present ACT approach only requires a court to inquire into a child's understanding of the obligation to give truthful evidence without it being required to

inquire into the child's cognitive and recollective abilities as well. It appears strongly arguable that once a child, of any age, is able to satisfactorily discern experiences and to respond rationally to questions as to those experiences, and once a court is satisfied that the child understands the duty of speaking the truth, there should be no difficulty in allowing a fact finder to rely on that evidence, if satisfied of its truth, without it being corroborated. One proviso, discussed below under 'Corroboration' should be added. The liberation from corroboration is a mixed blessing.

Of course, even this measure does not fully bridge the chasm between the child who, outside court can offer only a spasmodic and inconsistent account of experiences and the foreign discipline of the examination of witnesses. At its starkest, the accommodation syndrome of which Dr Roland Summit (1983) writes may be beyond a formal enquiry into an alleged offence.

Corroboration

In the ACT prior to 1985 judges were required to warn juries of the dangers of accepting the uncorroborated evidence of adult and child complainants in sexual abuse trials. The *Evidence (Amendment) Ordinance (No. 2) 1985* abolished the rule with respect to adults and retained it for children (s. 76F(3)).

Discussion

It is trite to state that of all offences, child sexual abuse is the least likely to offer corroboration. It is the silent crime.

The ACT amendments (see also s. 405C(2) *Crimes Act 1900* NSW) would appear progressive at first blush insofar as they bring allegations of sexual offences into line with any allegation of a criminal offence. Recent ACT experience, purely anecdotal, suggests however that greater emphasis is now placed by defence counsel on attacking the credit of the complainant where they are the only witness going to the gravamen of the offence.

(It must be observed that following the amendments, prosecutors relying on this 'single strand' are now pursuing allegations which they might previously have not. In so doing they properly acknowledge that their discretion to prosecute should not replace the jury's role of weighing a complainant's evidence.)

Particularly where children are to provide the single strand of evidence, the result of this closer cross-examination provides a strong argument for the retention of the 'corroboration rule' where children give evidence. At the least, caution should be manifested when considering its abolition.

Complaints out of Court

Again prior to the 1985 ACT amendments a complainant in a sexual abuse trial could give evidence of their early complaint to show credit worthiness in the rest of their evidence. Section 78C *Evidence Ordinance* now disallows evidence of recent complaint.

Other complaints almost always fall foul of the hearsay rule or the prohibition against the acceptance in evidence of prior consistent statements. This prohibition provides that evidence of such statements should as a matter of policy be disallowed on any number of grounds including their superfluity (*Fox v. General Medical Council* [1960] 3 All ER 225 at 230), their potential to confirm evidence by force of accumulation (*Gillie v. Posho Ltd* [1939] All ER 196), and less persuasively perhaps, their amenability to manufacture (*Jones v. South Eastern and Chatham Rail Co.'s Managing Committee* [1918] 87 LJKB 775).

Discussion

The common law held in high esteem the motivation of a complainant to raise the alarm. Given the child's propensity to complain, if at all, to a confidant in terms demanding substantial courage, it seems unfortunate that the child should not be allowed in the ACT to bolster their credit by pointing to a recent complaint.

The process ensuing from the first complaint (whether recent or not) raises the vexed question of minimising the number of hands through which the complaint passes. Given that in many instances the complaint will be disallowed as evidence under present provisions, it does the child's credit even more serious harm if they have been requested to tell and repeat an account to friend, teacher, counsellor, doctor, and so on until finally someone with forensic training takes a formal statement. All the good-willed recipients add colour to the child's final account, usually unwittingly. In the extreme and highly publicised cases, the child verbalises language and suggestions not their own. As so many professionals working in this area note, the dilemma lies in the desirability in therapy to lead answers from a child, particularly a young child.

Accordingly, the strength of a child witness' evidence will be inversely proportional to the amount of intervention prior to the forensic interview, and the question of diversion from court proceedings is again squarely to be addressed.

Cross-Examination

Most jurisdictions have legislative provisions limiting cross-examination. In the ACT, ss. 58 and 59 *Evidence Ordinance* prohibit the cross-examiner from asking questions which go to a witness' character but which are insufficiently relevant, and from asking indecent, scandalous and purely insulting, annoying or needlessly offensive questions.

Courts have the power to control proceedings before them so that the issues may be fairly tried (Halsbury, 4th edn, vol. 37, p. 387).

ln 1935, Viscount Sankey, LC sitting in the House of Lords observed:

> It is right to make due allowance for the irritation caused by the strain and stress of a long and complicated case, but a protracted and irrelevant cross-examination not only adds to the cost of litigation, but is a waste of public time. Such a cross-examination becomes indefensible when it is conducted, as it was in this case, without restraint and without the courtesy and consideration which a witness is entitled to expect in a Court of Law (*Mechanical and General Inventions Co. and Lehwess v. Austin and the Austin Motor Co* [1935] AC 346).

In NSW, Hope JA appears to have followed this approach in *Albrighton v. Royal Prince Alfred Hospital* (1980) 2 NSWLR 542.

Discussion

It appears that the courts may have failed to flex muscles in limiting those cross-examinations which needlessly bully a witness.

There is, of course, little incentive for defence counsel, before a jury to 'tear apart' a child complainant where the probability exists that the jury will sympathise with the child. That limitation does not exist at committal proceedings where the effect of a bruising cross-examination may be to leave a child fearful of going through a second ordeal.

Thought should be given to the NSW innovation of not requiring a child complainant to give evidence at committal proceedings unless the defendant can show good reasons for it. The child's statement to police, if any, would be presented to the committing magistrate as evidence for the prosecution (*Justices (Paper Committal) Amendment Act 1987*).

It is arguable that the ACT legislative provisions mentioned above offer protection to a child witness if applied sensitively. However, to put the matter beyond issue, it would require only a minor amendment to the provisions to have the court take into account when considering whether a question is objectionable, the age and competence of the witness.

Conclusion - Strengths and Weaknesses of the Court Process

Just as it is trite to state that child abuse is a matter requiring substantial community education, it is worthwhile stressing that the courts and their players are expected to observe and implement their communities' expectations in the manner in which they operate.

There has been an unfortunate underlying theme in much of the literature that courts are alienated from their communities. While as in so many general propositions there may be some truth in the statement, sight should not be lost of the influx of community values brought by many of the players. Jury members are the most obvious, but the bench and lawyers are becoming increasingly sensitised to the problems discussed at conferences such as these. That latter process is arguably of far greater import than many of the legislative amendments discussed in the various relevant reports and inquiries.

One ironic example lies in the de facto abolition of the *doli incapax* presumption; unless there was evidence to the contrary that a child above the age of criminal responsibility, but below the age of fourteen, could not be guilty of an offence because of a lack of knowledge of wrong. No legislative amendment has abolished the presumption. In theory it is still open to a child to rely on the presumption. However, courts appear to have little difficulty today in finding evidence capable of showing that the child knew that what they were doing was wrong. Courts have mentioned universal education and a general rise in sophistication as factors in their rebutting the presumption.

Consequently there is little merit in reacting to a perceived ignorance (which may not in fact exist) either by begging the question of an accused's guilt or by disallowing a child's evidence, the strength of which comes from answering cross-examination. It is all too tempting to enshrine in legislation the interests of the child witness in proceedings not concentrating on protective intervention above all else. That approach may place too high an expectation on the child.

Most children can accept (as do most human beings) that their ability to recollect is of varying quality, that they look to others for acceptance of what they say and for confirmation of it, and that they may experience self-doubt. They just do not use the big words. Experience suggests, watching the gamut of emotions of children going through combined care proceedings and giving evidence in criminal proceedings - that a child is able to comprehend the distinction between the two proceedings and the need for the distinction. With proper advice and help a child can appreciate how each operate. It would do the child no favour at all to so tip the balance that their self-doubt be extinguished, and that their passages of poor recollection and a perceived false acceptance of what they say by the community were legitimised in their mind.

Endnote

1. *See* the interesting discussion in Discussion Paper No. 12, 'Sexual Offences Against Children (March 1955), Law Reform Commission of Victoria, p. 56.

Reference

Summit, R. 1983, 'The Child Sexual Abuse Accommodation Syndrome', *Child Abuse and Neglect*, vol. 7, pp. 177-93.

The Use of a Watching Brief as a Legal Tool for the Protection of Child Victims in the Criminal Justice Process

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Any lawyer who is asked to act for a child victim very quickly discovers that their client is at a disadvantage in the criminal justice process. The experience can challenge all the assumptions held with respect to the common law system. Lawyers trained in this system realise that from a child victim's perspective the situation appears unsatisfactory and problematic. It is necessary to search therefore for some answers that could lead to legal intervention to protect the interests of a child victim.

Firstly, the principles that have guided lawyers in the criminal justice system for several hundred years should be mentioned. One of the greatest traditions of this system is that every accused person is presumed to be innocent until proven guilty in a properly constituted court of law. Also, any crime a person is accused of must be proved beyond reasonable doubt before any conviction can be made. Indeed, an essential prerequisite of a democracy is that all accused persons should have a fair trial. The common law rules of evidence clearly embody these principles. Lawyers have, by their very training in this system, developed a strong resistance to any perceived erosion or compromise of these basic values. It has long been accepted that these fundamental rules should be paramount and no-one can doubt the validity of this point of view.

However, having stated the above, there are instances when these rules have been modified by statute, so precedents have been established for careful re-examination of other situations that may warrant a fresh approach - such as the problems faced by child victims.

There are other principles in the law that have been, unquestioningly, held in good faith over the years but have now been reviewed as public attitudes have changed. It was not long ago in Victoria that married women, lunatics and children, were considered as classes of persons who were not competent to act for themselves. The first two categories of persons have achieved remarkable progress in the recognition of their rights in the law, but there are still difficulties with society's attitudes to child victims. Society has failed to recognise or acknowledge that children are in need of special protection in the criminal justice process.

Lawyers need to ask if common law principles are incompatible with protecting the interests of child victims in the criminal justice system. Initial cases seem to indicate that it is possible to remedy some of the disadvantages faced by child victims without compromising the above common law principles. The challenge then facing any child victim's lawyer is to develop ways of protecting their client without failing in their duty to accused persons.

Legal Representation of Child Victims

In Victoria, which has inherited a modified version of the English common law, the same difficulties are faced as by American states when confronting the problem of legal representation of child victims in the criminal justice process. The role of lawyers in the criminal justice process has been limited to that of guardians of liberty of accused persons. Indeed, Sir Harry Gibbs said recently:

> It is obvious enough that the fundamental aim of the criminal justice system is to keep down crime. But public order and the suppression of crime, may sometimes be secured only by too great a sacrifice of the freedom and a democracy must seek to maintain a proper balance between order and liberty (Gibbs, speaking in Canberra, February 1987).

This reflects the current state of play in Australia. The state, largely the police and the prosecutors, protects society (and by implication the victim) and lawyers assist the accused persons in the preservation of their liberty. However, there is a description of the function of the criminal law that would appeal much more to lawyers interested in assisting child victims. In 1957 in England, the Wolfenden Law Report defined the function of the criminal law as being

> to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in state of special physical, official or economic dependence (Wolfenden 1957, pp 9-10).

It does not take long to realise that the criminal justice process falls short of the ideals expressed in the above definition when the current Victorian law with respect to child victims is examined.

The Family Court of Australia and the Children's Court of Victoria (as well as provisions under welfare and family law) do afford some safeguards to abused children who appear before them. In fact, there is a procedure for separate legal representation of children in the Family Court when the court determines and orders that it is 'in the interests of the child' to be separately legally represented. Cases of abuse surface in this jurisdiction in relation to such questions as access and the Legal Aid Commission of Victoria funds a lawyer for the child in these circumstances. Although the objectives of these courts are different to those of the criminal justice process, they all seek to protect the rights and interests of children in situations where there are other competing rights to be considered before the court. Additionally, courts have lately used their inherent powers to protect the interests of children against that of competing care givers (*Re: Baby 'X'* Supreme Court of Victoria, 3 July 1986).

In disturbing contrast, the criminal justice process in Victoria does not protect children with special rules when they are compelled to be witnesses in a trial. Often the children are victims, with the accused person being charged with committing a sexual or physical assault on them. In the prosecution of such cases, the background against which a child victim's lawyer has to operate is discouraging. There is no mandatory reporting of child abuse nor any significant intervention in the criminal justice process to protect child victims, as exists in several states in America. There are no *Guardian ad litem* programs or proposals for them as yet in the criminal justice process in any Australian state. However, the victims' rights movements have made several attempts to protect and assist child victims, but these take the form of 'support' from professionals who cannot function in the criminal justice process.

The result is a situation where it is impossible to prosecute successfully accused persons where very young child victims are involved, and such crimes then continue by and large, without redress in the criminal justice process. Yet, lawyers still do not see this situation as a miscarriage of justice.

The Overseas Alternatives

As the Australian approach has been limited by tradition, one can look at other courts and other countries that have a shared tradition of the common law to see how they have developed methods to overcome the problem. In Malaysia, America and Australia, the needs of victims have been addressed in different ways, but there are some similarities.

The watching brief

The watching brief is a method of representing clients who are not strictly parties to the proceedings. It was developed early in England in the Coronial Courts as a device to put forward and protect the rights of persons who had an interest in the proceedings and its outcome. It was used by counsel retained for potential defendants, the estate of deceased persons, and other witnesses or victims who had a stake in the findings of the Coroner's Court. It has been described thus: 'any person who, in the opinion of the coroners is a properly interested person is entitled to examine any witness at inquest either in person or through his counsel' (*Halsbury's Laws of England*, vol. 3, p. 621). It is arguable that child victims have an interest in the prosecution of an accused person and this has been ably argued elsewhere (Hardim 1986).

Interestingly, the watching brief has not been confined to Coroner's Courts. It has been used in criminal trials, in civil litigation and before administrative tribunals in Australia and elsewhere. It is stated in Halsbury's Laws of England that 'counsel may accept a watching or noting brief, but if this is on behalf of a person who is not a party on the record or who is not allowed to take part in the proceedings, he ought not to take part whatsoever in them'.

In 1835 an English judge said to a barrister who 'had a brief in the cause', 'I am aware that there are many precedents to bear out the learned counsel in consenting to stand in his present position', but the judge continued to exercise his discretion and refuse the barrister the right to participate in the hearing (*Moscatti v. Lawson* [1835] Mood and R at 454). It is submitted that this authority of the court is an effective safeguard to the rights of the accused person. Thus, participation by the use of a watching brief in the proceedings is not a right but is at the discretion of the court. The lawyer holding the watching brief is free to act for the child victim before and after the trial. This is a valuable role that can be undertaken by any lawyer as the due process of prosecution begins long before the hearing. The child victim's lawyer is in a position to coordinate the whole system to protect the interests of the child victim client. The following are some of the duties that have been undertaken by a child victim's lawyer upon instructions from an adult in charge of the child victim:

- interview the adult in charge of the child and discuss the options available;
- put the child victim in touch with health and welfare agencies;
- make a legal aid application;
- obtain/tender reports from a psychologist/counsellors/doctors regarding:

  the effect of proceedings on the child; the child's development and whether the child is able to understand the nature of an oath or duty to tell the truth; and a victim-effect report;
- advise on appropriate action in the interests of the child and of the immediate steps to be taken to protect the child - for example welfare proceedings;
- prevent repetitive medical examinations or questioning that would distress the child;
- obtain a statement and if possible a list of charges against the accused person;
- investigate matters not covered by police;

- negotiate with police to lay charges against the accused persons;
- assess the appropriateness of charges against the accused person and decide whether other charges need to be laid;
- maintain contact with police to tender any new evidence;
- review evidence with respect to matters which may be damaging to the child;
- negotiate on the exclusion of matters damaging to the child with police or defendant's lawyer;
- give input into any charge bargaining;
- contact police with respect to input on bail/conditions of release/custody;
- monitor the welfare of the child prior to the trial and advise of any further action that needs to be taken to protect the child victim;
- make pre-trial applications on behalf of the child victim;
- ensure police are advised on any breaches of bail/conditions;
- advise the adult in charge of procedures in court;
- attend to pre-court formalities for the child victim;
- tender the victim-effect report to the prosecution;
- have input into early release options;
- ensure protection of the child victim upon release of the offender from gaol;
- coordinate civil and criminal proceedings.

In Malaysia, the strategy of a watching brief was used when a victim suffered an assault from a politician. The watching brief there took the form of a 'talking brief' as the victim's lawyer was allowed to participate in the proceedings and the victim's lawyer worked very closely with the police on a watching brief (*R v. Seow Hun Khim* [1985] Penang Magistrates Court, Malaysia).

In Australia, the watching brief has been used in two ways - to negotiate with the police to lay charges, and to protect the interests of child victims when they were prosecution witnesses in a trial. In both cases the Legal Aid Commission of Victoria assisted in funding, which represented a breakthrough, as such funding had never been granted previously. However, since those cases, there appears to be resistance to assisting child victims in this manner and in a time of scarce resources, there appears to be a policy to fund accused persons more readily than child victims. The Law Institute of Victoria, through its Child Welfare Committee, is seeking to redress this situation now that a precedent appears to have been established. A child victim's lawyer is on that Committee to promote the idea of a watching brief.

In the case where the Legal Aid Commission of Victoria (*Re: Baby 'X'*, Supreme Court of Victoria, 3 July 1986) funded a child victim's lawyer, most of the above duties were performed on behalf of the client. The child victim's lawyer sat at the bar table and his presence was not objected to by the prosecution or the defence. The court has not seen this as a potential threat to the accused person's right to a fair trial (*State v. Walsh* 1985 A2d 1256 New Hampshire Supreme Court).

Again in the case (*Re: Baby 'X'* Supreme Court of Victoria, 3 July 1986), an application was made in pre-trial proceedings and the child victim's lawyer was able to obtain the approval of the court, the defence and the prosecution to adopting an approach that was the least traumatic for the children involved. A good rapport with the prosecutors was of great assistance. Early cooperation and input into the criminal justice process can result in a more efficient, well-run case for the child victim, and reduce the need for their participation in the actual trial.

Separate and independent representation has proved its worth in other ways as well. Given the finite resources of the police and the prosecution, there is often no ongoing relationship between the prosecutors, the investigators and the child victim. As a result, information that would assist the prosecution may not be communicated to them. In one case recently, an investigatory role was played by the victim's lawyer and details of an alleged voluntary confession was passed on to the prosecution. In another case, the police

were unaware that the suspect had a gun which the child victim's family believed could be used against the victim. Information that the licence for the gun could have expired, gave the police material that they could act on before trial to protect the child victim from a potentially tragic situation.

It sometimes happens that an accused person or their family may seek to intimidate the victim or their family. In such situations, the child victim's lawyer can address the situation by either informing the police or taking other appropriate action. Civil remedies can also be used.

In all of these cases, a relationship is established between lawyer and client which without this relationship may have prevented the client communicating matters of importance.

In many intangible ways, the child victim's lawyer is made to realise that they are helping their client. One child said in wonder in the courthouse before the trial 'All these people believe me!' This unquantifiable support may have given the child victim more confidence to deliver their evidence - and in that case a conviction was obtained. In one case recently, a psychologist indicated that children feel 'empowered' with such assistance and begin not to see themselves as only helpless participants in a system.

There will be other ways in which lawyers acting for child victims can assist their clients, depending on the client's needs. For instance, appropriate Family Law injunctions can be used to remove an accused person from the victim's family rather than removing the child victim through welfare law and the Children's Court. Holding a watching brief for a child victim and attending court at sentencing can result in an acquisition of knowledge of the accused person that was previously not available. For instance, information can be obtained about the accused person's psychiatric condition, which would have been material for a plea of mitigation and would have been communicated to the court at sentencing. This same information could be a basis for restricted access or contact with the child victim once the accused person is released from custody.

In Victoria, a claim can be made to the Crimes Compensation Tribunal for damages for pain and suffering. It is also proposed to develop common law torts to seek compensation for child victims. Child victims are also put in touch with health and welfare professionals for appropriate emergency and ongoing assistance.

The bulk of the duties undertaken by a child victim's lawyer using a watching brief can also be undertaken by a *Guardian ad litem* for the child victim. As can be seen so far, none of the duties undertaken pose a real threat to the rights of the accused person. However, duties in court during the trial could prove more problematic. Nevertheless, in using a watching brief, the court retains the discretion to refuse to allow the child victim's lawyer to participate in the proceedings. Arguably then, given the court's discretionary powers, the accused person's rights are safeguarded. In one case where legal assistance was granted to the child victim for their own representative, the child victim's lawyer was unable to address the court on a point of law. Despite this, a conviction was obtained. It is clear that the chances of conviction may increase with the presence of a child victim's lawyer but this, it is submitted, in itself does not jeopardise the accused person's rights to a fair trial (*State v. Walsh* 1985 A2d 1256 New Hampshire Supreme Court). Rather it can be argued that the services of a child victim's lawyer lends support to a child victim and thereby helps in the prevention of an injustice, when accused persons are protected by the criminal justice process to the detriment of a child victim.

A detailed examination of the disadvantages faced by child victims reveals a crucial role for any lawyer. This role is to develop the proper use of professionals outside the legal field to balance the interests of child victims and the community against the rights of accused persons. Psychologists have developed tests to assess the ability of children to verbalise and thus to give evidence on oath. This ability plays a vital role in the criminal justice process in Victoria. If a child victim cannot understand the nature of an oath, that child cannot give any sworn evidence, which means that there can be no conviction without corroboration. Thus in such situations the child victim will not even be able to participate in the criminal justice process. Corroboration is typically absent in many such cases and this

rule, whilst quite properly safeguarding the right of an accused person, does not safeguard the rights of a child victim.

Whilst there are difficulties in the use of expert opinion, the criminal justice process must be open to intervention by professionals who are specially trained to assess verbal communications of children. Their professional evidence need not be unchallenged, but arguably should be received to prevent an injustice occurring in a situation where the system clearly needs assistance in ascertaining properly presented evidence. Expert opinion has long been accepted in common law systems. Judge Saunders, in England in 1554, said

> If matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. This is a commendable thing in our law. For it thereby appears that we do not dismiss all other sciences but out own, but we approve of them and encourage them as things worthy of commendation (*Buckley v. Rice-Thomas* [1554] 1 Plows 118 at 124).

Given that this philosophy underlies our system, the child victim's lawyer should seek out and coordinate all the expert opinion available - from doctors, psychologists and counsellors. In Victoria, the use of a psychologist's report on the question of the child's ability to understand the oath is being developed. At present this fact is ascertained by the court on a voir dire, and not by professionals trained to discover this fact. This is an unsatisfactory situation as the court has to decide on this difficult issue without assistance. It is a situation that need not continue as there are common law precedents where the court has sought assistance on this very matter.

Conclusion

Earlier, reference was made to three common law principles that had shaped the criminal justice process. Exposure to other disciplines have indicated that there is perhaps a need to examine more closely some of the premises upon which these principles are based. It is submitted that the criminal justice process has assumed that any contest in their courts is between two equals. Rules in the criminal justice process have been framed for adult offenders and victims who come before a court for a trial, but no special rules have been developed for contestants who are not 'equal' to the offender. The concept of 'equality before the law' is a principle that we have readily accepted, but usually only with reference to accused persons and not child victims. The criminal justice process incorporates rules to protect accused persons who are deemed not 'competent'. These same persons, however, are clearly at a disadvantage in the criminal justice process when they are victims.

In civil litigation children act through a *Guardian ad litem*, yet no-one acts for them when they are in the much more vulnerable position as victim in the criminal justice process. To expect the same standards and burdens of proof from children and adults is somewhat illogical and unrealistic. There cannot be a fair trial for a child victim in such circumstances. Does the criminal justice process recognise that child victims are not 'equal' to adults before the law? In Victoria, we continue to believe that child victims' interests are adequately addressed by the mere fact of prosecution and by bringing the accused person to justice. By this process accused persons continue to remain in a situation where they can avoid the community's disapproval and can continue to function in that society like any other law-abiding citizen without confronting their responsibility for such offences.

An alternative approach to this problem is to re-examine once again basic common law principles which appear to reflect current public policy and appear to have their origins in the rules known as 'presumptions'. Such presumptions are more or less a reflection of our attitudes and perceptions, rather than sacrosanct and inviolable principles of law. Indeed it has been stated that 'the classification of many presumptions is uncertain. In some cases the

same rule has, at different periods in history, been treated as a presumption of fact, a rebuttable presumption of law, an irrebuttable presumption, or a rule of substantive law' (Halsbury, vol. 17, p. 83).

In Victoria, there is an irrebuttable presumption of law that children under the age of 10 are incapable of committing a crime (*Crimes Act 1958* (Vic.)). This is a presumption based on public policy as this age varies from state to state in Australia. What this means in effect is that children are deemed to be innocent and no facts are admissible to show that this cannot be so. Does this presumption sit comfortably beside the presumption that children are not competent to act for themselves? It appears that in the criminal justice process the presumption of innocence of an accused person takes precedence over other presumptions about the innocence and vulnerability of children. There is some conflict here. It has been suggested that where there is conflict of presumptions, we should examine the social policy behind the presumptions, to enable the policy which seems more vital to prevail (Professor Morgan, *Harvard Law Review*, vol. 44, p. 906).

If this criterion is used to examine all rules, principles or presumptions in the criminal justice process then such debate may result in a change of public policy. Perhaps a reappraisal of the arguments that have been accepted for so long is necessary if we are to increase the legal profession's awareness and sensitivity to the problems faced by child victims. If the watching brief is used in every case where child victims are involved, their lawyers will inevitably continue to challenge a system that automatically disadvantages their clients.

A modification of some of the common law rules without compromising the accused person's rights may be warranted. An examination of the position of both the child victim and the accused person is necessary rather than traditionally confining the debate to just the rights of one party in the criminal justice process.

Ultimately, it must be acknowledged that the strength of the common law lies in its ability to change and adapt to the community's needs. The use of a watching brief to assist child victims can be a very useful tool to promote and protect child victims now, without the need for law reform or a court order.

The lawyer's role in this process of law reform is crucial. A French lawyer and writer, Denis Langlois, who is said to be one of today's most outstanding fighters against injustice, stated in an interview (*The Guardian*, 31 August 1986) that:

> I feel the lawyer's role is clearly evolving. For a long time he was someone who defended an accused person, or accused a person, before a judge. Today, he has become more of a helper, a support for someone who feels somewhat crushed, someone completely intimidated by the legal apparatus, someone who cannot understand anything simply because he is not expected to understand anything. This is more than simply defending a client.

This is the kind of challenge that faces lawyers acting for child victims today. The road ahead for the field of pioneering endeavour will be marked with controversy and obstacles, as we will have to confront the criminal justice process with the needs of child victims. Their needs are immediate and substantial. The watching brief has been devised to offer them some assistance now - without waiting for law reform.

Imaginative use of discretionary powers vested by statutes or the common law in the courts, continues to be used to extend the frontiers in the criminal justice process, to assist child victims. It is hoped that lawyers will be able to overcome their conditioning, which has quite properly made them zealous in protecting the rights of the accused, and rise up to the challenge posed by the plight of the child victim.

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The Court Hearing - Procedural Improvements

DISCUSSION GROUP I

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It is my strongly held opinion that the only times a child would choose to be witness in a court are as follows:

- when it is a relatively straightforward matter, the child has no emotional involvement, and they get paid witness' fees;
- when the child is extremely angry about the offence committed against them, understands fully the difficulties and trauma associated with the court process, but is willing to undergo all that because of a strong desire to see the offender punished; and
- when the child wishes to have an input into the process leading up to a decision which directly affects their life.

Apart from these situations, the court process often constitutes a severe form of child abuse, particularly when the child has been the victim of a sexual offence.
This concern about the child victim's role in criminal prosecutions is not new. In 1925 a United Kingdom Departmental Committee on Sexual Offences against Young Persons reported:

> A large number of witnesses desire to spare the child the prolonged strain involved in waiting for the trial. A committal for trial necessitates the child having to relate the facts over and over again to different people, and on at least four different occasions. It involves more formality in the proceedings of the court of trial and the likelihood of a more trying cross-examination than was undergone at Petty Sessions. And, lastly, the details have to be kept in mind during a waiting period which may be as long as 5 months, the child being thus obliged to remember what, in its own best interests, it should be allowed to forget.

In spite of comments such as these, little has been done to alleviate the position of the child victim in the criminal justice system. The desirability of having an alleged offender prosecuted is often outweighed by the resulting emotional trauma suffered by the child victim.

That being said, what do child victims say would have assisted them when they were required to give evidence in court?

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- Children are normally terrified by the formality of court and the unexpected number of adults present whom they perceive as intimidating. Children are further traumatised by the physical presence of the accused.

  It is suggested, therefore, that there be a capacity for the magistrate or judge to order that a child's evidence be given in a room other than the formal courtroom, in the presence of the magistrate or judge, the lawyers and a supportive adult of the child's choice. The accused, the jury, and any other relevant persons could observe proceedings on closed-circuit television. This would not prejudice the accused if proper provision is made for them to instruct their counsel.

- Children do not understand the language used by the adults in the court. The confusion this causes, and the latitude allowed to defence counsel in the areas covered in cross-examination, (for example in one case a child was questioned about a lie he told a teacher five years previously when he was in Grade 2) makes the children feel they are the ones on trial rather than the accused. The feeling is that all the people in court are there to protect the accused.

  Features of the adversary system such as cross-examination bear particularly harshly on children who are used to deferring to adults. The prosecution intent on gaining a conviction may not always be attuned to the peculiar disadvantages of a child in this respect. It is therefore suggested that there are times at which a child may need a separate legal representative, who is not engrossed in either securing a conviction or an acquittal, to advocate for their needs; to ensure that the child understands what is being said, to intervene during a cross-examination which is causing increased distress for the child and inhibiting clear testimony. This lessens the possibility that the child will be used as a pawn in the pursuit of a successful outcome for either the defence or prosecution.

  The child's legal representative must be able to talk to the child and not down to the child. The child must respect, believe and trust their legal representative, who could also play a very important role in helping the child to prepare for their court appearance.

- In cases where the accused is acquitted because of a paucity of corroborative evidence, the child is left with the belief that all those people in the court consider that they are a liar.

  There are some specific statutory requirements for corroborative evidence but, in practice, corroboration is required before a finding of guilty on any charge relating to a sexual offence. This appears to reflect a belief that women and children are inherently unreliable and that it is unsafe to accept their evidence without some objective facts to support what they are saying. It is surely the truth in any given situation which is the concern of the court, and truth can surely be assessed without the current rigid requirement for corroborative evidence.

  It is suggested that either the requirement for corroborative evidence be abolished, or that no prosecution be commenced unless there is clear and unequivocal corroboration of the child's allegations.

Resolutions

The Group's response to the aforementioned proposals is as follows.

Proposal 1: Children are normally terrified by the formality of court and the unexpected number of adults present whom they perceive as intimidating. Children are further traumatised by the physical presence of the accused.

Group's response

It was accepted that for the child witness the experience in the courtroom would often be quite traumatic. Some of the group noted that in their experience the juvenile witness or the adult might also be similarly traumatised.
Some had reservations about the key recommendation that there might be a physical separation of the accused and the jury at the time when a child gives evidence. The comment was made that the jury would see the television screen presentation of the child's evidence as flat and dull when compared to the evidence presented in the courtroom in the usual way. It was noted that from their nightly experience of watching television people expect to see colour, sound and drama, and that in comparison the presentation of evidence via this medium will seem dull. Of course, the experience of jurisdictions which use this medium might belie these concerns.
It was, however, pointed out that a defence counsel would be likely to put it to a jury that the evidence taken in another room and presented to them via the television had a second rate quality which made it less reliable than the evidence presented to them directly.
There was a view in the group that it might be better to examine other ways of dealing with the problem of trauma. Preparation of the child for the experience was seen as a major antidote.
One participant noted that some United States commentators had suggested that there might be child-sized courtrooms - with child-sized furniture and surroundings familiar to children. It was felt that the adults would not be able to cope with such a radical change, but that at least in the pre-trial period this idea might find room for implementation.

Proposal 2: Children do not understand the language used by the adults in the court. The confusion this causes, and the latitude allowed to defence counsel in the areas covered in cross-examination, make the children feel they are the ones on trial rather than the accused. The feeling is that all the people in court are there to protect the accused.

Group's response

The proposal for separate legal representation for the child was accepted as a good idea. It was also said that to the extent that the problem in the courtroom lay in defence counsel attacks on credibility of the child in various ways, part of the answer lay in magistrates rethinking the 'logic' of the attacks. That is, for example, that a better understanding of human behaviour (such as the ability to recall precise detail) might lead to a re-evaluation of the lawyers' notion that a witness' confusion or inability to recall is necessarily damaging to their credit.
A major consequence with the proposal for separate legal representation for the child would be the need to re-think the role of the prosecutor. One participant said that in one case where to his knowledge there was a solicitor briefed to watch after the interests of the child, the barrister for the Crown refused to accept advice from the solicitor. It was pointed out that the barrister may have taken the view that the only binding instructions came from the Crown Law office (or whatever). One consequence might be the need for representation of

the child at the bar table, and if this is to occur, the usual course of the trial would need to be reconsidered.

Proposal 3: In cases where the accused is acquitted because of a paucity of corroborative evidence, the child is left with the belief that all those people in the court consider that they are a liar.

Group's response

The way the problem is stated points to the need for 'follow-up' of the impact of the whole proceedings on the child, and it was put that this was so whether or not the accused was convicted.
So far as corroboration was concerned, it was pointed out that in many jurisdictions the common law requirements had been qualified or removed, but that many judicial officers nevertheless instructed juries to look for corroborative evidence. Some in the group proposed a ban on any such comments; others pointed out the difficulty of preventing defence counsel or judges from, in one way or another, drawing attention to the absence of other evidence to implicate the accused.

Improving the Court Environment

DISCUSSION GROUP J

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It is frequently argued that the process and rules of the criminal justice system make it very difficult for many children, particularly young ones, to give effective testimony. The assessment that a child may be too intimidated by the trial process to testify, influences decisions by police and prosecutors about discontinuing the investigation and prosecution of individual cases. Instances where a child has been unable to begin or continue to give evidence in a trial are common. Some people argue that the experiences of the legal processes may even seriously harm some children psychologically (Warner 1987).

These considerations have led to a variety of changes in practices and procedures in many jurisdictions designed to make it easier for children to give evidence. Some measures aim to improve a child's ability to deal with the existing environment for example acquainting child witnesses before a trial with how a court looks and how a trial is conducted.

Some measures aim to change the traditional conduct of a trial to reduce or eliminate a child's participation for example by admission of previously recorded evidence.

Some measures aim to change the physical and/or procedural environment of the court, and/or the child's direct participation in the courtroom.

This paper considers a number of changes which fall into the last of these categories. The content is taken from the Law Reform Commission of Victoria's recent discussion paper, *Sexual Offences Against Children*.

Modification of Courtrooms

Various measures have been adopted or proposed to modify courtrooms, and the appearance and location of the parties, in order to make the setting less intimidating for child witnesses. These include:

- judicial and other legal personnel dispensing with traditional garb such as wigs and robes: this was proposed a decade ago by the Royal Commission on Human Relationships (1977) and adopted in a recent English case for the first time in a criminal trial in that country (*The Times*, 21 October 1987);
- courts using furniture of appropriate size for children: this was recommended by the New South Wales Sexual Assault Task Force (1985);

Some courtrooms are by their very design intimidating and frightening. The chairs in the witness box and the height of the witness box itself allow adults to sit comfortably in the witness box and be seen, whereas children cannot. In these circumstances, children are often required to stand for lengthy periods whilst giving evidence. Furniture should be used which will allow children to be accommodated;

- positioning the child and the accused so that they do not look at each other: in the English case referred to above, the child complainants gave evidence from behind a screen which concealed them from the accused, but not from the jury, counsel and the judge.

The New South Wales Government has recently introduced legislation to permit the use of 'alternative arrangements' for the giving of evidence by child victims of 'personal' assault offences. These arrangements are 'such as the Attorney-General considers appropriate to reduce the trauma for, or intimidation of, the child when giving evidence' (Schedule 3, s.405E Crimes [Personal and Family Violence] Amendment Bill 1987). The provision applies to children under 16. The types of alternative arrangements which may be prescribed are illustrated as 'seating arrangements, including the level at which people are seated and the people in the child's line of vision', and 'the premises where the proceedings are conducted'.

The use of certain alternative arrangements, such as screening the child from the accused, might be regarded as reflecting on the accused's innocence or guilt. To counter this possibility the legislation provides that the judge may, at the request of the accused inform the jury that the use of the alternative arrangements is standard procedure required by law; and warn the jury not to draw any inferences or give the evidence any greater or lesser weight because of the use of the alternative arrangements.

Excluding the public from the trial

A complainant in a sexual offence case may find it extremely embarrassing to testify when members of the public are present. However, the obvious remedy, excluding the public, conflicts with the basic principle that the judicial process should be conducted as openly as possible.

In its report on procedure and evidence in sexual offence trials the Victorian Law Reform Commission concluded that the principle of open justice is too important to impose a rule that all sexual offence cases should automatically be closed to the public when the complainant gives evidence. The exclusion of the public should remain a matter for the discretion of the court. In order to bolster the preparedness of judges and magistrates to exclude members of the public in specific cases where the complainant was being badly affected, the Commission recommended:

- that the grounds on which a court can exclude members of the public, other than support persons for the complainant and defendant, should be extended to include protection of a complainant from distress or embarrassment; and
- that the Australian Institute of Judicial Administration should develop educational programs for judicial officers on issues in sexual assault cases, including the complainant's testimony.

South Australian courts already have power to exclude people in order to prevent hardship or embarrassment to any person. The South Australian Task Force believed this to be inadequate protection for children, and recommended that courts should be closed while a child victim gave evidence, 'to minimise the harmful effects of court proceedings on the victim' (1986). Legislation implementing this recommendation is presently before the Parliament (s.8 Bill for an Act to amend the *Evidence Act 1929*).

The New South Wales Child Sexual Assault Task Force reached a different conclusion, very similar to that of the Victorian Commission in its procedure and evidence report. It recommended that closing of the court should remain a matter for the court's discretion, and that in making a determination whether to close the court, the interests of the child who is the alleged victim of sexual assault be taken into account (1985).

Children's evidence by closed-circuit television

A number of American states permit child victims to testify via closed-circuit television. The child gives evidence in a separate room, but can be seen and heard by all in the courtroom. The procedure has recently been adopted in New South Wales and legislation to introduce it is before the Parliament in England.

The procedures which have been adopted by the various jurisdictions differ in certain key respects:

- presence of the lawyers: in Texas the lawyers for both sides are in the room with the child; in California, they remain in the court.
- the age of the child: in New South Wales and California the procedure is available to children aged ten and under, the English Bill specifies children under fourteen and in Florida, the procedure is for children under sixteen.
- the availability of the procedure: in Florida, the procedure is applicable when the court is satisfied that there is 'substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court' (Warner 1987, p. 102). In New South Wales it is to be used in all cases of 'personal assault' on children under ten, unless the facilities are not available in the premises being used for the proceedings.

The main advantage claimed for closed-circuit television is that it allows the child to be examined in less intimidating surroundings than the conventional courtroom[1]. In particular, it allows the child to give evidence without directly confronting the accused person. The major objection to the procedure is that it may suggest the child has a valid reason not to confront the accused, and thereby indicate that the accused is guilty. Other issues raised by critics of the use of closed-circuit television are that a complainant is more likely to tell the truth when compelled to face the accused, and that a jury should be able to evaluate the demeanour of the complainant when they are repeating the accusation in the immediate presence of the accused. The California Court of Appeals has expressed concern about the impact of television on a jury.

> . . . (T)here are serious questions about the effects on the jury of using closed-circuit television to present the testimony of an absent witness since the camera becomes the juror's eyes, selecting and commenting on what is seen . . . [T]here may be significant differences between testimony by closed-circuit television and testimony face-to-face with the jury because of distortion and exclusion of evidence . . . For example, the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanour in a number of ways, . . . Variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanour . . . [A]nd off-camera evidence is necessarily excluded while the focus is on another part of the body . . . Thus, such use of closed-circuit television may affect the jurors' impressions of the witness' demeanour and credibility . . . also it is quite conceivable that the credibility of a witness whose testimony is presented via closed-circuit television may be enhanced by the phenomenon called status-

> conferral; it is recognised that the media bestows prestige and enhances the authority of an individual by legitimizing his status . . . Such considerations are of particular importance when, as here, the demeanour and credibility of the witness are crucial to the state's case (*Hochheiser v. Superior Court* 161 Cal.App. 3d at 786).

New South Wales seeks to minimise the danger that the procedure may be prejudicial to the accused by having the procedure apply to all cases involving children aged under 10, and requiring the judge:

- to inform the jury that the use of those facilities is standard procedure required by law in all cases of evidence given by young children on whom it is alleged that an offence such as that charged has been committed; and
- to warn the jury not to draw any inferences or give the evidence any greater or lesser weight because of the use of those facilities.

Whether the New South Wales approach will have the desired effect depends in part on whether a jury perceives that the procedure has been adopted because of the accused's presumed guilt, or because there are other significant considerations which make it desirable. The New South Wales Violence Against Women and Children Law Reform Task Force (1987, p. 7) believed that there were:

> Children may also be intimidated or disturbed by other aspects of the courtroom environment. The size of the courtroom, the size of the witness chair, the location of the other participants - raised bench, bar tables, public galleries, etc. - may increase the child's feelings of discomfort and lack of stature in the proceedings.

The Law Reform Commission of Victoria was not convinced by the objections that a child is more likely to tell the truth when faced by the accused, or that a child complainant's demeanour in the presence of the accused will tell a jury whether the complaint is true or false. Is a child who is unable to speak about incest in court petrified with fear because she is lying about her father, who is sitting in the court looking at her, or because of what he did to her? The argument about the need for confrontation has also been strongly made in England by critics of the proposed use of closed-circuit television, or video-link as it is also known. A supporter of the proposal has responded in the following way:

> The obvious objection to this is that with a small child such a confrontation does not make it tell the truth, but makes it too frightened to say anything at all; which, whilst excellent for child-molesters and their defending lawyers, is bad for everybody else. Small children have been known when confronted in court with their attackers to dive screaming under the clerk's desk in terror and to hide there for the rest of the proceedings . . . If the basic traditions of British justice really require the Colin James Evanses* of the paedophile world to confront their four-year-old accusers face-to-face, even if this makes it impossible to get a word of evidence out of them, it is the traditions of British justice which need re-examining, not the video-link proposal (Spencer 1987).
>
> [*Evans is a man with a long record of child sexual abuse in England who in 1984 was sentenced to life imprisonment for murdering a child of four whom he had abducted and sexually assaulted.]

Undoubtedly there are offences which are not reported, or not prosecuted, because of soundly based doubts and concerns about childrens' ability to cope with the stresses of the courtroom. The question is whether to propose a procedure to assist these cases to come forward, though the procedure might have an adverse impact on the fairness of the hearing

which some accused person's receive. A judgment must be made about the advantage to complainants, weighed against the degree of risk of prejudice to the accused.

Resolutions

The discussion group considered a range of recently implemented and proposed reforms in relation to courtrooms and the key participants with a view to making it less stressful for children.

General Observations

- Even without environmental improvements child witnesses can be greatly helped by being properly prepared in advance for the courtroom and the trial procedures.
- Environmental improvements are important, but must form part of a broader package of procedural and evidentiary reforms to the criminal justice process.

Specific Proposals

There was general agreement that the following reforms would be of value, and raised no significant contentious issues:

- The furniture and layout should allow a child witness to see and be seen;
- judicial officers and lawyers should not wear special attire which child witnesses might find strange and therefore intimidating; and
- a child witness should be permitted to have a non-participating support person nearby.

There was general agreement that fairness to the accused does not require face-to-face confrontation with a child complainant, because such confrontation does not provide an assurance of the truthfulness of a child's testimony, and may intimidate a child into being unable to testify.

The group therefore accepted as legitimate, procedural reforms which prevent face-to-face confrontation. There were, however, different views about the most suitable procedures and how they should be implemented. The two key issues of difference were:

- Whether the child should be kept in the courtroom while testifying (for example by use of a screen, or by having the accused leave the courtroom) or whether the child should testify from another room (for example in judges' chambers in the presence of judge and lawyers, the rest of the court watching by closed-circuit television, or in a special room, communicating with the judge and lawyers, and watched by the jury, by closed-circuit television).
  The main advantage of keeping a child in the courtroom was seen as enhancing the credibility of the child in the eyes of the jury; it was felt juries would not be as moved by seeing and hearing a child on television. The main advantage of having a child out of the courtroom was that, even without confrontation with the accused, the courtroom is seen as a very intimidating place, because of the strangers present (for example the jury), and its size.
- Whether the special procedure should be at the court's discretion (for example on application by the prosecution) or mandatory.

The main advantage for a discretionary system is that some children are very good witnesses under present arrangements, and special procedures could reduce the weight of their evidence in a jury's eyes. The main disadvantages of discretion, and in favour of a mandatory procedure, are:

- a discretionary procedure is more likely to suggest a presumption of guilt in relation to the accused in trials where it is used - the jury will see it as unusual in relation to a specific person, and therefore as an indication of that person's guilt; and

- a discretionary procedure can lead to lengthy arguments about whether the discretion is appropriate to apply in a particular case; there may be a battle of experts about the child's needs.

Concluding Observation

Australian and overseas procedures and reforms must be monitored and evaluated to ensure that change will achieve hoped-for benefits, without substantial disadvantages to the rights and interests of children, the accused and the justice system.

Endnote

1. There is debate among experts whether closed-circuit television will in fact greatly assist children. One British expert has criticised the English proposal arguing that 'children might not be able to give good account of what they say or experienced while speaking to a disembodied voice or looking at video images of the courtroom' - Professor Graham Davies, *The Independent*, 18 December 1987.

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Lessening the Involvement and Trauma of Children

DISCUSSION GROUP K

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The group discussed three topics: how the child's court appearance may be minimised or managed more effectively; promoting appropriate questioning of the child; and adequate support and protection of the child in court.

Group 1

This group discussed 'how may the duration, frequency and delays in the child's court appearances be minimised or managed more effectively?'

The main causes for delay were identified as defence counsel tactics and clogging of court lists. It was recognised that the former is usually at the magistrate's or judge's discretion and the latter was a resources issue.

Recommendations:

- Committal hearings be dealt with exclusively by the hand-up brief system (paper committals);
- priority trials be established for all matters involving children as victims;
- the child ought not to be compelled to give evidence at all on applications for care and protection in Children's Courts in cases where there has been an element of abuse.

Group 2

This group discussed 'ways of promoting appropriate questioning of the child in court'.

Recommendations:

- questioning should be simple and straightforward, appropriate to the age and development of child;
- there should be a reduction of the intimidating aspects of the courtroom and court procedure. Judges and magistrates should be encouraged to use the protective powers of the court. For example, a judge may use his discretion to disallow certain questioning;
- in abuse matters, the court should be closed. There should be a presumption that a court is closed with the proviso that the judge has a discretion to open it as required;
- investigation of the possibility of a court interpreter. This could be a person employed by the court and called whenever children are in the witness box. Solicitors would address all questions to this person who would then rephrase them suitably for the child. This may be a way to prevent harassing or badgering of the witness;
- child witnesses should not be kept waiting all day nor called very late in the day. They should not have to go on a rest day or a weekend while still under oath;
- physical modification to court buildings to reduce confrontation of witness and accused such as separate waiting areas for frightened children in particular and physical separation of accused and witness inside the courtroom.
  The use of closed-circuit television may be particularly helpful here. It is recommended the child be removed to a small room which reduces the 'stage fright' of the open court setting and gives a sense of privacy when giving embarrassing information. If it is used, the adults who will be questioning the child should meet with the child beforehand.

Group 3

This group discussed 'how may the child be adequately supported or protected in court?' It was emphasised that each child's needs are very individual.

Recommendations

- Children should have the opportunity to verbalise fears, to explore the courtroom before they appear (several times preferably), and to meet the prosecutor;
- all workers involved should meet early in the case to specify roles, collate information and make recommendations for interventions;
- there should be a primary support person for the child in court and the role of this person clearly identified. This would ideally be someone who could follow through with the child from the time of initial disclosure. The child should have some choice as to who this person may be and where that person is located in the courtroom. One controversial suggestion was that in some cases the support person may be another child who has been through a similar situation. A committee should be established to draw up a set of guidelines and information for the support person;
- there should be more support available for the 'supportive adults', whether parent, professional or court worker;
- the child should be counselled about possible outcomes of the court hearing or trial to lessen the impact of unexpected or unwanted outcomes;

- attention should be paid to the safety of the child while the case is proceeding. In some jurisdictions protective legislation is either inadequate or inadequately enforced;
- children should be empowered by increasing their confidence in their ability to have some control in the courtroom. Some examples are:

  - reminding them that they have the right to ask counsel to repeat or clarify questions and to request a break; and

  - encouraging them to be assertive about their replies. Role-playing may be a helpful device here.

Child Sexual Assault - Are there Alternatives to Court Action?

DISCUSSION GROUP L

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As child sexual assault is a crime in New South Wales, it is likely that, soon after disclosure, victims of this crime will become involved with the processes of the criminal justice system. In most other forms of child abuse and neglect, children neither have to bear witness nor be a part of court proceedings.

Children who come before the courts are disadvantaged and will continue to remain so, irrespective of changes which may be brought about in procedure from time to time. Adult victims of unprovoked attacks do not blame themselves for the assault but respond spontaneously and retaliate, or report the assault demanding justice and retribution. Children who have been sexually assaulted by an adult behave quite differently. They usually keep the abuse secret, hold themselves responsible for it, feel guilty and are afraid to tell the truth about their experiences and to ask for help. Children want to keep out of trouble and to avoid punishment. They also do not expect to be believed by adults.

A child who has experienced sexual assault usually discloses it long after the event, often tentatively and at a critical time in the child's life, perhaps when the child is in conflict with the family, or more specifically with the father. Often the child is then seen as deceitful and vindictive (Summit 1983).

In the Australian criminal justice system law there is a presumption of innocence - proof of guilt must be beyond reasonable doubt. Yet in a child sexual assault case, many facts important to the child's future may be inadmissible in evidence, because they are considered prejudicial to a fair trial. Thus evidence of previous abuse, previous abusive behaviour by the suspected perpetrator, the suspect's own background of abuse and neglect, and the family's background of violence can never be revealed in a criminal case.

The contest between the parties is harsh and adversarial. It is therefore naive to expect kindness, latitude and consideration for so-called 'innocent' children. Children go into the ring on equal terms with everyone else and even though at the end of the battle the defending lawyer may regret the trauma suffered by the child involved in the case, the child will often emerge from the court sadder, more bruised and not greatly impressed by the adult world and the administration of justice. The very innocence and immaturity of children mitigate against them when they confront jury, judge and an array of unsmiling, doubting and hostile adults. Paranoia is easily evoked in a court environment and children are particularly vulnerable.

In criminal cases the interest of the accused is paramount and to the lawyers the child is just another hostile witness. Where the evidence presented cannot establish the guilt beyond reasonable doubt - a frequent outcome in alleged sexual assault - the accused must be acquitted. However, the way in which the evidence is presented by the prosecution and the competence and fierceness of the defending lawyer may be crucial in convincing a court and jury that the accused is innocent.

It was recently reported by a morning paper that the police found a man, known to be a habitual paedophile, in bed with a twelve-year-old boy. Though the medical evidence proved homosexual intercourse, the accused's lawyer stated that his client would 'strenuously deny and defend' all charges. The two teenagers involved told a fantastic story of sexual and physical abuse, combined with strange quasi-religious erotic rites. Though they could not conceivably have fabricated such a bizarre story, the jury did not believe them.

Four trials involving sexually abused children seen at the Royal Alexandra Hospital for Children Protection Unit had to be aborted or rescheduled; one because of a language problem, a second because of a flawed question asked by a lawyer, a third because of a question about the expertise of a medical witness, and a fourth because the jury failed to agree on the verdict.

The primary concern of the defence is to see that the accused is acquitted and in order to achieve this goal the defence will use any means available to it. Many published studies show that children are intimidated, bewildered and even terrified by what goes on in a police station or a courtroom (Jones & Krugman 1986). Indeed many adults feel the same. Certainly all the courtroom trappings, the judge's bench, the witness stand, the sombre black robes, the wigs, the strict rules of procedure, all these things are designed to create an atmosphere of authority and utmost seriousness - to elicit truthfulness by instilling awe and fear.

From an early age children are taught to obey, respect, and also to fear adults. They are often made to feel guilty and they learn to expect retribution for their misdeeds, without much differentiation between major and minor transgressions. It is therefore easy for a magistrate, barrister or judge to intimidate a child. All that is needed is a little persistence, obfuscation, a stern look, a harsh word or an impatient tone of voice. Courts have never been kind to children - until the beginning of this century children of tender years were incarcerated in adult prisons in both the United Kingdom and in Australia.

Reliability of Child Witnesses

Adults have always considered children to be unreliable witnesses. Yet children cannot conform to adult criteria applied to their evidence. There are myths enshrined in legal history that children often lie or make up stories, that they cannot discern the difference between reality and fantasy, that they cannot remember events correctly, nor relate events and times reliably.

Numerous papers have been written and many studies done (Nurcombe 1986; Goodman 1981 and 1984; Johnson 1984; Davies 1986) which do not confirm this convenient belief. In cases where either the child retracts the statement or admits that they have made up the whole story of abuse, subsequent revelations of fresh abuse often show that the change of mind was a defensive mechanism, allowing the child to survive and illustrating the child's despair at being disbelieved.

Medical Evidence

Medical evidence is considered to be very important in cases coming before the courts. Yet there is not always unanimous agreement as to what is or is not a normal finding.

Hendrika Cantwell (1983) reported that a vaginal opening greater than 4 mm (VO+) was indicative of child sexual assault. The observed enlargements proved to be a reliable prediction in 74 per cent of the cases where there was a positive history of child sexual assault (in 70 of 95 girls examined). Cantwell (1987) states that, in 1983, six girls who were originally reported to have a VO+ but a negative history were re-examined by her because of a new allegation of child sexual assault. These girls retracted their previous false denial, stating that they had experienced sexual abuse prior to their first examination. False denial is more likely than fabrication of a complaint and therefore a second examination may be in the interests of the child, provided there are other cogent reasons for subjecting a child to this unpleasant experience more than once.

However, it should be remembered that in the majority of cases of child sexual abuse there is no positive medical evidence of abuse.

Children's Language

The latest study on 'Child victims under cross-examination' (Brennan & Brennan 1988) shows that children's language is not the same as adult language. Children often do not understand the meaning of questions asked in ways acceptable to adults. They certainly fail to understand much of what is asked and said in court hearings. Children report facts but use different ways of describing them. A three-year-old who said 'man put needle in my bottom' meant that the little girl's brother had several times stuck his finger in her anal orifice. A young girl described full intercourse yet the medical evidence did not confirm this. She was not lying, but rather told what she believed had happened to her. In fact she was describing vulval or simulated intercourse. One girl told such a story but refused examination. Her story was not believed and no further action was taken. Some time later she again reported child sexual assault and this time it was confirmed by corroboration and medical examination.

There is no reliable past or recent evidence that children often fabricate stories about abuse, despite some anecdotes about children making up such stories. They rarely make up stories which are going to result in their exclusion from the family, in being hated by siblings, relatives and parents, in sending their father to gaol and their mother to a psychiatric ward, and in finding themselves in foster care or in a refuge. Yet this is the picture which is so often put before the court.

Despite recent changes to the law regarding evidence given by children, some judges still feel that the jury ought to be warned that the unsworn and uncorroborated evidence of children must not be given the same weight as that of an adult.

Young children are trusting, innocent and easily influenced by adults. They are taught to obey adults and to submit to their authority. They are taught 'to be good'. The child will repeat exactly what they have been taught (Jones 1985). Rather than telling the whole story of an experience of abuse, the child may repeat only fragments of it, or may remain altogether silent. This is especially likely to occur under pressure in court.

For a long time our response to the occurrence of child sexual assault has been to ignore it, then to deny it, or to say that it is uncommon (Grunseit & Ford 1985). When a particularly brutal sexual assault occurs people become enraged and demand instant retribution. There are demands for castration of offenders and for the death penalty to be reintroduced for such crimes. The demand for retribution is so loud that the previous New South Wales Government responded by legislating for very long gaol terms in child sexual assault cases. The 1985 Crimes (Child Assault) Amendment Bill provides for twenty years' gaol for sexual intercourse 'in its broadest sense' with a child under the age of ten. A father or teacher faces ten years gaol for intercourse with a ten to sixteen-year-old. The courts rarely impose maximum sentences and even when they do, offenders usually only serve a fraction of the sentence. Despite claims that these laws have great merit, there has so far been no decline in child sexual assault.

Prison does not alter behaviour nor does it benefit the child. Some critics of intervention in child abuse claim that all that intervention achieves is to complete the disintegration of a very damaged family. The recent introduction of minor modifications to the court environment and other cosmetic changes to the system are unlikely to help children significantly. Even if all the latest advances in technique and technology are adopted, we are left with an adversarial system which does not care about children. The recent cases of child sexual assault in California (*the McMartin case*, Summit 1986) and in the United Kingdom (The Cleveland Inquiry 1988) in which expert evidence was ultimately shown to have been unreliable, prove that there has been a strong reaction by defending lawyers in child sexual assault to the type of evidence submitted by the prosecution. Thus the children and their families in these cases have been subjected to a great deal of trauma, while the cost to the taxpayer is considerable and the end result not beneficial to anyone. In Australia, expert evidence was seriously attacked in the notorious Azaria Chamberlain case and it is likely that a lot of so-called expert opinions about matters relating to sexual abuse will be vigorously challenged in the future as a result of what happened here and overseas.

Sexual assault is rarely witnessed. Only the perpetrator and the victim know what took place. New technology used in gathering evidence of such abuse makes this process more intrusive than previously. For instance, the use of anatomically correct dolls distresses some children, especially if they have not been sexually abused. A whole new industry has been created which is very good for bureaucrats, doctors, lawyers, the police and film makers but which is of doubtful value to children. Inexperience in investigating child sexual assault may lead to unnecessary further distress and enthusiasm is no substitute for professional competence.

What Alternatives are There?

Some professionals believe that many cases of child sexual abuse should be decriminalised. Even now most cases of child sexual assault are dealt with in the same way as other forms of child abuse and neglect, are not prosecuted at all, or unsuccessfully prosecuted. The child victims rarely benefit in any way.

What needs to be achieved in these cases is that:

- abuse should stop forthwith;
- the child should be protected from further abuse;
- the child should be helped to cope with what has occurred;
- the child and other family members should be rehabilitated;
- offenders should receive 'treatment' as well as punishment;

- where there is good reason to suspect that sexual abuse is occurring, the child should not be removed from the family but the suspected perpetrator should be separated from the child.

If these goals could be achieved by negotiation and agreement, without the ordeal of court appearances for the child, then so much the better. R. Krugman, editor of *Child Abuse and Neglect* states:

> I would emphasise that the criminal prosecution of a case of sexual abuse should be a secondary aim for paediatricians. The primary aim is to protect children ...

and later he states:

> One of the greatest mistakes we can make is to proceed only with criminal prosecution and forget that it is the juvenile court that is in place to protect children (1987).

I would like to see court action either through the Children's Court or the Family Court without the child appearing as a witness, or with the use of a child advocate who can speak on behalf of the child in court. Recently passed laws dealing with domestic violence could ensure that the suspected offender is removed from the child's home until the matter is resolved through investigation and assessment of the known facts.

Alternatives to Court Action

Offenders should be given the incentive to admit their guilt and to seek treatment for their unacceptable behaviour. So far the pre-trial diversion program, modelled on that developed in Sacramento, has not yet begun in New South Wales. When introduced, it will initially cater only for twenty-five offenders, presumably because of cost. It will not be possible to draw any conclusions about the merits of this treatment from such a small number of participants.

Although there are more than 200 treatment programs for offenders in the United States of America, the available analysis of benefits is inconclusive. The Giaretto Program (Giaretto 1982) is one which treats sentenced offenders who pleaded guilty. Such a plea ensures that child victims need not appear as witnesses in court. If Giaretto is to be believed (Giaretto, Giaretto & Sgroi 1977; Giaretto 1977), the system used by his group in Santa Clara County has been successful in 90 per cent of cases (after fifteen years of experience in treating large numbers of offenders and their families), and this system should be examined more closely with a view to its possible adaptation in Australia.

Conclusion

Through a process of education it should be made clear to all adults, males in particular, that sexual activity with children is wrong and can never be justified. Children are incapable of giving informed consent so the responsibility always rests with the older person.

Adults must learn to believe children when they disclose about sexual assault. However, neither the reporting nor the prosecution of cases of sexual assault will bring about a significant decrease in its incidence.

During the delay between reporting and the resolution of the case, children often receive no treatment. This may seriously interfere with their recovery. Not infrequently, children are abused again during that time. The emphasis for the future should be the prevention of child sexual assault through a change in the perception of adults about children and their rights.

Resolutions

The discussion group made the following resolutions:

- the discussion group did not want child sexual abuse to be decriminalised;
- the pre-trial diversion system to be introduced in New South Wales was not thought to be a good alternative for offenders in that it was untried and may ultimately not prevent the appearance of children as witnesses in court in a significant number of cases;
- the Giaretto humanistic approach appeared to be more acceptable although one had reservations about its high rate of success (90 per cent);
- the Giaretto approach is not an alternative to criminal court action but an alternative to the child being involved in the court system;

- two alternatives which could be tried apart from that of the child advocate used in Israel were suggested:

  - Suspended prosecution

    Admission of guilt by offender. The offender agrees to abide by a number of undertakings, such as leaving the house and staying away from the victim;

    The approach is more of 'a social or humanistic' one as regards family, victim and perpetrator but if the undertakings are broken, prosecution follows;

  - An inquisitorial system similar to that operating in France where on the best available expert evidence the child would be unduly affected by the court experience;

    The child's statement would then be recorded on a video and a 'friend' would appear to give the evidence;
- the need for changing the perception our society has about children and about their rights was emphasised;
- the 'cultural' response to child sexual abuse was also highlighted and the group felt that we must endeavour to change this attitude by education of all people, not only professionals;
- the criminal justice system is wanting when it comes to dealing with children. As it is not sacrosanct and could be changed if society demands, it should be changed so that children are not disadvantaged to such an extent by the system when they appear in courts of law.
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Obstacles to Prosecution in Child Sexual Assault Cases: A Preliminary Report on Some Victorian Data*

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It is commonly assumed by people working in the field that even if a sexual assault on a child does not get reported to the police, the chances of the offender being prosecuted are very small. According to a former coordinator of the Victorian Community Policing Squad, Inspector Bob Lovell, 'there were only about a dozen successful prosecutions as a result of 177 reports of sexual assault against children aged fourteen years and under in 1986-87' (*The Age*, 6 November 1987). Elsewhere within the Victoria Police, it is frequently suggested that only about one in every ten reports leads to a prosecution.

This apparently low prosecution rate has been attributed to a number of factors. A particularly significant obstacle is said to have been created by the requirement that the evidence of a child witness be corroborated (s.23(2) Victorian *Evidence Act 1958*). The effect of this requirement is reinforced by the hearsay rule which generally disallows admission of out-of-court statements made by the child to people such as parents, teachers or welfare workers.

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Another set of obstacles is said to be found in the trial process itself. It is argued that the alien nature of the court environment, the presence of the accused in the same room, and the sometimes vigorous techniques of cross-examination employed by counsel, often have a traumatic effect on child witnesses and may make them incapable of giving convincing testimony. This has led to a variety of proposals aimed at making it easier for a child to give evidence, such as suggestions for the use of closed-circuit television and/or prerecorded interviews, and calls to restrict the defence's right to cross-examine child witnesses.

Unfortunately, much of the discussion in this area has proceeded in an empirical vacuum. On closer examination, it becomes apparent that assertions about the low prosecution rate have been based on casual observation and fragmentary bits of data, rather than on the results of systematic research. Similarly, it has been assumed rather than shown that the removal of perceived obstacles such as the corroboration requirement will significantly increase the number of prosecutions.

The purpose of this paper is to present and discuss some data which bears directly on these issues. This data has been obtained from the internal records of the Victoria Police, and relates to the disposition of reports of sexual assault on children under the age of fourteen.[1] As part of this study, nearly 100 briefs of evidence prepared by the Victoria police were examined, along with a larger number of crime report forms processed by local offices. To our knowledge, no similar study has been undertaken elsewhere in Australia. As such, the material presented here should be of particular relevance to the debate over the desirability, and implications, of changing the laws of evidence as they relate to child witnesses.

The report is organised along the following lines. The first section outlines how cases of child sexual assault are processed by the Victoria Police and describes the types of data which were collected from police files. The second section uses this data to estimate an overall prosecution rate and to compare prosecution rates in sexual assault cases involving adults and children. The third section focuses specifically on those reports which did not make it to the prosecution stage and endeavours to explain why they were screened-out. Particular attention is paid here to assessing the impact of the corroboration requirement. In the concluding section of the paper, some policy implications of the findings are briefly discussed.

Police Procedures for Processing Reports: An Overview

As with other offences, reports of sexual assaults on children are subject to a fairly elaborate process of filtering. In this process, three decisions are of crucial importance. First, the police must be reasonably satisfied that an offence has been committed, that is, the acts reported have actually occurred and fit the legal definition of a sexual assault. Second, when and if an alleged offender is located, it must be decided whether a brief of evidence against that person should be prepared. This decision may be influenced not only by the adequacy of the evidence available, but also by 'public interest' considerations and the willingness, or otherwise, of the victim to proceed. Third, if a brief is prepared it must then be determined whether it should also be authorised, that is, if prosecution of the accused person should be initiated and, if so, on what charges.[2]

In the case of sexual assaults on children, primary responsibility for taking the above decisions is shared by three groups: the Community Policing Squad (CPS), the Criminal Investigation Branch (CIB) and the Child Exploitation Unit (CEU). (The role of the now disbanded Sexual Offences Squad was restricted to taking statements from victims and arranging medical examinations).

The Community Policing Squad

A section of the CPS operates in each of the 11 metropolitan police districts and most of the 12 country districts. These squads, which are part of the uniformed branch, have been established to provide a specialist response to problems associated with families and children. They are empowered, *inter alia*, to 'interview, take proceedings against and assist with adults offending against children' (*Victoria Police Manual*, 43:4(2)(b)). Most reports of sexual assaults on children are initially processed by the CPS. Where such reports are received it is unusual for the CPS itself to prepare briefs, except where the assault is relatively minor in nature, but all of the squads visited were reasonably active in carrying out preliminary investigations and establishing whether further police action was warranted. The CPS sometimes also acts to protect child victims from further assaults, by obtaining care and protection orders under the *Community Welfare Services Act 1970* (Vic.), or intervention orders under the recently proclaimed *Crimes (Family Violence) Act 1987* (Vic.).[3]

The Criminal Investigation Branch

Each metropolitan police district contains several CIB offices. These offices deal with allegations of sexual assault on children as part of their general function of investigating and clearing reports of crime in the areas under their control.[4] Most complaints forwarded to the CIB have initially been processed by the CPS, although some reports may have come directly from the general uniform branch or, in rare cases, from within the CIB itself. Where the CIB member assigned to an investigation is satisfied that an offence has been committed, s/he is normally expected to prepare a brief of evidence - provided of course that the alleged offender has been located. In cases of sexual assault, when the brief is completed it must be submitted for authorisation to a Detective Chief Inspector (or his deputy), along with a recommendation from the investigating officer. Our research indicates that this last stage is a fairly formalistic exercise - at least as far as sexual assaults on children are concerned - since the investigating officer's recommendation was followed in all cases.

The Child Exploitation Unit

At the time this research was conducted, the CEU was part of the Licensing, Gaming and Vice Squad. It now comes under the umbrella of the CPS. Its stated aim is 'to identify and prosecute those persons or groups responsible for the sexual and drug exploitation of children' (*Victoria Police Manual*, 41.48(4)). Most of the cases of child sexual assault dealt with by the CEU are referred to it by other sections of the force, most notably the CPS, but some reports are received directly. Like the CIB, CEU members have responsibility for investigating reports and preparing briefs where it is considered appropriate. The final decision to authorise prosecution is made by the Chief Inspector of the Division, or his deputy.

Data Sources

The data on which this study is based was obtained from several sources: briefs of evidence prepared by the CIB and CEU, CIB Crime Reports, CPS casebooks, and the Victoria Police Information Bureau index of sexual assault victims.

The briefs data set

In all, ninety-seven briefs of evidence relating to victims under fourteen were coded. Eighteen of these briefs came from CEU files, being all of the available briefs for 1986, plus a small number finalised in 1987. The seventy-nine remaining briefs were randomly selected from 1986 files held at CIB Central Administration. This represented around 75 per cent of all the sexual assault briefs involving children under fourteen forwarded to CIB administration in that year. These figures should not be seen as indicative of the total number of briefs prepared by the Victoria Police in 1986, as they do not include briefs prepared by the CPS or other sections of the force. Also, it is possible that some briefs prepared by local CIB officers were never forwarded to CIB Administration, or became lost somewhere in the system.

The information extracted from the briefs related primarily to offender, offence and victim characteristics, and to the type, amount, and perceived value of the evidence obtained. Only one coding sheet was prepared for each offender. In cases where more than one child victim was identified, victim characteristics recorded were those of the first named complainant. Conversely, where a victim identified multiple offenders, a sheet was prepared only for the first named offender.[5]

The reports data set

As indicated, many allegations of sexual assault on children are screened out prior to a brief being prepared. In order to ascertain the extent of such filtering, a separate study was undertaken of crime reports and related documents held at individual CIB and CPS offices (there being no satisfactory centralised system for recording reports of sexual assault on children). Generally speaking these files contained less information than the briefs, but nonetheless it was possible to extract some useful data on case characteristics and on the justifications offered for not preparing a brief.

In the case of the CPS, the data was obtained from the casebooks maintained by the squads of four metropolitan police districts. These casebooks provided a detailed account of all the matters dealt with by members of the CPS during each working day and indicated the action, if any, taken. For the purposes of the present study, only those matters which constituted a specific complaint were coded as reports, that is the child must either have told someone about the alleged assault, or medical or other evidence indicative of sexual abuse must have been available. Using this definition, data was obtained on 126 reports. Of these reports, forty-five had to be excluded from much of the analysis because the matter had been handed over to the CIB or CEU at an early stage and the casebook did not indicate if a brief had subsequently been prepared or not.

Data on cases handled by the CIB was obtained from copies of the official Crime Reports (Arrest and Non-Arrest) held at four metropolitan offices. Where possible this data was supplemented by the Case Progress Reports prepared by CIB members for internal use, although these documents were not always available. In all, data on sixty-nine reports was collected from CIB sources. As not all Crime Reports held by the CIB show the age of the victim, it is likely that this figure underestimates the total number of reports processed by the offices studied. As discussed below, it is also possible that written records were not kept for all of the matters notified to these offices.

At most offices, files for the last two years were examined, although in two cases data was obtained for 1987 only. Ideally, the study should have been restricted to reports received in the same year as that covered by the briefs data, but this was not feasible given resource and time constraints. At any rate, there is no evidence that the screening-out rate has varied significantly from one year to the next.

Although data on a substantial number of reports was obtained, it was possible to visit only a relatively small proportion of CPS and CIB offices. As the practices of these offices varied considerably in some respects it is conceivable that a different or larger sample could have produced a somewhat lower, or higher, estimate of the prosecution rate. Again, as with the briefs sample, it is not possible to determine the size of the population from which this sample of reports was drawn.[6]

The Information Bureau data set

The Information Bureau of the Victoria Police (IBR) maintains an index of sexual assault victims, compiled primarily from official Crime Reports. For 1987, the index recorded 152 reports where the victim could be definitely identified as under the age of fourteen. (In another 200 cases, the age of the victim could not be established.) This index contains information on the nature of the offence and the action taken (arrest or non-arrest). It does not show whether a brief was prepared or a prosecution authorised, but the arrest rate can be used as a rough guide to the brief-preparation rate.[7]

The main limitation of the IBR index, for present purposes, is that it is not representative of the full range of sexual assault reports received by the police. While all complaints are supposed to be recorded on the index, in practice most reported indecent assaults are not included. Thus 85 per cent of the cases involving children which were recorded by the IBR involved actual or attempted sexual penetration, compared to only 35 per cent of the cases in our sample of reports. Because of this unrepresentativeness, data from this index is used here only for comparing prosecution rates in sexual assault cases involving children and adults.

Sample characteristics: a summary

Table 1 gives data on victim, offender and offence characteristics for the reports and briefs samples. In summary form, what it shows is that:

- males were alleged to be the offenders in virtually all of the cases which came to the attention of the police and females were the complainants some 75 per cent of the time;[8]
- many of the victims were very young, with over 50 per cent of those in the reports sample being aged eight years or less at the time of the investigation;
- the great majority of alleged assailants were known to the complainant prior to the day of the assault and a substantial proportion were close family members;
- around one-third of the reports alleged actual or attempted sexual penetration and over 50 per cent of cases in the briefs sample involved multiple assaults.[9]

These findings may be compared with Goldman and Goldman's (1988) survey of some 1000 Victorian tertiary students and Goddard's analysis of 104 cases of suspected child sexual abuse processed by the Royal Children's Hospital in Melbourne (Goddard 1988). Although the results of these two studies diverge from the present one in some respects - largely because of the different data sources and definitions employed - all three show roughly similar patterns in their data.

It will also be observed from Table 1 that there are some differences between the two samples, most notably in respect to the variables of 'complainant's age' and 'relationship with alleged offender'. This is due primarily to the fact that there is a correlation between these variables and the willingness of suspects to make admissions, the latter in turn being the major determinant of the decision to prepare a brief.

The Screening of Reports

As stated at the beginning of the discussion, there is a widespread perception within the police force and the community at large that offenders in child sexual assault cases are rarely prosecuted. The data presented here indicates that this is an excessively gloomy picture. Although it has not been possible to measure the prosecution rate with precision, our evidence suggests a rate of 1 in 2.5 recorded reports, not 1 in 10. Given that over 90 per cent of offenders prosecuted in 1986 were subsequently convicted, the overall 'success' rate was only slightly less than the prosecution rate. This does not of course mean that the obstacles to prosecution identified earlier are illusory, but it does suggest that the magnitude of their effect has been exaggerated.

Table 2 shows how these estimates were obtained. Given that it was not possible to track the one set of reports through the system, we were forced to use a less straightforward - and less satisfactory - estimation technique. This involved first calculating a brief-preparation rate for the reports data (based on those 150 reports where the disposition was known) and an authorisation rate from the briefs data. The overall prosecution rate was then obtained by multiplying these two ratios together.

As can be seen from Table 2, briefs were prepared for seventy-nine reports, or 52 per cent of the reports for which the outcome was known. Of the ninety-seven CIB and CEU briefs analysed, prosecution was authorised in 76 per cent of cases and convictions were obtained in 68 per cent of cases. This gives an overall prosecution rate of 40 per cent of recorded reports, and an overall conviction rate of 36 per cent.

Table 2 also presents the results of a smaller, pilot study of cases processed by the CEU in 1986. This study covered all recorded reports of sexual assault on children received by the CEU in that year. As can be seen, the overall prosecution rate for the CEU in 1986 was virtually identical to that obtained by the above calculations. Given that only thirty-two CEU cases were examined, and that the CEU may not necessarily be typical in either its practices or the types of reports which it processes, considerable caution should be exercised in interpreting this finding. Nonetheless, it is encouraging that the two sets of estimates should be so close.

Table 1

Description of Sample Populations

		Briefs Sample	Reports Sample
		(n=97)	(n=195)
1.	Sex of Complainant	(%)	(%)
	Female	74	77
	Male	26	23
2.	Age of Complainant		
	5 and under	14	30
	6-8	24	21
	9-11	29	25
	12-13	33	24
3.	Most Serious Offence Alleged		
	Sexual Penetration (Including attempts and incest)	30	36
	Indecent Assault	65	63
	Act of Gross Indecency	5	1
4.	Frequency of Occurrence		
	Once	45	n/a
	2-5 times	43	n/a
	6+ times	12	n/a
5.	Relationship Between Complainant and Suspect		
	Family member	28	39
	Caring Role (child-minder, youth group leader, etc.)	16	10
	Otherwise known (family friends, neighbours etc.)	40	39
	Unknown prior to day of offence	16	12
6.	Gender of Suspect	No females	1 female
7.	Age of Suspect		
	Average	36	n/a
	Range	12-87	n/a
8.	Family Member Details	(n=27)	(n=76)
	Natural Parent	17	49
	Step-Parent De Facto	43	26
	Grandparent	14	13
	Uncle	26	2
	Brother	--	10

In presenting these findings, two notes of caution should be added. First, it is possible that the estimated prosecution rates for the CIB and CPS have been inflated by sampling error that is if another set of reports and briefs had been randomly selected, a different picture might have been obtained. Both the briefs and reports samples are of a relatively small size, and the statistical confidence intervals for any estimates are consequently quite wide. Thus, there is a 5 per cent chance that another random sample of reports could have produced a brief-preparation rate as low as 45 per cent, and that a different sample of briefs could have shown an authorisation rate as low as 68 per cent. On the other hand, there is only a 1 in 400 chance that differently drawn samples of reports and briefs together would have produced an overall prosecution rate as low as 30.5 per cent. Moreover, there is an equal probability that another sample would have produced a rate as high as 49.5 per cent.

Second, there is no doubt that a proportion of the reports received by the police never got on to the books. This could have occurred because of an oversight, a decision that the matter was not worth investigating, or perhaps because of a deliberate effort to enhance the perceived efficacy of an individual officer or a section of the force. If such informal screening-out has taken place on a large scale, it would follow that the actual prosecution rate could be significantly lower than the figure cited here.

By its nature, the extent of informal screening is extremely difficult to gauge. Suffice to say that the CEU and the CPS squads which were visited kept very thorough records of their activities and it seems unlikely that more than a few of the reports received were not formally accounted for. It is not possible to be so confident about the CIB, which shows an unusually high brief-preparation rate, but the CIB members we spoke to insisted that the available files gave a reasonably accurate indication of the total number of matters dealt with by their offices. While such assurances should not necessarily be taken at face value, the openness with which other problems in this area were discussed gave us no reason to believe a deliberately distorted picture was being presented.

Even allowing that some informal screening-out took place, it would have had to occur on a massive scale for this to explain away the discrepancy between our findings and the oft-quoted figure of a 1 in 10 prosecution rate. To obtain a rate as low as 10 per cent it would be necessary to show that 75 per cent of the reports received by the police were never recorded. To get a rate as low as 20 per cent it would have to be shown that one-half of all reports suffered this fate. For the reasons just stated, it is very much doubted that informal screening of this magnitude has occurred.

In summary then, while it is quite conceivable that the estimate of the prosecution rate has been inflated by sampling error and the failure of the police to record all reports received, it seems that the 'true' rate is much higher than the figure of 1 in 10. It can only be assumed that members of the Victoria Police have taken a much more pessimistic view of their efficacy in this area because they have had first-hand knowledge of too few cases to be able to form an accurate overall picture, and understandably have tended to focus more on their failures than on their successes. Research by cognitive psychologists indicates that such inferential judgment errors may well be the norm rather than the exception (Nisbet & Ross 1980).

Table 2

Estimates of Screening Rates

A. Overall

(i) Brief Preparation Rate:

Number of Briefs / Reports Received = 79 / 150 = .52

Source: Reports Data

(ii) Brief Authorisation Rate:

Number of Authorised Briefs / Total Briefs Prepared = 74 / 97 = .76

Source: Briefs Data

(iii) Brief Conviction Rate:

Total Convictions Obtained / Total Briefs Prepared = 68 / 97 = .70

Source: Briefs Data

(iv) Overall Prosecution Rate:

Brief Preparation Rate x Authorisation Rate =
.52 x .76 = .40

(v) Overall Conviction Rate:

Brief Preparation Rate x Brief Conviction Rate =
.52 x .70 = .36

B. CEU

(i) Brief Preparation Rate:

Number of Briefs / Reports Received = 18 / 32 = .56

(ii) Brief Authorisation Rate:

Number of Authorised Briefs / Total Briefs Prepared = 13 / 18 = .72

(iii) Overall Prosecution Rate:

Brief Preparation Rate x Authorisation Rate =
.58 x .72 = .41

Source: CEU files

Comparison with Adults

It is often assumed that the special evidentiary problems which arise in relation to child witnesses make the police more reluctant to prosecute where the victim of a sexual assault is a child rather than an adult. The evidence collected in this study indicates that this is not the case.

According to the IBR index of sexual assault victims, 62 per cent of reported sexual assaults on children led to arrests, compared to only 39 per cent of the cases involving adults (those aged eighteen or over). This can be taken as a rough indication of the relative frequency with which briefs were prepared. Data obtained from CIB files for 1986 also show that once a brief was prepared the likelihood of a prosecution being authorised was roughly the same, regardless of whether the complainant was a child or an adult. Thus an analysis of seventy-seven briefs relating to victims over the age of fourteen indicated that prosecution was authorised in fifty-seven cases. This gave a brief authorisation rate of 74 per cent, which was virtually identical to the rate reported in Table 2.

In part, the higher brief preparation rate in cases involving children can be put down to the fact that children are substantially less likely than adults to be sexually assaulted by a stranger. For 34 per cent of the adult complainants on the IBR index the alleged offender could not be located, whereas the alleged offender could not be found in only 14 per cent of the cases involving children. But even if cases with missing suspects are excluded from the analysis, the arrest rate is still higher, with arrests being made in 72 per cent of child cases compared to 58 per cent of the adult cases.

Another reason why the brief preparation rate is lower in cases involving adult victims is that consent - a problematic issue in many cases involving adults - is not an element in sexual offences against children. It is significant in this regard that 11 per cent of the adult cases on the IBR register were categorised as NOD (no offence disclosed) compared to only 2 per cent of reports relating to children.

The Decision Not to Prosecute

Even given that a substantial number of reports do make it to the prosecution stage, it is still the case that around 60 per cent do not. Moreover, this figure must be interpreted in the light of evidence that the police were able to locate the alleged offender in all but 7 per cent of cases. What, then, explains the failure of the police to proceed in the remaining cases?

As Table 3 shows, for a substantial number of reports the police were not satisfied that any offence had been committed - either because they doubted the veracity of the report, or did not regard the action complained of as a sexual assault.[10] In another eight reports, the decision not to proceed was made by the victim or a parent, not by the police. No doubt several of these decisions were influenced by police assessments of the likelihood of a successful prosecution, but other considerations (for example pressure from other family members, a desire to 'put the matter behind the child') were sometimes also important. This leaves 43 per cent of reports in which the primary **stated** reason for not preparing a brief was that the evidence was insufficient to sustain a conviction.

Table 3

Justifications for Not Preparing Briefs

Primary Explanation Offered	Number of Reports	Percentage of Reports in which cited as Main Reason
	(n)	(%)
No Offence disclosed	15	34
Complaint withdrawn	8	18
Effects on child/family	2	5
Evidentiary problems	19	43
Total Cases	44	

Source: Reports Data

Note: This table excludes eleven reports where no offender could be located and another fifteen in which it was not possible to identify from the file why no brief was prepared.

Insofar as reports were screened out on evidentiary grounds, what were the major perceived weaknesses in the case against the accused? This question is best answered by looking at the characteristics of those cases which were eventually prosecuted.

As Table 4 shows, it is clear that the key factor is the availability of admissions by the suspect. In 68 per cent of the briefs examined an admission was made to one or more charges, and 97 per cent of these briefs were subsequently authorised for prosecution.[11] By contrast, in those cases where no admissions were recorded, only 32 per cent of the briefs were authorised. Thus not only was an admission a sufficient grounds for initiating a prosecution, it was close to being a necessary condition.

Table 4

Admissions and the Decision to Authorise

	Number of Briefs	Number Authorised	Authorisation Rate
	(n)	(n)	
Admissions Made	66	64	.97
No Admissions	31	10	.32
Total Briefs	97	74	.76

Source: Briefs Data

For any offence, it can be assumed that the police would be more likely to prosecute where they have obtained an admission (all other things being equal). But there are two aspects of child sexual assault cases which arguably have made the role of the admission particularly crucial.

First, and most importantly, the corroborative evidence which the law requires is frequently not available in cases involving children. Hence the police perceive, correctly, that without an admission the prospects of obtaining a conviction are much diminished. As Table 5 shows, a relatively small proportion of assaults in the briefs sample were directly witnessed, and then sometimes only by other young children.[12] Other corroborative testimony (that is from witnesses to the circumstances of the assault rather than to the assault itself) was available for only 15 per cent of briefs, and some of this was assessed as unreliable.[13] Medical evidence corroborative of the assault (but not of the assailant's identity), was reported in only 6 per cent of the briefs. What is more, insofar as other forms of corroborative evidence were available, this was mostly in cases where an admission had also been obtained. Thus of the thirty-one briefs examined in which there were no admissions, other evidence was available in only six instances, compared to 42 per cent of the briefs containing admissions.

Table 5

Relationship between Admissions and Other Evidence

	Number of cases	Witnesses Available	Other Corroborative Testimony	Medical Evidence	No Other Evidence
	(n)	%	%	%	%
Admissions Made*	66	24	16	9	58
No Admissions	31	6	13	0	81
Total Briefs	97	19	15	6	65

Source: Briefs Data

* This row adds to more than 100 per cent because some briefs contained more than one type of evidence.

A second feature of cases involving children which serves to make admissions so important is the fact that admissions generally lead to guilty pleas and, conversely, denials generally result in trials. This is of particular significance in relation to children, because of police concerns that a child victim may have trouble giving convincing evidence in the threatening and alien environment of a courtroom. Some police we spoke to were also concerned that the child should not have to undergo the additional trauma of a courtroom appearance if it was at all possible to avoid it.

Although the police placed much stress on the availability of admissions, it should be noted that there were ten cases in which they nonetheless initiated prosecutions without this form of evidence being available. Surprisingly, these were not cases in which other strong evidence was present. In fact, in only two cases was any type of corroboration available,

and then only in the form of witnesses to the circumstances of the assault, rather than to the assault itself.

In some of these cases the decision to proceed appears to have been based on the hope that the defendant might 'crack' at a later stage and enter a plea of guilty. Another apparent consideration was the age of the victim. As Table 6 shows, in the ten cases where a brief was authorised in the absence of an admission, the average age of the victim was 10.4 years. In contrast, for those reports which did not even make it to the brief preparation stage the average age was only 7.2 years.

Table 6

Age and Outcome

Status of Brief	Average Age	Median Age	Number of cases	Source
Brief Authorised, No Admissions	10.4	11	10	Briefs Data
Brief Authorised, Admissions	9.5	9	64	Briefs Data
Unauthorised Briefs	8.4	8	23	Briefs Data
No Brief Prepared	7.2	7	68	Reports Data

Because of the very small number of cases in some of these categories, the differences shown in this table are not statistically significant. Nonetheless, the data displays a clear pattern and the observed relationship is consistent with the proposition that the older the child, the greater the probability that they will be deemed capable of giving sworn evidence.

Overall, the data presented here supports the view that existing evidentiary and procedural rules do act as a deterrent to prosecution. This is seen most clearly in the heavy reliance on admissions and, to a lesser extent, in the apparent sensitivity of the police to the age of the victim. It does not follow of course that all of the cases screened out on evidentiary grounds would have gone ahead had the rules been different. For example, for a number of reports the main problem was not a lack of corroboration so much as doubts about the truthfulness of the complainant's account. Likewise, for some very young children the obstacle was less one of their inability to give sworn evidence than of their capacity to give any kind of testimony at all. But for a significant number of cases which were not prosecuted, it does seem fair to say that the decision might have been different, had the police not felt it so necessary to obtain corroborating evidence, and if they had been more confident of the ability of the child to give evidence in a courtroom situation.

Conclusion

This study has shown that, at least as far as Victoria is concerned, the rate at which reported offenders are prosecuted for sexual assaults on children is significantly higher than many people believe. This can be attributed largely to the fact that admissions are obtained more frequently than is often assumed. At the same time, it has been shown that existing evidentiary rules do act as a significant deterrent to prosecution in those cases in which no admission was forthcoming.

It is not within the province of this paper to state a case either for or against removing the corroboration requirement or altering the rules governing the conduct of trials. These difficult issues of policy embrace questions about the reliability of children vs. adults, the relative merits of different approaches to examining child witnesses, and so on, which have not been touched on in this discussion. However, in concluding the following points should be made:

First, although significant obstacles to prosecution have been shown to exist, reform of the law relating to child witnesses will not necessarily result in an immediate and significant increase in the overall prosecution rate. In part this is because it will take time for these changes to filter through to affect the established perceptions and practices of investigating officers. More generally, as has been seen, there are a range of other considerations which enter, directly or indirectly, into the decision to prosecute. Thus, even if the corroboration requirement was removed, there would still be a number of cases in which the police would not be satisfied that an offence had in fact been committed, or where the complaint was later withdrawn for reasons unrelated to the strength of the evidence.

Second, it is conceivable that changes to the law in this area may induce more suspects to make admissions. At present, if the child victim is very young and no corroboration is available it is most unlikely that a suspect who has denied an allegation will be prosecuted. Once suspects become aware that they can be convicted on the basis of the child's testimony alone, some may see it as in their interests to 'cut their losses', make an admission, and have the matter dealt with as a guilty plea. It is unlikely, however, that this effect on suspect behaviour would assume major proportions, particularly in the short term.

Third, irrespective of whether the number of admissions increases, removal of some of the existing obstacles ought to increase the willingness of the police to initiate prosecutions in the absence of admissions. This should lead to a higher prosecution rate and might reduce the temptation for investigating officers to use inappropriate techniques to obtain confessions. However, if more prosecutions are undertaken in cases where no admission has been forthcoming, the number of contested cases will increase and more children will be required to testify at trials. Insofar as this is considered an undesirable side effect, there will be a heightened need for diversion programs capable of providing a defendant with a relatively attractive alternative to a trial.

Finally, it is possible that reform of the existing law may eventually prove to matter more for its impact on the reporting rate than on the actual prosecution rate. Although there is in reality already a fairly good chance that an offender who is reported to the police will be prosecuted, there is a widespread public perception - fuelled by the media and workers in the field - that the police are unable to act in the vast majority of cases. This belief must act as a significant deterrent to the reporting of suspected child sexual assaults to the police. A well publicised removal of what are seen (rightly or wrongly) as major obstacles to prosecution may therefore serve a useful educative function vis-a-vis the community as a whole, quite apart from the effect which such changes may have on the actual decision-making processes of the police themselves.

Endnotes

l. The study was restricted to children under the age of fourteen at the time the reported assault was investigated, as this is the age at which the special requirements of s.23(2) of the Victorian Evidence Act become relevant. A sexual assault was defined as any act involving actual or attempted penetration, indecent assault, or gross indecency.

2. In practice, the screening process is not so neatly compartmentalised as this simple account suggests. For example, the decision to prepare a brief and the decision to prosecute may be taken more or less simultaneously. Nonetheless, it is useful for analytical and descriptive purposes to separate the decision-making process into discrete stages.

3. In practice, the CPS appears to be reluctant to invoke these procedures. According to the CPS casebooks which were examined, in only two out of 126 reports did the police obtain a care and protection order, with intervention orders being sought in another two instances.

4. It is not possible to determine how many reports of child sexual assault are processed by the CIB in any given year, but it is clear that they make up only a tiny proportion (probably less than one in 300) of all matters handled.

5. Most reports and briefs analysed involved only one offender, but in one case dealt with by the CEU a thirteen-year-old girl made allegations of sexual penetration against fourteen males of varying ages. Cases where there was one offender and multiple victims were reasonably common, particularly where the assaults occurred in a family situation.

6. Victoria Police statistics do not break down reported crimes according to the age of the victim, except for the two age-specific offences of sexual penetration of a child under ten and sexual penetration of a child aged ten to sixteen. Moreover, the figures quoted for these offences relate to the number of acts reported, not the number of victims. As many child victims are subject to multiple sexual assaults, these figures cannot be used to provide even a rough approximation of the number of victims who become known to the police.

7. For IBR purposes, the term arrest 'refers to an apprehension of an offender, when it is proposed to proceed against that person by way of a charge, summons or caution' (*Victoria Police Manual*, s.4.33). We have been assured that it is standard police practice for a brief to be prepared in such circumstances.

8. The one alleged female offender was an 'alcoholic de facto grandmother' who had indecently assaulted her thirteen-year-old grandson. The CPS referred this case to the CIB for further investigation. No result was shown in the casebook.

9. In one brief prepared by the CIB, the thirteen-year-old victim alleged that she had been indecently assaulted by her stepfather on more than seventy separate occasions over a five-year period.

10. For example, in one instance it was concluded that the actions of a babysitter, who had 'inadvertently' touched the breasts of a twelve-year-old girl whilst engaging in a 'friendly wrestling match', were not sexual in nature.

11. In three cases the admission was to a lesser offence only. For the remaining sixty-six cases an admission was made to at least one count of the most serious offence alleged.

12. For example, in one case involving an indecent assault by an 87-year-old man on a four-year-old girl, the only witness was the girl's brother, aged around six. The offender strenuously denied the allegation and no prosecution was initiated. In another case which did not proceed, the only supporting evidence was the testimony of a nine-year-old friend of the victim.

13. For example, in one case in which three members of the family provided corroborative evidence against their de facto father, it was concluded that the complaint was a fabrication.

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Child Witnesses: Evidentiary Reforms

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It is widely acknowledged that the legal system itself contributes to the difficulty of proving child sexual assault. First, the rules of evidence undervalue the evidence of children and exacerbate the difficulties of proof. The inequalities of power between the abusing adult and the abused child are reinforced by a legal system with rules which discredit the evidence of children. Secondly, the intervention of the legal system can be traumatising to a child and may inhibit a child from testifying or contribute to retraction or refusal to testify at all.

Special rules of evidence applying to the testimony of children are based upon the view that the evidence of children is inherently less reliable than that of adults and that there is a grave danger of false accusations by children, particularly of sexual assault. Opponents to change invoke the unreliability argument. For example, in a recent debate in the House of Lords on child witnesses, Lord Paget said that children are untruthful by nature and are given to falling in love with their teachers and social workers (British Government 1987). But available evidence suggests the incidence of false complaints of child sexual assault is low (Warner 1987) and modern psychological research has exposed the invalidity of commonly held assumptions about the unreliability of evidence of children compared with that of adults (Goodman 1984). Special evidentiary rules relating to competence and corroboration can no longer be justified on the grounds of unreliability of the evidence of children.

Competence

The common law rule is that a child is only permitted to give sworn evidence in civil or criminal proceedings if they appear to the court to possess sufficient knowledge and understanding of the nature and consequences of the oath. If they do not understand the nature of the oath, unsworn evidence can be given provided the court is of the opinion that such child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth.

Both the oath test for sworn evidence and the intelligence and understanding test for unsworn evidence have been criticised because they are inconsistent with modern psychological knowledge and practical experience (Australian Law Reform Commission Report No. 26; Hewitt 1986; Sturgess 1985; Berliner & Barbieri 1984; Melton, Bulkley & Wulkan 1981; South Australian Task Force on Child Sexual Abuse 1985; New South Wales Child Sexual Assault Task Force 1985). The ability of children to give sound evidence depends, not upon the moral and religious understanding of the child (the oath test)

nor upon the vague concept of intelligence (the understanding and intelligence test for unsworn evidence), but upon the cognitive development of the child and whether questions are tailored to the stage of cognitive development that a particular child has reached. The principal justification for rules of competency is that the evidence of children is potentially unreliable. But developmental psychology has now challenged such assumptions. There is no correlation between age and truthfulness, adults are suggestible as well as children, and the memory of a child is no more fallible than that of adults. Children relate less on free recall than adults, and may be more vulnerable to suggestion, but such differences do not justify rules which permit valuable evidence of children who are emotionally strong enough to give evidence to be lost or undervalued. Children, even very young ones, can give reliable evidence if questions are tailored to their cognitive development.

The deficiencies in the present competency rules are such that changes are necessary. There are a number of possibilities. First, the competency rules may simply be abolished leaving it to the jury to determine the weight and credibility of the evidence. Many states in the United States of America have done this and it was the approach recommended by the Canadian Report of the Committee on Sexual Offences Against Children and Youths (1984). Secondly, the existing rules could be replaced by a new single test of competency which removes the significance of the distinction between sworn and unsworn evidence. This has been done in New South Wales where the *Oaths (Children) Amendment Act 1985* provides that where a child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth, their evidence is admissible and is of the same weight as sworn evidence. The Australian Law Reform Commission has proposed that existing competency tests be replaced by the requirement that a witness understand the obligation to give truthful answers and be able to understand and respond rationally to questions (Report No. 38). This would be determined by the judge or magistrate questioning the child. The proposal envisages that the issue could be determined generally and in relation to particular evidence, so that a child could be permitted to answer simple factual questions but be ruled incompetent to answer abstract inferential questions. A third possibility is for the competency rules to be abolished for all children over eight years, and for the competence of younger children to be determined by a pre-trial clinical evaluation (Nurcombe 1986). A further possibility, which is not necessarily incompatible with the above proposals is to use experts in child development to assist courts to determine the weight and credibility of the evidence of individual children, and if a revised test of competency is introduced, to assist the courts to determine whether the requirements of the rule are satisfied. Whichever approach is adopted, it is clear that much assistance could be provided if an expert witness could assist the court in relation to the cognitive development of a child and the kinds of questions which a particular child could understand and respond to.

Corroboration

A person accused of a crime cannot be convicted on the unsworn evidence of a child unless the testimony of such a child is corroborated in some material particular by other evidence (s.128(2) *Evidence Act 1910* (Tas.); s.9(2) *Evidence Act 1977-1984* (Qld); s.9(2) *Evidence Act 1958* (Vic.)). At common law there is a rule of practice to the effect that the trial judge should warn the jury that although they may convict on the sworn evidence of a child witness, it would be dangerous to do so in the absence of corroborative evidence (Byrne & Heydon 1986; also *Paine v. The Queen* [1974] Tas.SR 117, NC 14 in which the Court of Criminal Appeal suggested the requirement was not peremptory). In some jurisdictions corroboration or corroboration warnings are still required for sexual offences, and therefore in cases of child victims of sexual assault, corroboration may be required by two separate rules.

Corroboration rules provide an additional obstacle to proof of child sexual assault. If appropriate corroborative evidence is not available, proceedings against the alleged offender

will rarely be commenced. This is despite the fact that the child's evidence appears reliable and truthful, and despite the existence of other evidence such as a prompt complaint or medical evidence of trauma to the child's genital organs, pieces of evidence which may fail to satisfy the strict legal technicalities of corroboration. Corroboration rules have been criticised. First, they are based upon false assumptions about the unreliability of evidence of children. Secondly, they are complex and difficult to apply. (Australian Law Reform Commission Report, No. 38 para. 1015). Thirdly, it is unsatisfactory to have rigid rules which attempt to evaluate a witness' testimony depending upon whether that witness falls within a certain class (Canadian Law Reform Commission 1975). Fourthly, a danger of the rules is that they can lead to corroborated evidence gaining an artificially enhanced value (Clarke 1980) or conversely when a warning is required, to the jury seeking proof beyond reasonable doubt (Law Reform Commission of Tasmania 1982).

A number of reform proposals have been made ranging from abolition of corroboration requirements to modification of the strict legal requirements, for example, by abandoning the rigid requirements of the Baskerville test of independent evidence and material particulars. An intermediate option involves the creation of new safeguards, either a guided discretionary approach or the power to withdraw the case from the jury if in the opinion of the judge a conviction would be unsafe or unsatisfactory.

The Australian Law Reform Commission has recommended that, except in relation to perjury and like offences, existing corroboration requirements be abolished and replaced with an obligation to give a warning to the jury about any dangers associated with evidence in a number of defined categories including evidence of children and victims of sexual crimes where a party requests the warning unless the judge is satisfied there is a good reason not to warn (Australian Law Reform Commission, Report No. 26 and No. 38).

Recommendations for abolition have been accepted in some jurisdictions. For example, in New South Wales corroboration requirements were abolished in 1981 for cases of sexual assault. In 1985 the requirements of corroboration in the case of the unsworn evidence of children, and of a mandatory warning in all cases of the sworn evidence of children were abolished. In Tasmania neither corroborative evidence nor corroboration warnings are required in the case of sexual offences, but the rules in relation to child witnesses remain. In the United Kingdom a clause in the Criminal Justice Bill 1987 contains a provision which abolishes the rule that there can be no conviction on the uncorroborated, unsworn evidence of a child and the requirement of a warning about convicting the accused on the uncorroborated evidence of a child. But the independent rule that the judge must always warn the jury of the danger of convicting on the uncorroborated evidence of a complainant in a sexual case remains. My preferred option is for abolition of the requirements of law and practice in relation to corroboration both of children's evidence and evidence in sexual crimes. These rules are based upon exaggerated views of the unreliability of the evidence of children and discredited prejudice against complainants of sexual offences. They are unwarranted. The law provides sufficient safeguards for the protection of an accused in the necessity of proof beyond reasonable doubt and appellate review for sufficiency of evidence. Moreover a trial judge would remain free to give a warning of the need for caution in evaluating unsupported evidence if considered necessary in a particular case without the need to refer to rigid and complicated rules.

Hearsay

The rule against hearsay prevents a person testifying as to statements made by a child victim of sexual or other assault when the object of the evidence is to establish the truth of what is contained in the statement. An assertion other than one made by a person while testifying is inadmissible as evidence of the truth of that which was asserted (Byrne & Heydon 1986, note 10, para. 16.3). There are a number of exceptions or apparent exceptions to the hearsay rule which may be relevant in cases where children are victims of assault.

- Evidence of a complaint recently or promptly made by the victim of sexual assault is admissible in criminal prosecutions for sexual offences (Byrne & Heydon 1986, note 10, para. 9.38). But the evidence is not evidence of the facts related in the complaint. It is only admissible as to the credit of the complainant and it can only be admitted if the complainant is a witness. Nor can it be relied upon to corroborate the complainant's testimony.
- Spontaneous utterances made by a child shortly before or after a sexual assault are admissible under the res gestae doctrine and constitute an exception to the hearsay rule. But the usefulness of this exception in child abuse cases is strictly limited by the requirements of contemporaneity of the statement (*Ratten v. The Queen* [1972] AC 378; *Vocisano v. Vocisano* [1974] 130 CLR 267; *R v. Christie* [1914] AC 544) and other evidence of the assault (Byrne & Heydon 1986, note 10 para. 19.16) in the case of the common law rule, and in the case of the Tasmanian statutory exception by the conditions that the maker testifies or is 'unavailable' (s.81F *Evidence Act 1910* (Tas)). The res gestae doctrine is the basis upon which statements concerning a contemporaneous state of mind or emotion or physical sensation are admissible. Therefore, a doctor can relate in evidence what an allegedly sexually abused child said at a medical examination about present physical symptoms or state of mind to prove the existence of those symptoms or state of mind, but statements as to cause are inadmissible.
- In the rare instance that the child alleges in the presence of the accused that the accused assaulted him or her, evidence of the contents of that statement may be given by a witness and if the accused acknowledged its truth by words or conduct it is admissible, if not it must be disregarded (Byrne & Heydon 1986, para. 17.94; Aronson, Reaburn & Weinberg 1982).
- The evidence of a previous identification of the accused by a child victim of assault may be given by another witness who witnessed the identification if the child is called as a witness and identifies the accused in court and testifies as to their previous identification (Byrne & Heydon 1986, note 10 para. 16.31).
- Section 81B of the *Evidence Act 1910* (Tas.) allows documentary evidence of a statement to be admitted. Although of great potential in a child sexual assault prosecution, it is limited, of course, to documentary evidence and by the requirements that the incident be 'fresh in the memory' of the witness, that the child be called as a witness and at least attempt to give oral evidence of the incident in examination-in-chief as well as being available for cross-examination. The provision has been used when a child victim of sexual assault has refused to describe in evidence-in-chief what the accused did to them, but will agree that their original statement given to the police is accurate. This statement, reduced to writing and acknowledged by the child as required by s.81E, can be admitted in evidence pursuant to s.81B. It would seem that either a video recording or audio recording of the representation would be admissible under s.81B, but this has not been attempted in a sexual assault trial.

The hearsay rule and its exceptions have been widely criticised for many years. Not only are the rules complex, technical and artificial, but they sometimes operate to exclude evidence of substantial probative value. Justification of the rule is that reported statements or second-hand accounts are untrustworthy evidence of the facts stated. Hearsay evidence is not the best evidence, it is not delivered on oath, and the truthfulness and accuracy of the person whose words are repeated cannot be tested by cross-examination, nor can the demeanour of that person be observed.

In cases of sexual offences against children, because of retraction, or difficulty in testifying, second-hand accounts may be more reliable than first-hand accounts, or a first-hand account may be unavailable because the child is unable to testify. In such cases the hearsay rule is irrational. As Spencer has reminded us, 'Suppressing such evidence not only

makes it hard to convict the guilty: it also makes it easier to convict the innocent . . . the case which established that the hearsay rule prevents anyone repeating a child's account of an indecent assault to the court was *Sparks v. R* [1964] AC 964 where a white man was prosecuted for indecently assaulting a little girl of three, and the court refused to allow her mother to say that immediately after the incident the child told her that the man who assaulted her was black' (Spencer 1987). An appropriately drafted hearsay exception applicable to oral as well as documentary (including videotaped evidence) would ensure that the best evidence is available to the court. By allowing a witness to repeat the child's account of the details of the assault or to produce a videotape of the child's account, trauma to the child would be significantly reduced.

There are a number of possible models. In some states in the USA new hearsay exceptions for child sexual abuse prosecutions have been enacted which make the out of court statements of the victim admissible under certain prescribed circumstances. An alternative possibility is to completely revise the existing exceptions to the hearsay rule rather than adding a new exception to the rule. A third possibility involves the enactment of statutory provisions which allow the use in court of video recordings of interviews with, or testimony of, child victims.

A new hearsay exception for child sexual assault victims

Adopting the recommendations of the American Bar Association's National Legal Resource Centre for Child Advocacy and Protection, a new hearsay exception was enacted in Washington providing for the admissibility in criminal proceedings of a statement made by a child under the age of 10 describing any act of sexual contact performed with or on a child by another if the court finds there are sufficient indicia of reliability and the child either testifies at the proceeding or is unavailable as a witness. If the child is unavailable, corroboration is required. In 1985 Florida enacted a more detailed hearsay exception which is applicable in criminal and civil proceedings to the statement of a child victim of a developmental age of 11 or less describing any act of child abuse. In the Florida provisions 'unavailability' is defined to include a finding by the courts that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm. A number of other states have enacted similar hearsay exceptions.

A revised category of exceptions to the hearsay rule

Rather than a new hearsay exception applicable only to the evidence of child witnesses of sexual assault, general reform of the hearsay rule could be undertaken. The Australian Law Reform Commission has suggested substantial reform to the hearsay rule (*Evidence*, Report No. 26, paras 686-700; *Evidence*, Report No. 38, para. 142). The general rule excluding hearsay is affirmed but a revised and simpler category of exceptions is proposed. In its application to child witnesses, the exception in relation to first-hand hearsay would enable oral or documentary evidence of a child victim's representation made when the facts asserted were fresh in the child's memory to be admitted in evidence in civil and criminal cases if the child is called as a witness. A document, which includes a video recording, could not be tendered before the end of the examination-in-chief of the child. Proofs of evidence are expressly excluded from this category of evidence in criminal cases. In the case of an unavailable child (a witness is unavailable inter alia if not competent to give evidence), oral or documentary evidence of a child's representation would be admissible in civil cases and criminal cases, if in the case of criminal proceedings the representation was made at or shortly after the time the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or if made in the course of giving sworn evidence in legal proceedings if the defendant had a reasonable opportunity to cross-examine the child.

Videotaped interviews as evidence

Video recordings of interviews with child victims of sexual assault have been used in Australia for a number of years by experts in the field of child abuse. But they have not been widely used as evidence in court proceedings, although in Tasmania at least, there is no legal impediment in theory to tendering a video recording of an interview with a child at the conclusion of the evidence-in-chief of a child in civil or criminal proceedings in accordance with the documentary hearsay exception in s. 81B *Evidence Act 1910*.

In Scandinavia, specially trained policewomen interview child victims of sexual assault, and recordings of the interview are regularly admitted at trial.

In Texas, special provisions were enacted for the admissibility of a video recording of the oral statement of a child under thirteen years of age provided the following conditions were satisfied: no party for either party was present; requirements of accuracy of the equipment and the recording were satisfied; the statement was not made in response to questioning calculated to lead the child to make a particular statement; all voices were identified; the interviewer was available to testify or to be cross-examined; the defendant was afforded the opportunity to view the recording before it was offered in evidence and the child was available for cross-examination (Texas Code of Criminal Procedure, Art. 38.071). This provision has been held to be unconstitutional on the grounds it infringes the due process clause in the constitution (*Long v. Texas* [1987] July 1, No. 867-85).

The use of video recordings of interviews with children as evidence has been suggested in a number of reports on child sexual assault in Australia. Leslie Hewitt, in a paper prepared for the Victorian Government (1986) recommended that consideration be given to presenting the child's evidence in sexual assault cases by means of a videotape of the original interview with an independent person or trained psychologist. D.G. Sturgess QC in the interim report of the Queensland Inquiry into Sexual Offences involving Children and Related Matters suggested amendments to the *Evidence Act 1977-1984* (Qld) s. 93 which would allow the evidence-in-chief of a child under the age of twelve years to be given by means of the production of a video recording of an interview, provided the child is available for cross-examination and evidence is given of the history of the interviews leading to the recorded interview. He also recommended that the courts have the power to order that the cross-examination of the child take place outside the courtroom provided it is videorecorded and the recording is tendered and played in court (paras 7.91-7.100, 7.114).

In the United Kingdom, Glanville Williams (1987) has made a bold recommendation which has received considerable publicity. He has proposed that the videotape of an interview conducted by a 'child examiner' should be admissible. The defendant and his legal adviser would be present throughout witnessing the interview through a one-way mirror with communications enabling the suspect's lawyer to direct questions to the child through the examiner. If the suspect were not identified until after the interview, there would have to be a supplementary examination under the same conditions at which the suspect's legal representative's questions could be put. The child would not be allowed to give evidence-in-chief at the trial, nor to be cross-examined, except at the direction of the judge for special reasons using closed-circuit television. The conduct of the interview would be controlled by rules of court and the child examiner would be available to give evidence of conformity with the rules. In 1987 the Home Office issued a Consultative Paper on the issue of issuing prerecorded videotapes as evidence, and although the response to the idea was favourable, the government refused to support the proposal. In the course of debate in the House of Lords on the Criminal Justice Bill which contained a clause to enable child witnesses to give evidence through closed-circuit television, a cross-party group of peers unsuccessfully attempted to amend the Bill by providing for the admissibility of videotapes of interviews with children. Their second amendment sought to meet the main objection to the first by

providing that the child be made available for cross-examination at the trial, but it was nevertheless opposed by the government and withdrawn.

The advantages of a new hearsay exception

A special hearsay exception which would allow the admission of first-hand oral evidence of a child's statement or video recording of such statements has the following advantages:

The best evidence is obtained: The failure of the hearsay rule to ensure that the best evidence of child sexual assault is before the court has been adverted to. Video recordings in particular of a child's statements would ensure the best evidence is available. The child's evidence, together with the demeanour and manner of disclosure, could be obtained and preserved while the details are fresh in their mind. The visual recording would be particularly valuable for small children who are likely to show by actions what happened. Moreover the interview method would be accessible and could be evaluated by the court.

Encouraging pleas of guilty: Knowledge of the existence of a video containing disclosures by a child of sexual assault is claimed to encourage the defendant to plead guilty, particularly if the video can be used as evidence.

Reducing trauma: The child would be protected from the ordeal of giving evidence, at least in relation to the details of the offence. If the video recording option which does not allow the child to be called or cross-examined is adopted, the protection of the child is even greater. Treatment and counselling can commence without fear of accusation of influencing the child's evidence and the child can be encouraged to forget the details of the offence without being required to be reminded of them perhaps weeks later.

Preventing retractions: It is now well recognised that sexually abused children will frequently assert that their initial allegations were untrue. Retractions are sometimes caused because of the disruptive interventions and trauma that can follow disclosure. The use of videotaped interviews can both help prevent and deter retraction.

The defence is assisted: The defendant can view the video and by knowing all the details of the child's evidence is in a better position to prepare the defence. If the proposal of allowing defence counsel to participate in the interview is adopted, questions which counsel may be inhibited from asking for fear of upsetting the child and alienating the jury can be put sympathetically to the child by the child examiner.

Criticisms of Hearsay and Video Proposals

Contrary to basic traditions of justice

Special hearsay exceptions and proposals to allow video recordings as evidence have been criticised on the grounds that they are contrary to basic traditions of justice which give the accused the right to confront his accusers, the right to cross-examine and thus properly test the evidence and ensure that the jury observes the demeanour of the witness while testifying. In the USA statutory hearsay exceptions and videotaping provisions have been criticised and in some cases held invalid on the grounds that they conflict with the constitutional requirement of confrontation. There is, of course, no constitutional right to confront witnesses in Australia, but a common law right to do so is recognised. The failure of the prosecution to call a child victim of assault as a witness in a criminal trial may, in some circumstances, be regarded as a failure to conduct the prosecution fairly amounting to a

miscarriage of justice (*Whitehorn v. The Queen* [1983] 152 CLR 657). Clearly a balance is required between the rights of the suspect and the interests of the child. The videotape proposals discussed above do not conflict with the basic traditions of justice. They envisage that the interviews be conducted by experienced child examiners who probe for mistake and fabrication. The interviewer must be called and cross-examined. The child must either be called and made available for cross-examination and thus the evidence can be tested, or if Glanville Williams' proposal is adopted the opportunity is provided at the interview for defence counsel to cross-examine the child through the examiner and provision is made for the judge to order the child to be called where necessary. A new 'first-hand' hearsay exception such as that recommended by the Australian Law Reform Commission, which would permit oral evidence to be given of a child's statement requires that an available child be called and made available for cross-examination. In the case of an unavailable child, a strict test of reliability such as that suggested by the Australian Law Reform Commission should be required.

Contaminated evidence and clumsy questioning

Some view videotaped evidence as involving considerable dangers of brainwashing and of coaching of children. The risk that the interviewer will prompt the child by excessive use of leading questions has been raised. This objection is answerable. The absence of videotapes does not preclude brainwashing possibilities. In fact, when videotaped interviews are carefully conducted with children as soon as possible after the complaint, the opportunity for coaching is less than when the time lapse between complaint and court proceedings is considerable. The presence of the defendant and his legal adviser could be an additional safeguard and rules of court or regulations controlling the conduct of the interviews could require that everything that occurs in the interview room be recorded, thus ensuring the absence of dummy runs. Difficulties in conducting interviews which must at the same time serve the therapeutic interests of the child and provide acceptable evidence have been acknowledged by expert interviewers. If interviews are to be used as evidence the interviewer must leave the child to tell the story as much as possible, retaining a neutral position while creating a sympathetic and understanding atmosphere. Technical problems of authentication and accuracy can also be solved. An in-built clock continuously showing the time on the screen can show whether the video has been stopped or edited.

Use by defence to discredit child witness

The objection has been raised that video statements if admissible as evidence would encourage a more detailed and exhaustive cross-examination of the child in the hope that discrepancies would emerge between the interview and the child's evidence in court thus discrediting the child and adding to distress. If Glanville Williams' proposal is adopted this difficulty is avoided, but even if the child is required to be made available for cross-examination this objection has been answered by Spencer (supra) who points out that even now children can be put through cross-examination on their video-statements because the defence have always been allowed to cross-examine witnesses on their inconsistent statements.

Excessive weight

The fear has been expressed that presenting the evidence in the form of a videotape may make too great an impact on the jury and thus usurp the jury function. This has been referred to in the USA as the phenomenon of 'status-conferral'. The media bestows prestige and enhances the authority of the individual by legitimising his status. This merely reflects a mistrust of juries and is an insufficient reason for rejecting the procedure.

Closed-Circuit Television

To reduce the trauma of testifying in court, a number of jurisdictions in the USA have introduced a procedure which allows child victims to testify on closed-circuit television. There are a number of variations relating to who should be present with the child, whether or not the child should be able to see and hear the defendant and thirdly whether the option of using closed-circuit television should be available at the discretion of the prosecutor or at the discretion of the court. In England a provision in the Criminal Justice Bill permits children under 14 to give evidence by video-link before the Crown Court on a trial on indictment for sexual offences and offences involving assault, injury or a threat of injury to any person. Leave of the court is necessary before evidence is given by live video-link.

Videotaped Depositions as Evidence

In the absence of a new statutory hearsay exception which would have the effect of allowing the admission of videotaped depositions as evidence, an alternative possibility is the enactment of special provisions permitting the video recording of depositions and for their admissibility at the trial. In the USA provisions specifically providing for videotaped depositions have been introduced in a number of states. In some states, normal courtroom procedures apply at the taping and the victim need not be present at the trial. An alternative approach is to provide for the videotaping of depositions outside the presence of the defendant using closed-circuit television. In some states a finding that the victim would suffer at least moderate emotional or mental harm if required to testify in open court is a condition of admissibility.

Conclusion

Reform in the area of child abuse is fraught with difficulty. There is a danger of overreaction and of ill-conceived child abuse campaigns which may result in overzealous investigation and damaging intervention. A sensationalised 'moral panic' approach to child abuse can militate against constructive resolution of the problem and lead to a demand for urgent solutions which leave no time to examine broader issues. In reforming the law in this area the challenge is to guard against overreaction and to maintain a balance between the rights of suspects and the protection of victims. At the same time, the limits of the exercise must be kept firmly in mind. The broader issues of the social structure which gives rise to child abuse must not be ignored. Not only are structural problems of inequality, poverty and resulting stress implicated, but institutionalised violence, the nuclearity of the family and gender power differentials are among the complex social factors which are linked with child abuse. The legal machinery of criminal justice, child protection and welfare should be seen as a short-term weapon rather than a long-term solution. But as a starting point, those aspects of the legal system such as evidentiary laws which reinforce the inequalities of power between adults and children should be addressed.

The case for significant changes to the laws of evidence in relation to the evidence of children has been made out. A comprehensive statutory approach is required. Existing competence and corroboration rules should be abolished so that evidence of children can be made available to the court and its reliability determined without it being rejected or evaluated on the basis of outmoded rules. The rules relating to expert evidence should be altered to allow experts in child development to inform the court on such matters as the reliability of children as witnesses and to assist the courts as to the type of questions which are appropriate to the cognitive development of a particular child. Clearly general reform of the hearsay rule is long overdue. A revised and simpler category of exceptions which would have the effect of making first-hand oral or documentary evidence of a child victim's

statement admissible, is desirable. But such provisions are likely to be too restrictive in some cases, for a child would still be required to appear in court and be cross-examined if available. In many cases it is not desirable to call the child. Moreover, a general overhaul of the hearsay rule may be difficult to implement in the short term. The best immediate solution is to give the prosecution the option of tendering as evidence a video recording of an interview with the child obtained in accordance with stringent procedures and with questions in cross-examination directed to the child through a 'child examiner' at the interview, or perhaps through the judge at the court. Where the child is required to give evidence, the evidence should be able to be given via closed-circuit television.

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Evidentiary Aspects: Improvements and Reforms

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This paper addresses a number of issues concerning the evidence that children give as witnesses in court proceedings. The problems and difficulties which face parties and their lawyers in trying to have useful and reliable evidence from children admitted have been the subject of much writing. A number of these problems are of general application. They apply whatever the kind of proceeding the child is involved in. Other problems are more particular. They arise, for example, because of the special nature of the criminal trial, and again, because of the special problems posed by sexual assault proceedings. This paper is not limited to sexual assault proceedings although they are an important and, regrettably, increasing class of case in which the evidence of child witnesses is important.

Evidence Report

The basis for this paper is the reforms to the law of evidence recommended by the Australian Law Reform Commission in its report *Evidence* (ALRC No. 38). That report, published in 1987, was a major exercise covering practically the whole of the law of evidence. It recommended what amounts to a codification of the law of evidence. Because of the limitations of the terms of the Commission's reference, the draft legislation attached to the report only applied in federal and territory courts - including the courts of the Australian Capital Territory. However, state administrations - in particular New South Wales - have shown considerable eagerness to take up the Commission's recommendations. The Standing Committee of Attorneys-General has also started to examine the recommendations with the view to producing as much uniformity as possible in evidence law throughout Australia. The recommendations made by the Commission may well be the law of evidence that everyone has to deal with in the future.

Outline of Paper

This paper deals with a number of discrete but interrelated topics. It has already been said that the Commission's recommendations were not limited to the criminal trial. But it is obvious that the criminal trial - and particularly sexual assault cases - are the most significant

kind of proceeding for our consideration here today: a number of sessions in this seminar have already been devoted to them. Accordingly, first to be discussed will be the underpinning assumptions, and the philosophical approach, that the Commission took to its work. Second will be the subject of competence of child witnesses, then the swearing of the child witness, with a few passing remarks on the rules governing the way children give evidence and the way they are examined and cross-examined, the impact of the hearsay rule on a child's evidence and of the opinion rule - in particular expert opinion - on evidence about children, a mention of confessions made by children and finally a few words about the Commission's recommendations about corroboration rules.

Policy Framework

Turning first to the basic approach of the Commission and the policy framework it adopted in formulating its proposals, the major area of contention in the Commission's work was, predictably, the criminal trial. Child sexual assault is a particularly horrid crime. The impact of such crimes on their victims is long lasting: indeed, some victims never fully recover. Non-child assault cases are equally disturbing.

The traditional view of the criminal trial was summed up in the Commission's report by Justice R. W. Fox:

> The central question in a criminal trial is whether the Crown has proved the guilt of the accused beyond reasonable doubt. The purpose of the criminal trial is not 'to find out if the accused is guilty'. The primary and specific object of the system is to be able to say with confidence: that if there is a verdict of guilty there can be no doubt that the accused did what was charged with the requisite mens rea.
> (Justice Fox 1982 quoted in Australian Law Reform Commission 1987, p. 19).

As courts, like any other human institution, are fallible, the approach to the criminal trial becomes a question of deciding what risk of error is acceptable - the risk of erroneously convicting the innocent or the risk of erroneously acquitting the guilty? Traditionally, the answer to that question has been that it is the risk of wrongful conviction which must be minimised. It is summarised in Blackstone's (1969) commentary that it is better that ten guilty people escape than one innocent suffer. The Commission gave detailed and lengthy consideration to this question. It concluded that a clear and strong case should be made out before any changes are made to the community's traditional view of the criminal trial. It concluded that no case for so fundamental a change had been shown. Accordingly, the proposals it developed, particularly in the context of criminal trials, focused on:

- the importance of fact finding - any departure from an evidentiary rule which maximises the ability of the court to find the facts requires justification; and
- the nature and purpose of the criminal trial - a more stringent approach was taken to the admission of evidence against accused persons as distinct from the admission of evidence for their benefit. A similar approach was taken in other areas such as compellability, cross-examination and unsworn evidence.

Competence

It is important at the outset to distinguish two kinds of competence. The first was described by the Commission as 'psychological competence'. It is, traditionally, what is described as competence. The second kind of competence was described by the Commission as 'legal competence' and covers such matters as the competence of the accused to give evidence as a witness for the prosecution.

The law on psychological competence - the ability of a person to be a witness - varies. The traditional common law test is that a witness who understands the nature and consequences of the oath is psychologically competent. Even here there is confusion as to whether it is necessary that the witness have a particular religious belief or not. Legislation in a number of jurisdictions has dealt specially with the evidence of children who do not understand the nature of the oath. The conditions under which such children may give evidence vary. In some jurisdictions, the court must be satisfied that the child is of 'sufficient intelligence to justify the reception of the evidence and to understand the duty of speaking the truth'. In other jurisdictions, in particular the Australian Capital Territory, the court is under a positive duty to explain to the child that the child must be truthful.

Even the definition of child varies. Some jurisdictions define child by reference to age - fourteen years in the Australian Capital Territory, twelve years in Western Australia, and Tasmania, New South Wales and Norfolk Island speak of a child of tender years. Queensland does not deign to define the expression at all.

All these tests, both the common law test and its statutory modifications, focus on the necessity for telling the truth. In the Commission's view that is really only half the story. Essentially, there are two tests which must be satisfied before it can be said that it is worthwhile to receive evidence from a person. The first is that the person must understand that there is an obligation on witnesses to give truthful evidence. Equally importantly, all witnesses must be able to engage in rational conversation on the subjects on which they are questioned. There is no point in taking evidence on a witness' whereabouts if the witness steadfastly claims to have been on Mars at the relevant time. Accordingly, the Commission recommended a three-stage test:

- that all witnesses are presumed competent to give evidence;
- a person 'who is incapable of understanding that, in giving evidence he or she is under an obligation to give truthful evidence - is incompetent'; and
- that a person 'who is incapable of giving a rational reply to a question about a fact' is incompetent to give evidence about that fact.

In the Commission's view, a test so structured is particularly appropriate in the case of child witnesses. Firstly, it will be for the party who wishes to impugn the child as a witness to make out a case. There will be no automatic assumption that a child of a particular age is incompetent. The understanding of the obligation to give truthful evidence will be satisfied in the case of children who do in fact understand the nature of consequences of the oath or affirmation. There is sufficient flexibility in the phrase 'truthful' to ensure that the court, in considering competence, directs its mind to the basic issue. The flexibility of the final test is also important. The degree of a child's understanding of the concepts involved in the evidence that they give varies with the age and developmental stage of the child. The extent to which the child's language skills have matured is also a significant factor. These skills vary between children, even those of the same chronological age. They also vary with the nature of the subject matter concerned. On some matters, children of a particular age and developmental stage will be able to give quite accurate and rational replies. For other matters, such replies will be beyond them. The proposal by the Commission is flexible enough to allow the courts to have evidence from children on those matters on which their evidence is rational and acceptable but to exclude evidence concerning matters that they are not psychologically competent to deal with.

The net result of the Commission's proposals will be to maximise the opportunities for courts to receive evidence from children while at the same time maximising the usefulness of that evidence.

Sworn and Unsworn Evidence

Closely allied to the question of competence is the question of swearing young children. The state and territory legislation mentioned above dealing with competence generally allows witnesses incompetent to take the oath under the traditional tests to affirm. The legislation dealing specifically with children does not, however, impose a requirement that the child affirm. The court simply has to be satisfied that the child understands the duty of speaking the truth.

The Commission's recommended legislation, on the other hand, requires all witnesses to swear an oath or make an affirmation. The Commission freely acknowledged that in many cases the requirement is merely symbolic. However, the Commission also noted that the process of taking the oath or making the affirmation could in some cases make witnesses more careful and thus assist fact finding. The Commission did not anticipate any difficulties with child witnesses through the requirement to take the oath or make an affirmation. For child witnesses who understand the nature and consequence of the oath, there is no difficulty with either an oath or an affirmation. For a child witness who does not understand the nature and consequence of an oath, an affirmation would be the appropriate way of proceeding. The Commission's recommendations provided for a form of affirmation as follows:

> I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth the whole truth and nothing but the truth.

Although this form was intended to standardise the various forms of affirmation in use in federal courts throughout Australia, there is no magic to those particular words. Any appropriate, similar form of affirmation, designed for the particular child, would be acceptable under the Commission's proposals and would focus the child's attention on the duty to be truthful in answering questions.

Manner of Giving Evidence

Next it is necessary to draw attention to a number of recommendations concerning the way in which witnesses are questioned. These are found in Division 3 of Part III of the Commission's Draft Bill.

The Commission's recommendations firmly recognise the control that a court has over its own proceedings. In particular, the manner in which witnesses are to be questioned may be the subject of directions and orders by the court at the court's discretion (Draft Evidence Bill 1987 clause 30). Subject to that overriding discretion, parties may question witnesses as they think fit. A particular attempt is made in the Draft Bill to encourage the court and parties to allow evidence in narrative form. This will be especially helpful in the case of child witnesses.

Two particular procedural rules should be brought to attention in the context of cross-examination. Both caused some consternation in the Commission's consultations, even though they really do no more than represent the present law. Cross-examination has traditionally been the playground of counsel and courts are normally reluctant to interfere with counsel in the conduct of cross-examination. But the Commission recommended two rules:

- *Improper questions*. The Commission included a special clause concerning improper questioning in cross-examination:

  (1) If a misleading question, or a question that is unduly annoying, harassing, intimidating, offensive, oppressive or repetitive, is put to a witness in cross-examination, the court may disallow the question or inform the witness that it need not be answered.

  (2) For the purposes of subsection (1), the matters that the court shall take into account include any relevant condition or characteristic of the witness, including age . . .
- *Leading questions*. A leading question is a question that suggests a particular answer. Generally speaking, leading questions are disallowed in examination in chief but quite permissible in cross-examination. The Commission's recommended provisions read:

  (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

  (2) In determining whether to disallow the question or give such a direction, the matters that the court should take into account include the extent to which . . . (d) the facts will be better ascertained if leading questions are not used.

As can be seen, there is ample scope for the court to control the cross-examination of child witnesses through these provisions. The very existence of these provisions, in a general Evidence Act, will itself tend to overcome the reluctance that courts may tend to feel about interfering with cross-examination, even of child witnesses.

Hearsay Evidence

The only matter of hearsay evidence that will be addressed here concerns the reception of what a child said outside the court. Particularly in sexual assault cases, evidence of what the child said will be an important matter for the prosecution. It will, however, normally be hearsay evidence and therefore inadmissible to prove the truth of what the child said.

First, the Commission recommended that the exclusionary rule for hearsay evidence should be continued. Evidence by hearsay should not be admissible to prove the truth of what is asserted, but if that evidence is otherwise admitted, for example for some other purpose, the Commission recommended that there be no bar on using it for the hearsay purpose.

In the criminal trial, the Commission distinguishes between two cases for hearsay purposes. The first is where the person who made the statement - in this case the child - is not available to give evidence. In the case of the child, that may be because the child is incompetent to give evidence. In this case, the hearsay statement may be admitted in a number of circumstances, the most relevant being that the statement was made at or shortly after the time when the events to which it relates occurred and in circumstances that make it unlikely that the statement was a fabrication. Furthermore, a more relaxed rule is available to the defence. The defence may have admitted any evidence of a hearsay statement if the witness who gives it saw, heard or otherwise perceived the statement being made.

A further reform is that notice must be given if evidence of this kind is to be adduced.

Where the child witness is available and competent to give evidence about what was said in the statement, the general rule is that the child must be called. In these circumstances the other recommendations, already discussed, about examination in chief and cross-examination will apply.

Opinion Evidence

There are two aspects of opinion evidence, as it relates to children, that should be noted. The first is the tendency of some children to give evidence which must be characterised as opinion evidence. Objection could be taken to such evidence on that ground alone. The second aspect is the extent to which evidence about children as witnesses can be given to a court: the expert evidence problem.

The traditional rule about opinion evidence is as expressed by the Commission:

> Evidence of an opinion is not admissible to prove the existence of a fact as to the existence to which the opinion was expressed.

Accordingly, evidence that a car was travelling 'very fast' could be in theory rejected on the ground that it is opinion evidence.

The Commission's recommendations pick up and rationalise the reality of court practice. A particular exception to the rule which excludes opinion evidence is given for what the Commission called 'lay opinion evidence'. Two conditions are required. The opinion must be based on what the witness heard, saw or otherwise perceived: the opinion must be the witness' opinion of what the witness personally saw or observed. The second requirement is that 'evidence of the opinion is necessary to obtain an adequate account of the person's perception'. This focuses on convenience and helpfulness to the fact-finding function of the court.

These exceptions to the opinion rule will provide the court with more flexibility in dealing with evidence given by children who, depending on their ages and stages of development, are more likely to infringe the technical opinion evidence rule.

The second matter is evidence about the child witness - in particular, expert evidence. It has already been indicated that the application of a number of the rules proposed by the Commission will depend on an assessment by the court of the developmental stage of the particular child witness. For this purpose, expert evidence will be required. The Commission proposes a significant rationalisation of the presently overly technical rules concerning expert evidence and their replacement with a simple and flexible test allowing evidence wholly or substantially based on the witness' specialised knowledge based on their training, study or experience. In particular, the recommendations involve the abolition of the rule known as the 'common knowledge' rule - a common law rule under which expert testimony on 'matters of common knowledge' has been excluded.

Confessions

The above has largely focused on the child as a witness in the proceedings only. However, it is equally important to focus on evidentiary rules which come into play in relation to the child as accused. Of these, the chief is the admissions rule, a rule which provides an exception to the hearsay rule for an admission by an accused (a confession).

The present law concerning the admission of evidence of a confession is technical, complicated and difficult to understand and justify. Basically it requires that to be admissible against an accused, a confession must have been made voluntarily. The content of the notion of voluntariness in this context is by no means easy to understand. In particular it is unclear whether the personal characteristics of the suspect who made the confession are relevant to determining whether the confession was voluntary, especially where there was no external pressure applied to make the confession. Furthermore, there is a vast body of

technical and unclear law dealing with the admissibility of a confession induced by threats or promises by a person in authority, such as a policeman.

The Commission's recommendations cut through this to the focus and function of the voluntariness test. Four principal rules were proposed:

- Admissions obtained by violence or other unacceptable conduct were to be completely excluded.
- The court must be satisfied that the confession was made in circumstances that were not likely to affect its truth adversely, taking into account, in particular, the personal characteristics of the person who made the confession, including his or her age.
- Certain procedural requirements were imposed. The questioning in the course of which the confession was made must have been recorded, and the recording must be available to the court, or an independent third person must have been present and be able to give evidence about the course of the questioning.
- Finally, a general discretion to exclude evidence illegally or improperly obtained, including evidence of a confession, was proposed.

Of particular relevance to the prosecution of children is the second of those criteria. The suggestibility of some children, and the ease with which moral and other pressure can be applied to them, make the admission of confessions by them a matter of particular concern. The Commission's proposals focus on the circumstances in which the confession was obtained, the physical, psychological and moral pressures that existed at the time and the extent to which those pressures may have caused the child to make a confession which was untrue.

Corroboration

Matters of particular interest, especially in prosecutions involving children, are the requirements of corroboration and corroboration warnings. At this stage it is necessary to refer back to the underlying rationale of the criminal trial mentioned earlier in this paper. The concern to minimise the risk of wrongful conviction requires that evidence which, either of its nature, or in the particular circumstances of the case, is less than completely reliable should be scrutinised carefully before being the basis of a finding of guilt. Corroboration requirements are one form of that scrutiny. The problem with the present law requiring corroboration (not just in respect of children's evidence) is that the categories of cases where corroboration is required are overly technical, arbitrary and have simply 'grown like Topsy'. In fact, the law on corroboration warnings may tend to mislead juries rather than to clarify matters.

The Commission's proposal was that all existing requirements that a witness' evidence be corroborated be abolished. Instead, the Commission proposed that an accused should be able, in a number of broadly specified classes of case, to require the judge to warn the jury about the unreliability or possible unreliability of the evidence. The classes of case listed by the Commission pick up the broad themes of the present law. They include:

- hearsay evidence;
- identification evidence;
- evidence the reliability of which may be affected by age;
- in the case of sexual offences - the victim's evidence; and
- prosecution evidence of those involved in the events giving rise to the prosecution.

It will be seen that the evidence of children, and the evidence of children in child sexual assault cases, fall within the classes of evidence in respect of which these warnings may be called for by the accused.

It is important to note, however, that the judge is not absolutely bound to give such a warning. The Commission's suggested provision reads:

> (2) Where there is a jury and a party so requests, the judge shall, unless there are good reasons for not doing so -
>
> (a) warn the jury that the evidence may be unreliable;
> (b) inform the jury of matter that may cause it to be unreliable; and
> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it (Australian Law Reform Commission 1987).

If there is no good reason to give a warning of this kind, the court will not be bound to give one. Where it is to give one, the warning must focus on the unreliability of the evidence. Vague and general warnings, such that evidence of children is always to be suspected, or evidence of the victim in a sexual case is always to be suspected, will not do. The court must direct the jury's attention to the particular matters which may make the particular evidence unreliable.

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Consideration of the Child Witness in the Family Court

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There have been very few occasions where a judge has given leave for a child to give evidence in the Family Court. *The Family Law Act 1975* (Cwlth) says that children can only give evidence with the leave of the judge, and I am thankful that that is so. On one occasion I have allowed a 16-year-old, who was working, to give evidence concerning acts of cruelty by her father against her mother. She was a willing witness and offered to do so. I thought she was able to look after herself and I was also satisfied that she would not be subjected to too much trauma if she did. Otherwise, I have never permitted a child under 16 to give evidence.

The Family Law Act

The difference between our court and other jurisdictions lies in the *Family Law Act* which is an Act which deals with private disputes between people. On the whole, the Family Law Act deals with civil matters, private affairs involving family law - very different from the criminal jurisdiction where the state is involved.

The guiding principle in the Family Court where custody and access are concerned is the welfare of the child. Since the welfare of the child is the paramount consideration then as a rule, a child should not be allowed to give evidence because the situation is too traumatic for it. As the Family Court has had powers referred to it to enable it to deal with ex nuptial children, it now has jurisdiction over all children as far as custody, access and maintenance are concerned.

In dealing with questions of contempt, which usually relate to disobedience of court orders, the Family Court exercises a quasi-criminal jurisdiction. But leaving that aside, the Family Court's job is not to punish or to deter, rather its job is to try and resolve disputes with as little trauma as possible for adults and for children. Its duty is to make orders for custody or access which serve the best interests of the child in both the short and long term.

The Family Court does have some investigative power, by virtue of its dealing with custody and access. It is not part of the inherent jurisdiction of the court but rather, the judge is allowed to ask questions of his own motion. That is not given in other jurisdictions as a rule. In the Family Court, if it is felt that a lawyer is not asking appropriate questions, or is not directing their attention to the important issues, the judge is allowed to step in and ask questions. If, however, he does it too often he can be taken up on appeal on the basis of interfering with counsel's conduct of the case. Generally speaking, the judge is not supposed to interfere with the cross-examination or the evidence in chief, nor with the conduct of the case by the counsel, but they are allowed to ask appropriate questions of their own motion in matters relating to children.

Evidence Before the Family Court

The rationale of this paper is not so much whether there should be child witnesses in the Family Court because that is a non-issue, but rather the question of how the court deals with

allegations of child sexual abuse. It is hoped that this account of the Family Court's procedure in getting the evidence before the court may be of assistance.

Court counsellor's reports

In South Australia there are a very large number of custody and access cases involving child sexual abuse allegations. For two weeks in every month, a judge is engaged full time on hearing nothing but these types of cases. One way the evidence is put before the court in these or any other matters is by an exception to the hearsay rule - court counsellors' reports are considered acceptable evidence. Whatever the child says to the court counsellor can come before the court as evidence in a report, either written or as orally reported by the court counsellor.

Reynolds v. Reynolds

Another way is via the High Court case of *Reynolds v. Reynolds* which allows statements made by the child (the subject of the dispute) to any adult, to be brought before the court through the evidence of the adult. Those two very important means: the statute legislation and the case of *Reynolds v. Reynolds,* enable the Family Court to hear evidence which is not available to courts of criminal jurisdiction. Whether this evidence should be available to courts of criminal jurisdiction is another matter best left for Parliament and others to decide.

Separate representatives

Another provision available to the Family Court is s. 65 of the *Family Law Act*, which enables the judge on the application of either party, or of his own motion, to appoint a separate representative. The representative, paid for by the Legal Services Commission, will then represent the child. The representative does not represent either party but simply acts as a champion of the child. The separate representative can arrange for such expert evidence or the calling of evidence as they think fit. This procedure is very close to the first-class proposal raised yesterday of an independent representative being appointed for the child victim/witness. It would have to be legislated by every state parliament as it is a matter for criminal legislation which is a state, not federal matter. There is certainly no legislative provision for it in South Australia, but should there be, it would be a great step forward. The provision for a separate representative (who is usually appointed in difficult custody cases and automatically appointed in the Adelaide registry in all cases involving allegations of child sexual abuse) is most useful and is usually of great assistance to the judge. For one thing, the independent representative does not represent the interests of either the father or the mother, but represents the child. Great weight can be placed on the evidence called by the separate representative.

Department of community welfare files

Another thing that the Family Court can do in cases of child sexual abuse is to ask the Minister for Community Welfare to intervene. There can be a production, for example, of the Department of Community Welfare files subject to examination under the Commonwealth *Evidence Act 1905*. It can contain all sorts of useful information.

Videotaped interviews

There exists a protocol in the Family Court as regards the conduct of child sexual abuse cases. It usually involves near automatic suspension of access (or at least allowing only supervised access while there is an investigation of the allegation carried out) because it is

very easy to make allegations of child sexual abuse and whether they can be substantiated or not is another matter.
The Family Court can also utilise the videotaped interview. This includes videotaping of access (supervised access between the allegedly abused child and the allegedly abusing parent) and videotaping of the original investigative interview. It is of tremendous assistance to the court to actually see and hear the interview instead of just relying on an expert's written notes of the interview. Of course, that means that the interview must be conducted on the basis that it will be used for evidence later, thus no leading questions are allowed etc. It also means that the expert who conducts the interview is subject to cross-examination, but not the child. The videotape is put before the court as an exhibit.

Corroboration

Also in the Family Court itself no corroboration is necessary for a finding of child sexual abuse to be made. The Court does not have the strict requirements of the criminal justice system.

Expert evidence

As regards the evidence of experts, the Chief Judge, Justice Elizabeth Evatt, put out a practice direction that there are not to be multiple examinations of children. If there were, then the judge could refuse to receive the evidence of the numerous experts that had examined the child. This is a very sensible practice direction, as it discourages the profession from hawking the child round from one expert to another. One problem is that if one side produces experts the other side will produce theirs, the separate representative may produce theirs, and the result is the proceedings become very protracted. In Adelaide, court delays have blown out considerably, simply because there are child sex abuse trials which go on for days and days. However, no children are involved as witnesses so there is no trauma to the child if matters are adjourned, but it is often of great inconvenience and expense to the litigant. Access is usually suspended while these delays occur, which can ruin the relationship between the father and the child.

Children at Risk

In the Full Court decision of *M v. M* (1987) the Family Court held that it was not necessary for the trial judge to make a positive finding of fact in relation to allegations of child abuse. The Full Court said that it was incumbent upon the court to protect the child and that the Family Court is not a court of criminal jurisdiction. Furthermore, even though no allegation of child sexual abuse has been proven, if the court is of the view that the child could be at risk **in any way** if access were to be resumed, then the father could be denied access. That has led to a lot of frustration because in many cases of allegations of child sex abuse, one is dealing with families which are already split. They usually arrive after access has taken place, or after custody even has been determined or while custody is being fought out. Sometimes the actual incident alleged is said to have taken place quite some time before and very often the police will not prosecute because they just do not think there is sufficient evidence.
Often an accused father wants to have his name cleared in the Family Court. The Full Court has held that it is not the function of the court to clear anyone's name, its job is to protect the child. So then, where does the accused go? There is no question of any punishment in the Family Court. Even if the court makes a finding of child sexual abuse, that in itself does not mean a gaol sentence or a bond or similar; all it means is that the accused is denied access. If the wife then disappears with the children - which has happened - and the husband then brings an application for access, the judge may feel very constrained to grant the application, simply because there is no-one there to oppose it. This is why it is so important to have the

separate representatives who can be there to oppose it and why, in fact, the Family Court automatically or almost invariably appoints separate representatives the moment there is any allegation of child sexual abuse.
Another aspect is when there is a consent order and the parties sort it out between themselves. It is very important to have the independent representative there to ensure that the terms are appropriate for the child, particularly if the independent representative believes there may have been sexual abuse. It cannot be a consent order if, in fact, the independent separate representative feels that the child's interests are not being protected. But, if there is no trial and no finding, it is very difficult to oppose that consent order. As can be seen, there are all sorts of flaws in the system - it is not a perfect system by any manner or means.

Conclusion

To make a finding of child sexual abuse, the Family Court, does not require it to be proved beyond reasonable doubt, but only to find it on the balance of probability. But in the Family Court of course, the liberty of the subject is not involved. It might be easier in some ways for the Family Court if it did allow children to give evidence directly to it. The judges could judge for themselves whether there is any substance in the allegation or not. But, regardless of that, my view is that children, particularly under the age of twelve years, should not be permitted to give evidence in the court, simply because of physical exhaustion and all the difficulties that have been spoken about over the last two days.
So if the adversary system is to be retained, some other solutions have to be found for the criminal justice system.

Consideration of the Child Witness in the Family Court - A Victorian Perspective

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The Family Court rarely has children giving evidence. We have developed a procedure whereby methods are substituted for the obtaining of evidence of children. The Family Court of Australia is not the only court in this country which deals with family law. The other court, of course, is the Court of Summary Jurisdiction, also called the Magistrate's Court or the Court of Petty Sessions. That court also is empowered to deal with some family law matters, and when it does deal with those matters it uses and applies the same law, rules and evidence as are applicable in the Family Court.

The Family Court of Australia is unique. The Court is presided over by a judge sitting alone. That means that we have no jury to assist us. The Family Court has jurisdiction to hear cases in all matrimonial causes - that is proceedings between partners to the marriage, sometimes involving other persons than the parties, for example representatives of the children, blood relatives, or even strangers. This jurisdiction covers matters of guardianship of children, custody of children, access to children, non-molestation of adults or children, sole use of the matrimonial home, property settlement, spousal or child maintenance, injunctive relief or enforcement of orders. We now have added to our burden additional jurisdiction in all states (except South Australia and Queensland, who will not cede their powers to the Commonwealth) to deal with all matters concerning children who are ex nuptial.

As is obvious from consideration of the topics with which we are empowered to deal, many, but not all, of these matters involve and affect children. Children, for our purposes, are persons under 18 years of age. They may file an affidavit or give evidence only with leave. Leave is seldom sought and seldom granted. The rationale behind the reason to restrict the right or duty of the child to give evidence is that, in a family situation, evidence concerning and affecting children should be given, so far as possible, by persons other than the child so as to avoid the child being polarised with one parent in a family situation.

I have only had two children giving evidence in ten and a half years. One of them was a girl about sixteen years who wished to give evidence in a case where her father sought access to her younger sister. She wished to tell me that she had been the subject of incest by her father on many occasions over the years and wanted to ensure that her younger sister was not placed in the same situation. The other one was a case of a young teenage boy who wished to give evidence of assaults by his father upon his mother.

Alternative Techniques for Obtaining Evidence in the Family Court

There are several alternative techniques used by the Family Court to obtain evidence of matters which concern or affect children. These are the interview with the judge, the use of counselling reports and separate representatives.

Interviewing the child in chambers

The first of the tools is the interview of the child by the judge in his chambers. That can take place without a counsellor being present should the judge wish it. To explain the terms - the judge in his chambers merely means in his private room; and the counsellor is a person who is employed by the Family Court in the Counselling Section, being usually either a clinical psychologist or a trained social worker. The presence of such a person is designed to assist the judge to see that the child is questioned carefully and properly and to assist the child to remain at ease during what may be regarded as a somewhat traumatic experience. I have adopted that practice on quite a few occasions and found it to be really helpful. But a problem with this is that the law provides that such an interview is confidential; that means that the judge is not permitted to inform either of the parties of what is discussed in the interview with the child and, of course, automatically the child is prohibited from mentioning to anyone the topics discussed. The judge is entitled to use the interview, and comments made by the child, as part of his decision making process, but as the interview is confidential the judge may then decide the case on matters heard in his private chambers, which are not known to either of the parties, and the whole trial process to that extent could be a mockery. This procedure is not very commonly used; indeed a Full Court of the Family Court has criticised the use of the interview procedure.

Counsellor's reports

The next tool used is the counsellor's report. A report is provided by a counsellor after the counsellor has interviewed the parents, the child or children and the relevant adults.

These reports, are reports in proceedings between parties relating to children - their guardianship, custody, access or their welfare in certain restricted areas for example allegations of sexual abuse. The reports deal with such matters as the wishes of children as to whom they should live with, or whether they should see the non-custodial parent. The reports deal with the interaction with and relationships between parents and children, and the parenting skills exhibited and displayed by the competing parties. These reports are a most helpful part of the decision making process, particularly when they deal with statements made by the children. But these reports are given no particular or special significance or weight, they are merely one piece of the evidence in the whole of the proceedings; it is important to bear in mind that the report is not merely rubber-stamped by the judge who hears the proceedings. These reports bring to the court's attention, often for the first time, allegations of sexual abuse which can then be properly investigated in accordance with the procedure for investigation which the court has worked out.

Separate representation

This last matter leads on comfortably to the topic of separate representation. The Family Court of Australia is the first court in the Commonwealth of Australia to have a separate representative an in-built part of the court process. A separate representative is a lawyer who is appointed to represent a child or children, the subject of proceedings. Guidelines as to the manner in which the separate representative will perform his/her duty have been worked out by the court and are laid out in practice directions. A separate representative is appointed automatically when an allegation of sexual abuse has been made and at that time the allegation of such abuse is referred to the relevant child welfare agency. A separate representative acts for the child alone, protecting the child's interests against the interests of

the parents or anyone else who seeks to intervene in the proceedings. At this seminar it is interesting to note that consideration has been given to introducing a very similar system for victim protection in court proceedings.

It follows that as the Family Court of Australia is a civil and not a criminal court, the Family Court does not deal with criminal charges of sexual abuse. It deals, however, with allegations of sexual abuse in cases concerning children. In determining whether or not such allegations have been established, the only standard of proof required is proof on the balance of probabilities. If an allegation of sexual abuse is established, the consequence in the Family Court is that the offender will have no hope of obtaining custody of the child or children, will almost certainly have access denied to him or her, and if they are living in the same house as the child, will almost automatically be required to vacate that house.

The greater problem arises if the allegation of sexual abuse is not established or proved to the required standard, but nevertheless the trial judge is satisfied that there is a risk of such sexual abuse in the future. In such a circumstance almost automatically, the person who is the suspected offender would have no hope of getting custody of the child, and so far as access is concerned, it would either be denied altogether or at the very least access would be physically supervised.

Conclusion

By the use of these means or tools as mentioned, coupled with the Family Court's approach to the rule against hearsay, indirectly - but clearly - evidence concerning children, their wishes and statements are received into evidence. We are satisfied that in the overwhelming number of cases we do, in fact, ensure that the welfare of children is the court's paramount interest in fact, as well as in name.

Children as Witnesses in the Family Court

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Although the author has assessed many children involved in litigation over custody and access for the Family Court, she has never seen a case where the child has had to testify in the Family Court. The Family Court does not allow children to be called as witnesses.

The two central issues in the use of children in judicial proceedings concern the competency of children as witnesses and the emotional effects of testifying.

The competency of children as witnesses will be briefly discussed with the major focus being on the emotional effects of testifying. Much has been written on the competency and credibility of children as witnesses (Benedek & Schetky 1986; Davies et al. 1986; Jones & Krugman 1986; Nurcombe 1986) and is addressed elsewhere in this seminar.

In the Family Court, Family Court counsellors, child psychiatrists and psychologists, skilled in the assessment of children, bring the children's stories, attachments, wishes and frustrations to the court and are subject to cross-examination. In addition, in difficult matters and where there have been allegations of sexual abuse, children have their own separate legal representation. It has been generally accepted that such expert evaluation offers more validity than the narrow examination and cross-examination by counsel for the parents. Children have their own use of language, often through play, they need to develop trust in the interviewer, and they are confused and bewildered by an impersonal court with its strange language and setting. Sexually abused children are unlikely to disclose in such a setting and if they have disclosed, they may retract.

With respect to the child's wishes, a distinction has to be made between what a child wants and what a child needs. Some children express a wish to live with one parent because they see that parent as vulnerable, and needy. They reverse roles and seek to care for such a parent. This may be against their basic needs and such children need help with their guilt. Other children may wish to live with a parent who has physically or sexually abused them, despite the fact that such abuse is likely to continue. For example a four-year-old girl who had been sexually abused by her father and had sustained an anal tear and bruising said pathetically - 'I want to see daddy - even if he hurts me, I do'. Her older siblings aged eight and ten did not disclose abuse, but there were strong indications that they too had been abused. They also wanted to live with their father.

The Emotional Effects of Testifying

What follows is a hypothetical account, because, fortunately, children are not called to give evidence in the Family Court.

In legally contested divorce proceedings over custody or access, children are in the centre of a battleground between their parents. The majority of disputes are settled out of court by consent, with the help of Family Court counsellors. However, there is a small core of clients who are resistant to counselling even by the most competent counsellors. Such clients seek the decisions of the courts and they may remain locked into litigation often for many years. Some children may have been physically or sexually abused, or there are allegations to that effect. It is my contention that all these children are emotionally abused.

The emotional effects on children who are involved in court contested disputes where there are no allegations of abuse will be firstly addressed. Such children are emotionally damaged by the conflict between their parents. Litigation usually exacerbates any conflicts. The old hostility between the parents is revived during the course of the legal battles. Each parent accuses the other of poor parenting (or worse) in order to gain advantage in the request for custody or denial of access. The child has no hope of resolving a conflict which cannot be resolved by the parents. Children vary in their responses to these conflicts according to their age, sex and identification with their parents. Parents can and do 'brainwash' their children, mostly unconsciously, but at times consciously.

The research literature has shown an increased delinquency rate (in boys) whose parents had divorced or separated (Gregory 1965 and 1966; Douglas et al. 1968; Gibson 1969; Rutter 1971). Further, Rutter (1971) has shown that the longer the discord lasts the more likely the children are to develop antisocial problems. Children who experience parental discord followed by divorce and later a second discordant marriage had double the delinquency rate compared with children who only experienced one bad marriage.

What then could be the possible emotional effects on such children, who are already traumatised by the parental conflict, testifying in a court which uses adversarial procedures? For these immature, conflicted children testifying against one or other parent could give legal sanction to this method of resolving conflicts. It may entrench, for the children, their parents' antisocial attitudes towards one another, and children are likely to identify with such antisocial attitudes and values. For children who have been 'brainwashed' a court testimony may reinforce their already polarised position. Such children develop extreme loyalty to one parent to the complete exclusion of the other, to protect themselves against the conflicting pull of loyalties. For those children who remain unaligned and conflicted in their loyalties, testifying can only exacerbate such conflicts.

Allegations of Sexual Abuse in Divorce Proceedings

Turning now to the increasing number of allegations of child sexual abuse in divorce proceedings, the usual scenario is that one or other parent (usually the mother) accuses the other parent of sexually abusing the child. It is vitally important to ascertain the truth or otherwise of such allegations. A mistake might jeopardise a child's future with risk of future abuse, or destroy a parent's (usually the father's) family life and career as well as exclude the child from knowledge of that parent. Allegations made by the parent may or may not also be made by the child. A child's allegations may be true or false.

Overall, false allegations of sexual abuse by children are rare. In a review of the literature, Green (1986), noted the low incidence of false allegations - 6 per cent of reported cases of child sexual abuse. This figure, however, rose dramatically to 55 per cent in one study (Benedek & Schetky 1986) and to 36 per cent in Green's (1986) study in Family Court cases with litigation over custody or access.

It is not the purpose of this paper to describe the evaluation of such allegations, but for your interest Green's (1986) table of characteristics of true and false cases of child sexual

abuse is included. False denial of sexual abuse is also very common, particularly where there is no dispute over divorce.

Child sexual abuse occurs in a climate of secrecy. Summit (1983) described the child sexual abuse syndrome. Secrecy and helplessness are prerequisites for the occurrence of sexual abuse. Dependent children feel entrapped and accommodate to the parental sexual demands. This may be followed by delayed, conflicted, or unconvincing disclosure. Having disclosed, the child is frequently disbelieved and retracts the disclosure. The child may feel very ashamed of the forbidden sexual acts which are sometimes accompanied by pleasurable sensations, and very guilty over the possible prosecution of the offending parent and subsequent break up of the family. Such pressures tend to inhibit disclosure of sexual abuse or encourage retraction once disclosure has been made. False denials therefore are common, but false disclosures are rare.

Effects of Testifying in Court

There have been no systematic research studies and follow-up evaluations done on the actual effects of courtroom testifying on children. However there have been many single case reports, particularly involving the criminal court. Mental health professionals have become increasingly aware that child victims may be victimised again by the court process. In addition to the traumas of the strange courtroom, the child has to face the defendant - often the child's own parent. Counsel for the defence will try to disqualify the child's allegations, adding to the child's belief that they will not be believed.

Children cope with such stresses in a variety of ways. Some children freeze and are unable to remember events that they had previously recalled in great detail. Some retract their previous allegations. Children frequently fear retaliation by the defendant, particularly if threats had been made to the child. There is also humiliation and embarrassment about the nature of the allegations and the children may feel that they are on trial.

A positive side of testifying has also been put forward. It may allow the child to take an active role towards mastering the trauma and towards seeing justice done. Single case reports particularly with adolescents (Claman et al. 1986) have demonstrated this.

Figure 1

Characteristics of the True and False Cases of Child Sexual Abuse

True Cases	False Cases
Delayed, conflicted disclosure, often with retractions	Disclosure easy and apparently spontaneous
Disclosure usually accompanied by painful and depressive effect	Disclosure with absence of negative effect
Child uses age appropriate terminology	Child may use adult sexual terminology
Child initially reticent to discuss abuse with mother	Child discusses the abuse when prompted by mother - child checks with mother or others
Child rarely will confront father with the allegation even with mother present	Child will often confront father with the allegation in mother's presence
Child usually fearful in father's presence, congruent with ideation unless molestation was gentle and non-threatening	Discrepancy between the child's angry accusations and the apparent comfort in his presence
Mothers often depressed; no other specific psychopathology	Prominent paranoid and hysterical psycho-pathology in mothers
Child usually demonstrates signs symptoms of child sexual abuse syndrome	Child might be sexually preoccupied but does not exhibit signs and symptoms of child sexual abuse

Source: Green 1986

The Need for a More Humanistic Approach

With respect to child sexual abuse a plea is made for a more humanistic approach towards offenders and their families.

Firstly, children reared outside the normal moral values of our society do not share our attitudes and values. Very young children do not know that child sexual abuse is abnormal. Older children, are in time, exposed to societal values and know it is wrong. Such children, sworn to secrecy, are deeply ashamed, guilty, confused and prefer to blame themselves rather than the parent on whom they are totally reliant. Frequently they do not share the investigator's or society's anger at the offender and are fearful of losing such a parent. They know the outcome of disclosure could be the parent going to gaol and the break up of the family. Such children should not have to be burdened by the investigator's (albeit very understandable) anger, relentless pursuit of the truth, multiple interrogations and repeated courtroom testimonies. We all feel angry or even outraged when children have been sexually abused, sometimes very cruelly. Yet we are not able to help such children until we come to terms with our own anger.

Children require therapy and support rather than investigation. In time, they may experience the anger (which is often outside their awareness), but it should be their own anger and at their own pace.

Secondly, the offenders could be dealt with differently. Society deals much more harshly with perpetrators of child sexual abuse than child physical abuse. Yet it is known that in both instances there is a cycle of abuse, with abuse being repeated through the generations. In communities where there is a more humane treatment of sexual offenders (Giaretto 1982; Phelan 1987) more offenders will admit to the offence and come forward for treatment. This also serves a very valuable preventive function. With this more humanitarian approach to child physical abuse the incidence of severe physical injuries has fallen, as parents are able and do call for help. This has not happened with child sexual abuse where there is every disincentive to seek help or to admit to the offence. If the emphasis was on treatment of the offender and not on punishment, the need for children to testify against their parents would be greatly diminished.

Thirdly, the family requires help. It has been a common assumption that incestuous families are better off without the offending parent. Yet the affected children are not thankful for the break-up of the family. It is possible, with a combination of individual, family and group therapy to treat these families (Giarretto 1983; Phelan 1987). It is also known that once the child sexual abuse has been exposed the recidivism rate is very low (0.6 per cent Giaretto 1982; 2 per cent other studies). The forensic psychiatrists also claim that whilst it is very difficult to treat fixated paedophiles, the treatment of incest offenders (who are regressed paedophiles) is relatively easy.

In conclusion, courtrooms are bewildering and traumatic for adults, and may be terrifying for children. The Family Court, with the welfare of children being its paramount concern, has rightfully kept children out of court.

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Children in the Family Court
Another Way to Play Blind Man's Bluff

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This paper will look briefly at the processes by which children are included in proceedings in the Family Court. Children generally are not called as witnesses in the Family Court. In fact, Rule 5 of Order 23 of the Family Law Rules states specifically that a child who is not a party to proceedings is not to be called as a witness or remain in court unless the court otherwise orders, (sub-rule 5 (5)). Similarly, a child is not to swear an affidavit for use in Family Court proceedings unless the court has given leave to do so (sub-rule 5 (6)). While Order 23 Rule 5(1) provides that a judge or magistrate may interview a child in chambers, this is not a widely adopted practice in the court.

So how does information about children come before the court? Clearly, children are intimately affected by many of the applications made to the Family Court. There are three common avenues for such information to be conveyed to the court and those participating in proceedings:

- through the affidavits and evidence of the parties to proceedings and witnesses they may call;
- through interviews and reports prepared by Family Court counsellors; and
- through information presented by a separate representative who may be appointed to represent a child, or an intervener such as a child protection agency.

This paper will focus on some of the current problems consumers encounter in their dealings with the Family Court. In drawing these matters to your attention, it must be pointed out that much valuable work has been conducted within and before the court. In the Sydney and Parramatta Registries in New South Wales much energy has been devoted to liaison between the Family Court and the Department of Youth and Community Services. A protocol was developed as to how matters should be conducted before the Family Court where allegations of child sexual assault were raised. In the last three or so years there have been reported judgments where the issues of child sexual assault are acknowledged as

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significant in custody and access proceedings. The concern is in part, the limitations of progress so far. Many of the improvements achieved over the last few years are not yet generally applied either by court personnel or practitioners.

The particular issues to be addressed relate to the processes used by the court to deal with children who have suffered abuse at the hands of one of the parties to a family law action. At the moment, largely the same process is applied to children who are the subject of custody or access applications, regardless of the reported history of their family life. A history of sexual or physical assault or emotional abuse can have a significant impact on the way in which a child will present to court counsellors and separate representatives and there are problems in the way the process is currently structured. Some of the problems arise from the way in which a child's behaviour is interpreted by those adults appointed by the court to present information about the child.

This paper will focus on the issues associated with allegations of child sexual assault and to a lesser extent, other forms of domestic violence. Whether the problems identified apply generally to all children involved in family law proceedings is a matter for further discussion.

Issues Relating to Child Sexual Assault

Some of the common misconceptions about child sexual assault and the ways in which such misconceptions affect the practice of lawyers, judges and court counsellors will now be examined. There is still a considerable level of ignorance and misinformation about child sexual assault in the community at large, and this of course, is reflected in the attitudes and beliefs held by Family Court personnel and legal practitioners. There are several common responses to a disclosure of child sexual assault that demonstrate a lack of understanding of the nature and effect of such assaults.

Disbelief

It is still very common for people, especially lawyers, to say that children lie about being assaulted or that they are 'put up' to it by their malicious and vindictive mothers (Wilson 1986; Nyman 1986). This is simply not true. That is not to say that there will never be a false complaint (Horsky et al. 1986; Summit 1983), but given the extraordinary frequency of sexual assaults upon children (one in four girls and one in seven boys prior to age eighteen years), it is much more likely that lawyers will be confronted with an offender who maintains he has done nothing, rather than a child who falsely says someone has assaulted them. An allegation of child sexual assault is a serious matter and should be treated seriously. Where such allegations are simply dismissed out of hand a great disservice is done to child victims.

(M)other blaming

A great deal of suspicion is directed to allegations of sexual assault that are raised in the context of family law proceedings. Adults and outsiders often expect that children will immediately disclose an assault upon them; however, this expectation flies in the face of the subordination and helplessness of children who are abused by a person in a position of authority and trust (Summit 1983). It is in fact much more likely that a disclosure will occur after the child has had a period away from the offender (for example, the breakdown of a marriage and separation of parties) and has had an opportunity to feel safe to talk about such things or is anxious at the prospect of having to resume contact with the offender (for example, through access visits) (Horsky et al. 1986, p. 170).

Similarly, there is an ill-informed wisdom that holds that 'women must know' when their children are being sexually abused. Flowing from this, women can be labelled as malicious or manipulating because they only choose to reveal abuse when this will be to their advantage in custody or access proceedings. In fact, 'most mothers are not aware of sexual abuse' (Summit 1983, p. 187). Typically, abusers will go to great lengths to ensure that the

offences occur unwitnessed and remain a tightly kept secret. Many women decide, on learning of the abuse, to protect their children and vote with their feet. Sadly, there are enormous economic, emotional and social constraints that work against such direct action. Yet clinical experience indicates that, 'a mother who can advocate for a child and protect against re-abuse' (Summit 1983, p. 179) provides power and self-worth which are essential to the recovery of sexually assaulted children. Society should be cautious of condemning women who attempt to protect their children.

We should also not lose sight of the fact that for many children, the Family Court will be the only legal arena in which the allegations of abuse are aired. This is often the case with very young children because they are not sufficiently verbal or have not suffered physical injuries that will corroborate their abuse for the purpose of criminal proceedings. Where the offender is no longer residing with the child, child protection agencies may decline to take action because the child is no longer in immediate danger.

Ignorance of the nature of child sexual assault

Misunderstandings as to the nature and effect of child sexual assault commonly lead to inappropriate inquiries and responses.

There continues to be a lack of appreciation of the different stages employed in the sexual abuse of children and a consequent discounting of the harm caused to the child. Suzanne Sgroi (1982) outlines the phases of engagement; sexual interaction; secrecy; and disclosure. Her analysis indicates abuse is generally structured in a progression from the engagement phase, where contact may be more 'superficial' (for example, fondling or masturbation presented in the context of a game and often accompanied by special attention of gifts from the perpetrator) to more invasive sexual contact (for example, vaginal or anal penetration) which is conducted often under threat of harm or force. Generally, the 'severity' of the abuse will increase over time if not stopped. This analysis is borne out by the statistics collected in the Child Sexual Assault Centres in New South Wales over 1985-86 (New South Wales Department of Health 1986) *(see Table 1).*

Table 1

Type of Abuse

Age of Child	**Fondling/Digital/Fellatio Stimulation**	**Vaginal/Anal Penetration**
0-5 years	65%	16%
6-11 years	55%	24%
12-16 years	31%	59%

Source: NSW Department of Health 1986.

When abuse is exposed in its early phases (perhaps partly in response to community education and awareness campaigns) there is a tendency for adults to trivialise the abusive conduct. 'He just touches her in the bath', 'inappropriate parenting'. The court also sometimes fails to acknowledge that such behaviour is the precursor of what is more easily identified as 'serious abuse' such as vaginal and anal penetration.

A consequence of failing to recognise 'engagement' behaviour is that the Family Court often does not consider that such behaviour should attract protection for children. Women are continually advised that the behaviour exhibited by children, or reported to them, 'is not enough' to get an order for suspension or supervision of access, and is sometimes dismissed out of hand by court counsellors.

Even when the court is satisfied that children may be at risk of further abuse on access, it is common for access to be ordered to continue under supervision. This is a very unsatisfactory situation, especially when the supervisor does not believe that any abuse has occurred nor that the child requires protection.

The continuation of contact between abuser and child has very serious consequences:

- it 'sets-up' the child to be available for the continuation and escalation of abuse;
- it tells the child that they are not believed, or at best, not valued and discourages subsequent disclosures; and
- even if no further assaults occur, the continued contact can present tremendous anxiety and emotional stress for the child in anticipating and enduring contact in which they do not feel safe.

Legal Process Versus Child Protection

An apparent lack of appreciation of the ways in which children experience and respond to sexual assaults upon them produces some serious problems in the processes employed by the court in assessing allegations.

Many of these problems stem from the tensions between the requirements of 'legal process' and the often contradictory requirement of child protection. Some of the more obvious difficulties presented by this conflict will be addressed in the second section of this paper.

Counselling interviews

A very common complaint pertains to the requirement of court counsellors that children be interviewed alone with each of their parents. Cases have been related where young children have been left alone in the interviewing room with their abuser and subjected to threats and intimidation whilst supposedly being 'assessed' for the purposes of the proceedings. Not only is this approach questionable but the inferences drawn by counsellors who observe children who fail to froth at the mouth when approached by their abuser, are not reliable.

Behaviour

Many counsellors apparently expect children who have been abused to exhibit fear or anxiety in the presence of their abuser. While this may be true for some children (such as those physically abused) many children will go out of their way to present to the world a 'normal' relationship with their abuser. They know the consequences of telling the secret and have probably had years of practice in accommodating the abuse in their lives in a way that does not attract attention to them or the abuse (Summit 1983, pp. 184, 186; Cameron & Smyth 1987).

Misconceptions of child sexual assault lead us to look for, or insist on, evidence which is usually not there such as independent witnesses, medical evidence, immediate disclosure. As long as the Family Court insists on such evidence it will fail in its duty to the majority of abused children who come under its jurisdiction.

Displaced abuse

The issue of 'displaced abuse' is one which many women feel the court has not yet addressed satisfactorily. By this is meant situations where the child has witnessed abuse but may not have directly suffered it themselves. The most common scenario involves young children who have witnessed their mother being physically assaulted by their father, although, they themselves have not been assaulted. Although they are often told such violence does not affect the access-parent/child relationship, women find this hard to swallow. The

position of the New South Wales Domestic Violence Committee has always been that it is contrary to the best interests of the child for them to be placed in a situation where they fear for their own safety, and often, that of their mother's.

A slightly different problem occurs where a man who has sexually assaulted his step-child or child seeks access to a younger child who has not yet been abused or has not yet disclosed. The presumption of innocence that applies in criminal proceedings is adopted in the Family Court and evidence of direct abuse is usually required before restraints are imposed on access.

Criminal behaviour

Generally, there appears to be a reluctance on the part of Family Court judges to squarely confront the issue of abuse. The difficulties posed by a civil court making findings of criminal behaviour are not easily resolved. Consequently, it is not uncommon to find the court unwilling to make a finding as to whether the abuse alleged has occurred. A detour has however, been mapped out relying on the mother's incontrovertible belief that abuse has occurred (*B v. B* [1986] FLC 91-758).

Pressure to settle

Other tensions derive from the gross inadequacy of resources available to the Family Court and its philosophy of encouraging parties to reach their own agreements to matters in dispute. The vast majority of custody and access proceedings initiated under the *Family Law Act 1975* are never heard by a judge or magistrate. In that context, the power of legal representatives and court counsellors can be significantly magnified.

One woman who stopped access when her five-year-old girl began to return from access visits exhibiting sexualised behaviour was threatened by a court counsellor, 'if you do not allow your husband to see your child, I will write a report recommending that she be placed in a boarding school and neither of you will see her very often'.

Many others report how their lawyers pressure them to agree to access against their own judgment - 'You cannot deny access.' 'You will lose custody.' 'It is better to agree to supervised access and keep some control over the process.' It is a very rare woman who has the personal and emotional resources to withstand such pressure.

The pressure to settle, experienced by many women seeking to protect their children, is produced by a combination of several factors. It may be due to the perceived gaps between truth and proof, that is the difference between what happened and what can be proved has happened. It may also result from an uneasiness practitioners face in having to acknowledge and deal with child sexual assault. Women are still told 'not to mention it' because they may inflame negotiations. The pressure to settle and ignore the issue of abuse may also be a response to lawyers' perception of the courts as suspicious or disbelieving of such allegations.

Separate representatives

The court has the capacity to appoint a separate representative for children whose welfare is to be considered in the context of family law proceedings.

The role of a separate representative differs from that of other advocates in the proceedings. The most common complaint about separate representatives is their perceived failure to adequately liaise with child protection agencies involved and their failure to collect and present information to the court that relates directly to the child's welfare for example, sexual assault assessments and reports of school counsellors. Child welfare agencies should keep themselves informed as to the progress of Family Court proceedings, but agencies and individuals need to know when reports are required and what particular issues need to be addressed therein.

This paper presents a brief overview of some of the most common difficulties and perceived inadequacies that abused children experience when they are involved in family law proceedings. A critical appraisal of consumer complaints relating to children in the Family Court highlights several areas that may benefit from further attention.

Despite the progress of recent years, there remains a need for much broader education of judges, counsellors and lawyers, in the general dynamics of child sexual assault, its effects on children and ways in which children may respond to and accommodate abusive behaviour.

Other complaints and concerns relate to the 'assessment' processes adopted by counsellors and lawyers. Procedures that meet the requirements of 'legal process' in cases where children are not at risk may not necessarily be the most appropriate to apply in a context requiring much greater attention to issues of child protection.

It has been described how an incomplete or inaccurate understanding of the nature and effects of child sexual assault leads adults involved in such matters to look for and expect to see, behaviour and evidence that usually will not be there. If society wants to maintain the welfare of children as the primary concern of the Family Court, it is necessary to critically review the procedures currently adopted and consider whether more appropriate measures can be devised to deal with matters involving children who are, or may be, at risk.

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The Child Witness in the Family Court

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The laws on using children as witnesses are riddled with inconsistencies. In this paper the rules on the calling of child witnesses in the Family Court will be compared with the rules in criminal cases to demonstrate the different approaches which have been taken. There will be a discussion of the difficulties that children have in putting their evidence to the court and suggestions on ways in which the rules can be made more consistent while still protecting the child.

Children's Evidence in the Family Court

Children are not encouraged to give evidence in the Family Court. In proceedings in relation to a child, the court is obliged to regard the welfare of the child as the paramount consideration (s.60D *Family Law Act 1975*).

In making orders in relation to custody or guardianship of a child the court has to consider any wishes expressed by the child on the matter and give them such weight as the court considers appropriate (s.54 (1) (6) *Family Law Act 1975*).

The court obtains information about the child's wishes from evidence of what the child has said to adults such as the parties or expert witnesses, from a court counsellor's report, or from information provided by a separate representative for the child.

The judge may interview the child in chambers either alone or in the presence of another person. Anything said at the interview is not admissible in evidence.

A child may not be called as a witness or remain in court unless the court orders otherwise. The only exception is in the case of a child who is, or who is seeking to become, a party to the proceedings.

A child is defined to mean a person under eighteen years of age (Family Law Rules Order 23 Rules 1 and 5). As a result of these rules children rarely have a direct input into Family Court decisions. The child's wishes are communicated to the judge through a third party. There are advantages to this procedure: the child does not have to attend court and have their schooling disrupted, nor are they cross-examined by hostile lawyers, and they can be interviewed about their wishes by a neutral person in familiar surroundings.

On the other hand it does mean that the court receives hearsay evidence of what the child has said. In a case where physical or sexual abuse is alleged against a parent it means that this second-hand evidence is set against the evidence of an adult who can give evidence in court on oath denying it.

In the Family Court of Western Australia the judges generally require corroboration of evidence of a child before they are prepared to believe that sexual abuse has occurred. This

would require something more than the child's statement even though it has been repeated to a number of different people.

The Criminal Courts

Where the child is the accused

In Western Australia the age of criminal responsibility is seven. A child of this age who is accused of a criminal offence can appear in court and may be required to give evidence in their own defence. In practice few children so young appear before an adult court. But children of around twelve frequently appear before Children's Courts. Children of fourteen and upwards can be sent to adult courts for trial and all children on murder charges have to be tried by the Supreme Court.

As defendants, particularly on serious charges, children are represented. But they are still expected to answer in public before the law in the same way as an adult. Children suspected of offences are liable to be questioned by police. There are rules in most states to encourage police to interview children in the presence of an independent adult, but if the rules are broken the court has the discretion to admit the evidence anyway (*Frijaf v. R* [1982] WAR 128).

There are no special rules to protect the child defendant in a criminal hearing. It is assumed that the child is capable of relating their version of events which can be weighed against the evidence of the prosecution witnesses.

Where the child is the complainant

When an adult is on trial and a child is a witness there are special rules to protect the adult. A child under twelve can only give evidence on oath if the court considers that they understand the nature of an oath.

A child may give unsworn evidence but this evidence must be corroborated by some other evidence, which may not include the unsworn evidence of another child (s.101 *Evidence Act 1906* (WA)). Even in the case of sworn evidence given by a child, a judge should warn the jury that there is a risk in acting on the uncorroborated evidence of a child (Byrne & Heydon 1986). The result is that prosecutors require corroboration before charging a person with an offence against a young child. An offender who assaults or commits a sexual offence against a child in private and who will not confess under interrogation suffers no consequences. Worse still they can go before a civil court and claim they must be innocent because they have not been prosecuted.

If a child does have to give evidence against an adult they can be cross-examined at length. They are intimidated by the practice and procedure of the court and exasperated by the delays. The court is obliged to treat their evidence as inferior to that of an adult.

Assessment of Children's Evidence

My own experience in criminal cases is that children make very reliable witnesses. It is always important to get information from children first-hand. So often adults want to take over and tell what they think the child said or ought to have said. If children are allowed to relax and tell what they have to say in their own way then it is well worth listening to.

It is pleasing to note that evidence is coming forth that young children are reliable witnesses. For example, at a conference organised by the National Children's Bureau, Professor Graham Davies described recent research which shows that although children remember less than adults, they are no more inaccurate in what they remember. Also children were able to differentiate clearly between what they had seen and what they had imagined (*The Law Society's Gazette*, 10 February 1988).

Children giving evidence in their own defence are just as involved in the case and as mindful of the consequences as children who are witnesses against an adult, or who are the subject of custody or access proceedings in the Family Court. Consequently it is suggested that children should have more of an opportunity to participate in Family Court proceedings which concern them.

Methods are being developed to allow children to give evidence without the adults who might inhibit them from speaking freely, being present. For example, instead of a mere report on the children's wishes there is no reason why a court counsellor could not videotape the interview with the child and produce the video with the report. Better still the Family Court could use one of the closed-circuit television systems which are being developed in New South Wales and Western Australia. In New South Wales the child is examined and cross-examined over closed-circuit television while out of the court. In Western Australia the child will give evidence in court while the accused is out of court watching on closed-circuit television (*Child Welfare Act Amendment Act (No.2) 1987* (WA)).

These procedures would allow the Family Court to get direct evidence from children. In cases where sexual abuse is alleged the burden of proof is less strict in the Family Court than in a criminal court. The court may make a finding against an adult on the uncorroborated evidence of a child but, unless the child gives evidence, the court is unlikely to make such a finding.

There remain benefits in preventing a child being compelled to give evidence against their will. The threat of being compelled to go to court and be cross-examined is something that can be held over a child or a custodial parent while the proceedings are pending. This can cause anxiety to the child. Perhaps the answer is to change the rules and give the discretion to the child as to whether they should give evidence, not to the court. An accused person cannot be compelled to give evidence in their own defence and it is suggested that the child should have a similar right to decide whether or not to give evidence in the Family Court.

Summary

This paper argues that there are inconsistencies between the Family Court, the Children's Court and the adult criminal courts in whether children are permitted to testify and the weight accorded to their evidence. It argues that the Family Court should give children more of an opportunity to give evidence directly to the court while continuing to protect them from manipulation.

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Long-Term Effects on Children and Their Families

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Principle 2 of the United Nations' Rights of the Child is as follow

> The Child shall enjoy special protection, and shall be given opportunities and facilities by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration (United Nations 1959).

Some of the effects of the criminal justice system on children and their families can be seen from the following quotes:

> I hate you. Look what you have done. Now he's in prison I've lost everything. A mother's comment to her eleven year old daughter on the imprisonment of the woman's de facto husband for sexual penetration of the child over a two year period (Country Court, Melbourne, 1987).

> She never talks about it. She doesn't remember anything. A comment by a migrant mother who had refused to take her nine year old to counselling. The child had hidden as the defendant entered the courthouse (Prahran Magistrate's Court 1986).

> I can't understand why he cries whenever I try to talk to him about it. A Mother's comment as she sat forward with clenched fists and eyes full of tears during pre-court discussions concerning the indecent assault of her seven year old son. The matter had been referred through the Centre Against Sexual Assault. The defendant later pleaded guilty. Although the child was not required to be at trial the mother took him 'to see justice done'.

> In many Australian families, children are fighting for their most basic right, survival. The description of the 'battered child' was originally meant to apply to young children who had received serious physical abuse, generally from a parent or foster parent (Deveson 1978, p. 124).

It is now recognised that although abuse occurs primarily in the home, it also spreads to others in the child's extended family; to authority figures with child care responsibilities; and to paedophiles who prey on innocence, exploiting the powerlessness of children.

The perpetrators of these crimes must be brought to trial even in the knowledge that the total process of the trial is going to compound the victim's psychological injuries. The problem facing the community is how to reform the system of justice with all its attendant trauma and long-term implications. Review and revision of legislation is only one of the answers. It is the manner in which emerging child victim services are provided that is the other.

The Child as a Victim - Historical Context

It is important to place today's concerns for child victims into an historical context to gain objectivity in appropriately addressing their needs. The above issues were of little consequence in the past. Exploitation and abuse of the least powerful members in society are imbedded in the history of humankind. They are, in Jungian terms, part of our collective unconscious. Although the terrorisation of children has only recently been brought into the public arena as a matter of grave concern, it is not a contemporary phenomenon. Through the past there has been: ritualised sacrifice of children; child abduction and slavery; burning of child 'witches'; children 'sold' in marriage - until 1929 in England the age of marriage was twelve for girls and fourteen for boys (Taylor 1981, p. 7); from 1660 children were told 'that's the way to do it' through the horrors of domestic violence in Punch and Judy shows; in 1875 child brothels 'flourished' as did the white slave trade (Taylor 1981, p. 7). The appalling conditions of the working-class drove young girls to sell their only possessions - their bodies (compare St Kilda and King's Cross in 1988 with the many 'gutter crawlers' in expensive cars, reputedly in some instances 'family men' who exploit children and later return to their own families); women and children, as well as men, were placed in work (poor) houses, slave and convict ships, and later extermination camps; children were sent down coal mines until their bodies were broken; they were, and still are, maimed and deformed to attract attention as beggars; and acts of gross brutality occurred to children (women and men) in the guise of war - with much of these continuing to today in the name of religion, racism and a righteous territorial imperative.

The knowledge of humankind's propensity to inhumanity and exploitation is not a cause for complacency. On the contrary it indicates vital challenges for service providers in the importance of placing today's concerns into an historic context to gain objectivity in appropriately addressing victim needs. Until well into the 20th century children (and women) were identified as possessions, and incidents that occurred within the family were seen as 'private' matters. Bringing matters to trial involving a child as the victim of a family or extended family member is only a relatively recent event.

History shows that the problem is one which has grave implications for effecting lasting change in community attitudes (including those embodied in revised legal procedures). The seriousness of this problem is supported by the January 1988 survey on *Community Attitudes Towards Domestic Violence in Australia*, commissioned by the Commonwealth Office of the Status of Women, which revealed that one in five Australians condoned such violent behaviour in 'certain circumstances'. Children (as well as women) are the most frequent victims of, and witnesses to, domestic violence.

Also ominous are the figures in the same report indicating that one in three women have been victims of sexual abuse, which must give rise to concern that these people will be amongst service providers to abused children. When this occurs, it is vital that all energies

are directed to the particular needs of each individual child, and that the temptation of dealing with the worker's own personal issues in an attempt to expiate the horrors of their own childhood experiences is avoided.

Treatment of Child Victims

Service providers and agencies

There is, of course, a place for self-help agencies to assist child victims. However, these agencies require close monitoring and quality control if they are to provide appropriate support. If supervision and debriefing are not available, service providers from such agencies may create further trauma for victims and their families. The very raison d'être of victim self-help also has the potential to entrench the victim status.

The courtroom drama

Victims of crime, and witnesses to crime, are compelled to attend the accused person's trial to provide the court with evidence of the offence. Balancing the scales of the criminal justice system to accommodate the needs of victims, while preserving the rights of the accused, is an important, complex and delicate task currently confronting law makers throughout Australia. There are considerable difficulties in accomplishing this balance, and no research data is available on the short, or long-term, effects of the courtroom drama itself on victims and witnesses. No longitudinal studies exist in Australia on the effects of crime on the family life of the victim. The available material describing the long-term impact on victims relates to those individuals who have become dysfunctional and have sought or received help. No material is available about victims who have coped with both their victimisation and their court appearance. Abundant anecdotal and 'phone-in' information suggests that many crimes, particularly those involving sexual abuse are not reported to the police, and it is widely assumed that many of these remain concealed because of fear of the trial process.

Absence of data on the successful coping of child victims, as opposed to those who have become dysfunctional, is crucial in evaluating the impact of the courtroom drama. It is usually a care provider (often a family member) that seeks assistance on a child's behalf, and it is possible that the difficulties being experienced may relate more to the family member than to the child. This is particularly relevant if the family member seeking assistance has also been a child victim.

If the child has been a victim of violence or sexual abuse from a family member, the child's ability to cope with the accompanying trauma will depend largely on its ability to ask for assistance within the family. If the child has cried for help but has not received it, this child will be at risk. A child may also be put at further risk by criminal proceedings.

The long-term effects of the above depend on the child's previous socialisation, ability to cope, developmental stage, family support and family strength. They depend on the availability of assistance and the appropriateness with which assistance is provided through police, counsellors, lawyers and court personnel. 'Interaction with adults whose values are different from those of the family milieu may produce later internal conflicts' (McCord 1978, p. 289). It is the quality of the care and support that are its crucial components. By focusing on the child's problems the child can learn that coping with crisis is both possible and normal, and that s/he is a valued, not a discounted member of society.

It is not possible to separate the long-term effect of the crime on the family, from the effect of the later court appearance; for immediately the child reports the crime the previous dynamic state of the family will be altered. If the perpetrator of the crime is a family member then the total unit may disintegrate. The child then becomes the victim three times over - a victim of the crime; a victim of the family; and a victim of society.

> The shock effects are particularly significant and have the most serious consequences if the threat to life has been overwhelming. The degree to which the child and family feel totally helpless and powerless may also contribute to the trauma. It seems likely that subsequent gaining of mastery may mitigate the effects of this reaction to some degree (Raphael 1986, p. 82).

However, a child is rarely in this position of recovery. On the contrary, after reporting the crime the child's powerlessness is reinforced as they are questioned continuously by family, police, counsellors and lawyers reliving and compounding the fears generated by the event time after time.

> . . . Despite common goals these agencies and individuals also have non-mutual interests in the kinds of information needed and the process by which it is gathered. More important, they rarely have authority or jurisdiction over one another's activities, and are not individually in a position to direct or co-ordinate one another's actions except by mutual consent. They must agree to work together to prevent systematic trauma and multiple interrogation of children if it is to occur on a community wide basis. They may have to give up some things in order to gain others, things that will ultimately be in their interests, because they are in the interests of children who are the objects of their intervention (MacFarlane & Waterman 1986 p. 166).

In matters of sexual abuse, a child's silent compliance to the acts is usually acquired through trickery, bribes, or threats of consequences. When the child is placed in the courtroom, in front of the accused, all the worst threats appear to come true. Further decisions are continually being made on the child's behalf and they are not consulted about who should be present in the courtroom. Children as young as nine years have said they do not want their families to hear details of the crime. These children are entitled to their privacy, but it is 'taken for granted' by the magistracy, judiciary and court officials that close family, usually a parent, provides the most appropriate support. It is the child who understands the dynamics of their family and the child should be consulted.

In commenting on the effects of sexual abuse on children, Kelly and Scott (1986 p. 160) point out, that 'discussing sexual topics is difficult for most people in Western societies. This difficulty is exacerbated when a client from one socio-cultural group attempts to discuss sexual issues with a therapist from a different socio-cultural group.' The problem becomes even greater for the victim talking to a police officer or a lawyer, and greater still when these matters become public in court. In cultural groups in which virginity is an essential ingredient to marriageable status, the 'damaged goods' syndrome of a young girl's rape can destroy both the child and her family. Some children learn to adapt to extraordinary pressures by not speaking about what occurred - by pretending to forget.

The important changes in evidentiary and procedural aspects of legislation relating to child victims in Victoria and elsewhere in Australia are to be applauded. The inclusion of video aids to assist children in delivering their evidence is an appropriate use of technology to protect the victim while ensuring that the accused stands before their accuser.

To keep pace with improvements in laws, the antiquated and austere law court buildings require urgent attention. Children and families have no privacy, comfort or available refreshments. The long periods of time spent 'doing nothing' in a fear provoking, inhospitable and uncomfortable environment compounds their problems. In most courts the conditions that victims and witnesses have to endure are intolerable, adding further stress to feelings of fear, alienation and confusion.

In Victoria, a child victim or witness in summary matters may spend a half day or day in court, rarely a longer period. But in the current climate of concern, little attention is being given to their needs in these cases regardless of the distress they may be experiencing. Indeed, trauma in summary matters can be identical to that experienced in superior courts. In the lower court a child is also in close proximity to the offender; is surrounded by strange

adults in an unfamiliar environment and is in a powerless situation, having to comply with demands to recall and retell the events of the offence.

The child has no frame of reference for the differences between summary and indictable offences nor a concept of the comparative severity of offences. Such distinctions are determined by adults. If the child had experienced overwhelming terrors and threats to survival at the time of the offence, the same feelings will be reactivated in a magistrate's courtroom.

In Victoria, it has become the practice in indictable offences for few children to be required to attend the committal proceedings. These are usually dealt with in the form of a hand-up brief to protect the child victim from the trauma of giving evidence on two occasions (the first at the Magistrate's Court committal proceedings, the second at the superior court trial). However, this very practice sometimes later jeopardises the child who will have had no 'dress rehearsal' for the tasks confronting it in the trial itself.

From the child's point of view, the major differences between the Magistrate's Court and Superior Court jurisdictions are the increased anxiety in care providers' and court personnel's responses; the ritual and regalia of the superior court and the presence of a jury. In many cases a child is also confronted by the adult's constant speculation of possible penalties for the accused. If the trial results in an acquittal, explaining this to the victim so that they do not feel disbelieved, devalued and discounted is a highly sensitive and important task.

The lack of statistics

> There are no reliable statistics of child sexual abuse in Victoria. This is partly due to the nature of the problem - many cases are unreported, or if reported are not able to be substantiated. There is a lack of research (Law Reform Commission of Victoria 1988 p. 79).

Additionally, there are no comprehensive figures on child victims or witnesses to other crimes. The details or extent of the problem is simply not known and it is not possible to make a definitive statement on the long-term coping of these families.

Available statistics lack common coding and there is no central data base. Police figures record the number of offences; Child Welfare Agencies and Centres Against Sexual Assault record the children involved; and the courts record convictions.

The impact of professional treatment

In contrast to the absence of adequate formal records, there is abundant anecdotal information which details the personal distress and frustrations victims experience from the time of the crime itself through to court appearance, months or years after the event. Additional material describes further problems encountered in later life, and there is evidence that many alcohol or drug addicted and imprisoned adults have suffered sexual abuse and family violence as children.

As earlier stated and emphasised here, anecdotal material details the difficulties of victims who had sought or received help. This information shows that it may not be the criminal act or court appearance which determines later dysfunction - rather it will be the meanings of these events to the person concerned which will determine their ability to cope with the future.

There is absolutely no doubt of the gravity of the effects of crime on children. Potential problems lie not only in the presenting of evidence in court, but in the environment in which this occurs. A child who is overwhelmed by a crime is vulnerable and extremely sensitive to verbal and non-verbal messages from family members, care providers and the professionals with whom they come in contact. The vital importance of appropriately skilled personnel in the key roles of care givers, counsellors, police, lawyers and court officials, cannot be over-emphasised.

These professionals are in positions of great power and lasting influence over fragile families. In dealing with delicate issues they also need heightened insight into the values and beliefs they carry as outcomes of their own life experiences. If key personnel are experiencing tension or distress, overload or burnout, these will be absorbed by the child with the likelihood of lasting effects. Caring supervision and stress debriefing are crucial for all workers involved.

> . . . Even beyond the challenge to positive anchors of security, sexual abuse of children assaults our pathological defenses. Anyone betrayed and molested by loving caretakers in childhood will try to establish a protective mythology . . . An adult survivor of such a childhood may be very good at helping others in distress even while despising the child who elicits that distress. Many practitioners in the helping professions are victims. Some will be incapable of empathy with abused children. Others, further in their partial recovery from abuse, can feel only for the children and against the offenders. Child abuse gives new meaning to the old adage 'Physician heal thyself' . . . (Summit 1986, p. xii).

These comments support fears about the long-term impact of professionals on the later lives of children. They were further endorsed in McCord's analysis of the Cambridge-Somerville Youth Study. This Massachusetts research project initiated by Cabot in 1935, studied over a thirty-year period an all male child population and their propensity to commit crime, rather than the effects of crime. Despite the obvious limits to single gender research, the results are relevant to child victims because of the age range (5 to 13 years, median 10.5 years), random selection, and diversity of socioeconomic backgrounds in the sample, and the project's aim towards the prevention of future problems.

The project's counsellors visited selected children and their families twice a month over a five-year period. They encouraged families to call on the program for assistance. 'Family problems became the focus of attention . . . boys were tutored . . . received medical or psychiatric attention and were brought into contact with other community programs' (McCord 1978, p. 284). Counsellors focused on the child's needs and on strategies for managing difficulties in a manner paralleling many interventions offered to victims today.

Apart from some short-term successes and pleasant memories of caring adults, the evidence thirty years later presents a disturbing and ominous picture. There was an absence of positive outcomes in areas of prevention and considerable negative results (suicide, alcoholism, higher dependence and stress, lower self-esteem and earlier death) amongst the experimental group, compared to the control group who had received no professional intervention.

In essence, the project did not support the hopes and intentions of establishing positive strategies for long-term coping. The ominous warning that accompanies this result is that in some cases intervention may have created dependency or unrealistic expectations in the children. Even more potentially damaging, the children may have justified the help they received by identifying themselves as requiring help.

There are grounds for considerable anxiety when these findings are related to the topic under discussion, in the light of the statement by the United Nations Declaration of the Rights of the Child that 'the best interests of the child shall be the paramount consideration.' The indicators that professional intervention, albeit well intended, may entrench the victim status described by Lusk (1986, p. 105) as a 'helpless victim mentality', possibly thereby making a child victim a victim for life, contain grave portents of impending future problems.

Conclusion

The plight of distressed children moves the hearts and minds of all members of the community. Over the last eight years in Australia (longer in the USA, Britain and Germany) there has been a long overdue recognition of the needs and rights of child (and other)

victims. The dramatic growth in child victim services show these to be the largest growth industry in all welfare services.

'In the knowledge that child abuse takes many forms, children can be sexually abused or abused from neglect. A child whose spirit is broken may suffer just as much as a child with broken bones' (Deveson 1978, p. 125). The 'explosion' of agencies to assist these children, along with the findings of the above research, throws out urgent challenges which demand recognition and action. These must be taken up by all care givers, welfare agencies and others involved in assisting child victims, witnesses and their families. There is an unmistakable requirement for constant evaluation of the direction and appropriateness of program design and service provision. Understanding possible personal (or political) reasons for each staff member's commitment to child victims, along with supervision and stress-debriefing for staff are essential components in all programs.

The literature and research abounds with details of difficulties in coping with the crime and with the legal system. Even with constant vigilance, and an extraordinary effort in avoiding compounding these difficulties, there can be no guarantee of success until there is a unified, concentrated energy in longitudinal research. Future problems may not lie exclusively in the needs of children and their families; it is likely that they also involve the quality of professional intervention.

'One single act of violence is as damaging, creates as much lasting fear, impresses a watching child, as a hundred years of repetitive acts' wrote a remorseful, abusing father, in a letter to the management of a refuge for battered women. Erin Pizzey (1983, p. 90) added that 'it is the children who suffer and the pattern repeats itself through each generation. The answer appears to be simple; rescue this generation of children from learning violence'. But in its attempts to rescue the children and break the cyclic pattern will society compound the problem, or even worse create additional problems for these children and their families?

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The Child's Experience of the Legal System

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The Child Protection Unit at the Children's Hospital, Camperdown provides a comprehensive service for children up to the age of sixteen years who have been abused. This includes crisis assessments, medical examination and necessary testing, family assessments, short and long-term counselling/therapy, a group program for adolescents who have been sexually abused, and another for non-offending parents. The social workers in the Unit are involved in most of the ongoing work with children and families.

Last year there were 418 children seen in the Unit, 260 of whom had been referred for assessment of sexual abuse. Of this number approximately forty have proceeded with police action and criminal charges. At present, the average length of time from the laying of charges to the time of trial is between two and a half to three years. The authors have been involved with children at a small number of trials, more at committal proceedings, and many for whom the prospect of court appearance is something that looms as a source of anxiety and distress. They have looked at twenty cases where children ranging in age from four to fifteen years have testified or otherwise been involved in the court process. This paper is not the result of quantitative research; however, it is expected that these clinical studies are consistent with much of the available research. Where this paper will differ is that it is focused on case material from cases recently dealt with in the courts in New South Wales. Names of course, have been altered to conceal identity.

Although there is very little research on the issue, it is often assumed that many investigations and litigation procedures have a negative impact on children and thereby further victimise them. Weiss and Berg (1982) present a convincing case on how court procedures interfere with the emotional reactions associated with sexual abuse in children. They point out that children do not have the same rights as other parties in the litigation process and that legal proceedings often prolong or intensify the child's emotional reactions. Berliner and Barbieri (1984) note that cross-examination is frequently difficult for child

*The authors have worked in the Child Protection Unit at the Children's Hospital, Camperdown for three years and have had some previous experience working in the area of child sexual assault.

witnesses. The attorney's job is to impeach the child's testimony. Consequently, the child may be intimidated, embarrassed, or otherwise humiliated. Burgess and Holmstrom (1978) point out that the slow litigation process may result in a temporary plateau in a particular child's development. DeFrancis (1969) found parents of the majority of victims feeling that the court process put too many pressures on the child and overall was bad for the child. Melton (1984) concluded his testimony before a United States Senate subcommittee by indicating that there is need for substantial research to examine the effects of legal procedures on children.

More recently, Tedesco and Schnell (1987) in a small study in the United States found that the litigation process was not necessarily harmful; however, multiple interviews and giving testimony were reported to be adverse factors.

It must be asked whether the legal system is the best forum to deal with child sexual assault or should using children as witnesses be avoided at any cost? Flexibility in the juvenile and criminal systems is needed to allow for different circumstances. Adjudication of some form does seem to be necessary if it is believed that a child has been sexually abused, because sexual abuse is behaviour that does re-occur if no external controls are placed on the abuser. Most agree that some form of control is necessary and that the law does serve that function.

In many of the defended cases dealt with in this country, children have to appear as witnesses; more so at the committal stage (Cashmore & Horsky 1987). As society's knowledge and awareness of child sexual abuse has increased, there has been a call for new laws that attempt to protect the rights of the child victim and prevent revictimisation in the legal process. Proposals that have been considered include modified courtrooms, videotaped interviews, preparation of children prior to testifying, specially trained prosecutors and presence in court of a support person. Consideration has to be given as to whether the child will be competent to testify and how traumatic the experience is likely to be for the child, as being competent does not necessarily mean they will be believed. This issue is highlighted in a video on the subject that was produced by the Harvard Medical Centre some eight years ago called 'Double Jeopardy'. Double Jeopardy meant the child is twice a victim - once a victim in the hands of the perpetrator, twice a victim having come to court and been assaulted again in cross-examination. The video gives a very positive and optimistic view of what can be done to assess those children who can go through this process and survive, and what has to be done in order to achieve this. There is a strong belief that there has to be prosecution, however, some but not all children can 'survive' this.

The authors reviewed a sample of twenty children who were assessed at the Child Protection Unit, where charges have been laid against the alleged perpetrator. These children ranged in age from four years to fifteen years with seven of the children under seven years of age (all but one of these having had to give testimony). Of these twenty cases one did not proceed, that decision being based on the lack of corroborating evidence and the impact that committal proceedings and a trial would be likely to have on the victim's education (this boy was very intelligent, in Year 9, and a trial would have been likely to have coincided with his HSC year). Of the nineteen that proceeded the defendants in two cases pleaded guilty. One received a three-year sentence of which he served fifteen months, the other was sentenced to a good behaviour bond of two years. In a further two cases, two defendants were found guilty at trial, one receiving an eight-year sentence of which three years was served, the other received a three-year good behaviour bond. In six cases, the defendant was acquitted, in four instances this was at the committal stage; in two cases this occurred at the conclusion of the trial, both girls having given testimony and undergone cross-examination at both hearings. While the data is not complete for all cases in the sample, it is known that in one case the time lapse between charge and trial was two and a half years. In the sample, twelve of the children had been sexually abused by people within their family network, including fathers, grandfathers, stepfathers, mother's de facto, and mother's boyfriend.

Looking at individual cases in the sample, a number of issues can be identified.

Confronting the Offender

At the time of disclosure of sexual assault, every effort is made to protect the child from further contact with the alleged offender. When the child makes an allegation of incest, the Children's Court and Family Law Court may intervene to provide such protection. For many children court means they must confront the alleged offender after many months of no contact. One cannot underestimate the powerful effect this has. The opportunity for further intimidation exists even if only with a look. Children report to us they fear that the defendant will attempt to attack them in the courtroom.

Naomi was a four-year-old girl who was sexually abused by her father. The committal hearing occurred approximately five months after she was first brought to the Child Protection Unit at the time of disclosure. Naomi was required to give evidence at the committal hearing and was judged as competent to give evidence by the magistrate. Her mother was not allowed in the court; however, Naomi was accompanied by a social worker from the Unit. She was able to proceed through her statement detailing the abuse but when asked to identify her father in the courtroom was unable to do so. He was seated close by and was observed to stare and wink at her while she gave her evidence. She left the courtroom screaming and ran to her mother. In Naomi's case there was strong medical evidence and she had been able to give a clear and consistent statement a number of times; however, her inability to point out her father in the courtroom resulted in the case being acquitted.

The Weight of the Child's Evidence

For those children who are able to give clear consistent statements and withstand cross-examination of their evidence, another problem exists. Children's uncorroborated evidence is not given the same weight as that of an adult. A great deal of research has been undertaken into the issue of whether children can make reliable witnesses. Johnson and Foley (1984) concluded that while young children recall less detail than adults, they do not fabricate details and can distinguish between fact and fantasy. Reviews of the studies have concluded that false accusations are not a plausible explanation for the large numbers of reported cases of child sexual assault (Burgess & Holstrom 1978).

The court's inability to appreciate the different stages of child development, the child's less sophisticated use of language and their difficulty with abstract concepts of time and place have resulted in children being categorised as less credible in the court (Brennan & Brennan 1986).

Matthew was a five-year-old boy who had been assaulted by a sixteen-year-old son of family friends. His mother witnessed the last of three incidents. As the alleged offender was a juvenile, the case was heard in the Children's Court approximately four months after his being charged. Both Matthew and his mother gave evidence and underwent cross-examination. The magistrate found the defendant guilty on one charge only, that being the one the mother had witnessed. Matthew's statement was equally clear in regards to each of the charges, however, it was only the evidence of an adult witness that resulted in the magistrate finding the charge proven and issuing a two-year probation order.

The Child as Primary Witness

The sexually abused child as a witness is under considerable pressure in the criminal justice system. As supporting medical evidence is present in only a small proportion of cases (Cashmore & Horsky 1987), and there is rarely any adult witnesses to this activity, the

child's statement becomes the primary, and sometimes the only, evidence. This puts the focus very much on the child. Throughout the therapeutic interventions - the crisis assessment, medical, and counselling, every effort is made to take the responsibility off the child and back on to the adults involved.

The child does not have to prove to these people that they have been abused as they are making their disclosure in an environment which is supportive. The criminal justice system presents a harsh contrast in its lack of a 'child focus'. The child carries the weight of having to present the evidence upon which important decisions will be made. In spite of the fact that a child may have given very clear disclosures to professional child protection workers who are available for cross-examination, theirs can generally only be used to corroborate the child's statement and not be used in place of it.

Justin was a nine-year-old boy who was sexually abused by a twelve-year-old neighbour (who was known to have been previously sexually abused). As the alleged perpetrator was a juvenile the matter was heard in the Children's Court, some six months after the charge was laid. In the absence of any supporting medical evidence or any witnesses - Justin's evidence constituted the primary evidence. He was not accompanied to court by a support person and did not meet the prosecutor before going to court. He gave his evidence well and underwent cross-examination where particular issue was made of the fact that he had changed his term for male genitals. In spite of having coped reasonably well with the testimony, the case was acquitted, although the twelve-year-old defendant was placed under the supervision of the Department of Youth and Community Services.

Mother's Evidence

The experience of giving evidence for those mothers whose children have been sexually abused by someone outside the family differs markedly to that of mothers of children who have been sexually abused by their former sexual partner. The former group are likely to be more emotionally available to their children at this time, provided their lives are otherwise in order. However, as this is likely to be the first court experience for them, they report finding it stressful, and that can reduce their ability to support their child. They can be so aware of what the court process can do, that they can raise their child's anxiety, and reports of their child's experience are influenced by their own perspective. The authors have had a little contact with mothers who have refused to believe their children and given evidence contradicting that of their children. Their requests of social workers are usually just to see that their children are stopped from telling lies. It can only be guessed what damage they do to themselves and to their children. For mothers giving evidence against former husbands or de factos, the experience can be difficult and painful. They are testifying against someone they had a commitment to and with whom they had an intimate relationship. This person, they have learned, has betrayed them and abused their children. They have the difficult task of containing their anger, being able to testify, and also being supportive to their children, putting their child's needs before their own. It is necessary to remind ourselves not to be judgmental of these women for they need our support for their own sakes if they are able to help their children.

Matthew's mother gave evidence. She has worked in the theatre for some time both as an actress and a producer, and is an intelligent, articulate woman. She said of the experience that she felt Matthew and herself were on trial, the accused was able to sit there and say nothing - 'sitting in the witness box I felt guilty, my heart was racing'. The legal jargon she described as 'offensive, distracting, and confusing'. When asked the colour of the accused's underpants she replied green, while in her statement she had said mauve, the defending solicitor aggressively said 'I put it to you that you are lying'. She said that if she had been asked straight after the experience whether she would do it again she would have replied 'No way, let the boy go free'. If asked again now six months later, she states she would probably say 'yes' if it is likely to prevent the accused becoming a paedophile.

Toni's mother gave evidence and in her case it was against her former husband, the girl's stepfather. The defence barrister put it to her that she had invented the allegations, bullied her children into reporting the abuse, had used witchcraft, and threatened suicide if the children did not persist with the story. Her motivation, he stated, was because she was after a large property settlement. She had made a suicide attempt some seventeen years previously, and her medical records from then were subpoenaed to try to discredit her testimony. Because the assault on her in cross-examination was so great she was less able to help her daughters at that time.

Cross-Examination of Children

There appears to be widespread agreement that it is the experience of cross-examination that it is one of the most distressing aspects of testifying (Tedesco & Schnell 1987: Berliner & Barbieri 1984; Ordway 1981; Weiss & Berg 1984).

While children may have been prepared for their evidence, cross-examination is something which is difficult to anticipate. The child will be spoken to by someone they do not know and who does not have their welfare at heart. As Berliner and Barbieri (1984) noted the job of the defence is to impeach the child's testimony. For many children this is the most powerful experience of being disbelieved and held responsible for the abuse.

The act of cross-examination reproduces many of the dynamics of the abuse. The child is said to be at best mistaken about events and their meaning, at worst a liar. For teenage victims, the event will often be presented by the defence as sexual activity that they consented to or in fact solicited. This results in the child being made to take responsibility for the actions of adults.

Brennan and Brennan (1986) have looked in detail at the experience of child testifying and have found a stubborn refusal on the part of the court system to use language and concepts appropriate to the child's stage of development. Both children and parents express frustration at the emphasis placed on details such as colour of underclothes and the exact sequence of events which for children who have been repeatedly abused is more difficult to recall accurately. Children and parents commonly express the feeling of 'being on trial' themselves, that they have to prove that they were not responsible in any way for the abusive acts that occurred.

With three very young children in the sample who were abused by the maternal grandfather of two of the children, it was put to them in cross-examination that they had got their heads together to get grandpa into trouble, without realising the very serious nature of what they were reporting. Put to them as a two-part question, it was difficult for children aged five and six to answer.

Another twelve-year-old of slightly less than average ability and social skill, and stressed and anxious when being cross-examined, was asked to state whether a particular incident of abuse had occurred before or after her birthday. After a couple of other questions, the barrister returned to ask her this, and when she answered differently, he said to her 'I put it to you that you are lying'. 'No', she said, 'you're just getting me ..... confused'. She was admonished for her language while the barrister was allowed to continue with his cross-examination.

Another fourteen-year-old girl who stated in her evidence that the man who had sexually assaulted her said to her before he left her 'you're hopeless'. The defence in cross-examination put it to her that this was a statement he had made in relation to her performance as a sexual partner, and because she had been angry and insulted by this she sought revenge by reporting the matter to the police.

Structural Problems

Unlike the other systems that are involved in cases of child sexual assault (the paediatric sexual assault services and the Department of Youth and Community Services), the criminal justice system was not designed to accommodate the needs of children. There are many technicalities within the system which can exacerbate the difficulties for children and work to the advantage of the accused.

The long delays in cases being heard present problems in that children's memory for fine details is not strong, and changes in children's development can be very rapid. This can result in children expressing themselves differently and understanding concepts differently after a twelve to eighteen-month period. Horsky and Cashmore (1987) found an average of fifty-two weeks between the time of charge and the time of trial. These figures relate to cases in the system finalised in 1982, and it is understood that the delays have increased (as the number of reported cases increase) and are more likely to be between 2.5 and 3 years. The longer the case takes to be heard the harder it is for any witness, let alone a child to give competent testimony. A very disturbing tactic that can be used is last minute adjournments. Bussey and Steward (1984) outline the three levels of preparation necessary for a child in order to be able to give competent testimony. These are: routine preparation which includes a court visit; explanation of the rules of the game; and preparation for risks inherent in the nature of the questions in cross-examination. Preparing a child to give testimony is difficult if they have been through the procedure a number of times following unexpected adjournments.

Toni was ten-years-old when she was first required to give evidence at committal proceedings. She and her older sister had been sexually abused over a period of five years by their stepfather. At the committal proceedings, her mother and older sister gave their evidence and underwent cross-examination. Toni was called to the witness box and had only begun to give her evidence when the case was adjourned for three months with Toni being instructed not to mention or discuss the matter with her mother or her older sister during the adjournment period. Three months later when she got into the witness box, the first question she was asked was 'Have you discussed the matter with your mother or sister since you last appeared in court?'

Children are disadvantaged by the language used in courts and particularly the refusal of legal representatives to use age appropriate language. Questions framed with double negatives are impossible for young children to respond to, as are questions which include several different concepts (Brennan & Brennan 1986).

On a practical note, courts are designed without facilities to ensure privacy for witnesses and their families, and to avoid confrontation of parties outside the courtroom. A child witness' exposure to the defendant can erode their confidence and increase their anxiety while waiting to give evidence. While accepting that the defendant's legal representative is there to defend the charges in the most effective way, it is of concern that this is often done at the expense of the child's well-being.

In Toni's case the defence barrister subpoenaed the social worker who had been counselling Toni. This had the effect of preventing the social worker from being able to be present in court with Toni as a support person while Toni gave her evidence. It also caused Toni to perceive this as her counsellor having abandoned her and aligning with 'the other side'.

The Question of Choice

Unlike the victim in an adult sexual assault, the child victim is not the person who chooses whether or not they wish to be part of a criminal trial. Such decisions are made jointly by parents, the Department of Youth and Community Services, social workers and the police. While adult victims can be given assistance to make decisions as to what is in their best

interests, children are essentially not given such rights. Those people who in fact do contribute to the decision often have very different needs to those of the child. For parents there is a question of defending the honour of the family which they feel will be achieved through litigation. Social workers and Child Protection agencies are conscious of the safety of other children and the need to identify those adults who pose a risk to their children. The police of course have an interest in doing 'their job'. All of these things do not actually represent the needs of the child. The reality is that the criminal justice system does not protect children (this is the role of the Juvenile and Family Law Courts) as litigation is 'defender focused' not 'child focused'.

The decision to proceed with charges depends on a number of issues including the ability to give a clear statement, the availability of supportive evidence (including medical evidence) and a judgment concerning the child's competence (Cashmore & Horsky 1987). The issue of whether it will be unduly stressful and whether the child will be adequately supported through the process are not primary issues. As a statement from the child may be taken very early after disclosure (or even before the child is seen in a paediatric sexual assault unit) there is little opportunity to assess whether in fact the child should give evidence or not.

Richard is the only child in the sample who was actively involved in the decision of whether to proceed with police action. He was fifteen, and gave a history of having been sexually abused by his paternal grandfather over a period of five years; the abuse had taken the form of fellatio and masturbation. There was no medical evidence and no corroboration. Richard's grandfather held a senior ranking position in one branch of the armed services, as well being involved in civic and welfare organisations. Richard is an intelligent, mature boy who was treated as an adult by the police. He understood clearly what would be involved if the matter proceeded to court, and the likely outcome, and made his decision not to proceed; he then made a statement withdrawing his complaint.

Discussion

While it is possible to look at the experience of children in the legal system and the immediate effects of that experience, determining long-term effects is very difficult. Even for those children where long-term effects are found to be relatively non-damaging, this does not compensate for the stress that children experience during court proceedings. That stress is associated with long delays and uncertainty about hearing dates, cross-examination, and a high rate of acquittal.

The authors' experience has not been as positive as that reported by Tedesco and Schnell (1987) or Cashmore and Horsky (1987). In the study completed by Tedesco and Schnell it would appear that many of the recommended reforms had already been instituted as 23 per cent of the children gave video evidence, 75 per cent had a support person present and in 54 per cent of cases a trial was completed.

Cashmore and Horsky (1987) found 86 per cent of defendants proceeded beyond committal to trial or sentence. Of those 92.8 per cent of cases resulted in a conviction either through guilty plea or guilt at trial. Only 22.9 per cent of children in their study had been abused by family members.

In order to ameliorate some of the stressful aspects of the court process, a careful assessment of the child should be undertaken in order to decide whether the child should testify. This needs to go beyond the issue of how readily the child is able to give their statement. What is important is the level of emotional disturbance the child has experienced as a result of both the abuse and the disclosure. Consideration should be taken of the level of support the child will receive, as children who are not believed by the non-offending parent are further scapegoated by testifying.

There are a number of possible practical changes which would make a significant difference for children and which would not require any major changes in legal procedure or legislation. Measures should be taken to ensure that the child witness and their family do not

have to confront the defendant or his family in the court waiting area. While the mechanism for the child to have a support person in the court is recognised, this is often organised on an ad hoc basis and needs to be formalised. Ideally the same support person and prosecutor should be available at both the committal and the trial.

A vigorous attempt needs to be made nationally to see that child sexual abuse matters are dealt with quickly. The present widespread practice of defence barristers being able to obtain lengthy and repeated adjournments in these cases should be recognised and curtailed. It can only be hoped that as courts become more familiar with prosecuting cases of child sexual assault, they will become more sensitive to the needs of children.

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Recommendations

At the conclusion of the seminar the following recommendations were agreed upon by participants. While they do not comprise an exhaustive list of changes seen as necessary by all participants they do reflect particular current concerns. Seminar participants called for:

- Children's independent rights to be taken seriously and upheld throughout any legal proceedings. There needs to be exploration of the best ways in which that might be done including better and specialist training for all those involved in the proceedings.

- Multi-disciplinary investigation and assessment teams to be encouraged, with the aims of:

  - minimising trauma to children
  - avoiding multiple interviews and unnecessary intrusion
  - reducing professional rivalries
  - maintaining respect for the child, and
  - generally avoiding any action which may prejudice the outcome of the case.
- The abolition of the necessity to call children as witnesses at committal hearings.
- The abolition of the statutory requirements that a child's evidence must be corroborated before a conviction can be recorded.
- The court environment and procedures to be improved to enable the child witness to give effective testimony.
- Children who are required to give evidence in court to be helped as much as possible to cope with the process through the provision of adequate support and preparation.
- Comprehensible language to be used in court especially when a child witness is questioned.
- Thorough evaluation before the introduction of video technology (with appropriate safeguards and standards) which may have a place in the investigation and subsequent court procedures involving child witnesses.
- Children to have the right to address the Children's and Family Courts' benches.

The following two recommendations were raised but not resolved:

- There be an independent, multi-discipline body, possibly within the framework of the Human Rights Commission that:

  - consults with and has representation from young people
  - contains grievance resolution structures
  - monitors the experience of young people in the legal system to identify and address problem issues.
- Any professional and/or reportable interview of a young person, be held in the presence of an independent witness, chosen in consultation with the young person.

The Reliability of the Child as a Witness

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Any discussion of children as witnesses has to consider several areas. These include the competence of a child and the degree of stress which may result to the child from being a witness in court. In recent years a body of literature has been developed on children's memory and some of this can be applied to children as witnesses. In the meantime, more research is needed to identify which age groups of children can be regularly regarded as being good witnesses and which younger age groups may be less reliable. If it could be shown that children below a certain age were not good witnesses then these children could be spared the stress of court appearances. Similarly if it could be shown that children above a certain age are just as reliable as adult witnesses, then this knowledge would help counteract some of the current prejudice that children may not be reliable witnesses. Hand in hand with this search for more knowledge should be a careful evaluation of finding more effective ways of children being able to give evidence and the development within the legal profession of skills in talking with children.

The Credibility of Children as Witnesses

In 1983 Yarmey and Jones published a study where they asked several groups of people to judge the reliability of a hypothetical eight-year-old's testimony. These groups included law students, legal professionals, citizens who were potential jurors and psychologists interested in research into eyewitness identification and testimony. They were asked how they thought a child of about eight years of age would answer questions by police or in court. Less than 50 per cent in any of the groups felt that the child would respond accurately. Sixty-nine per cent of the potential jurors believed that the child would either respond the way the questioner wished, while 82 per cent of the psychologists, whose area of expertise was supposed to be eyewitness identification, said that the child would respond according to the interviewer's desires.

Other researchers have shown similar results. A study in Britain (Sheehy & Chapman 1982) of adults' and children's accounts of road accidents concluded that there is a widespread belief that the comparative immaturity of children severely limits their competence and responsibility. This study found that, given the option of choosing between

the testimony of an adult and that of a child, most people would probably favour the testimony of the adult. A study from Denver (Goodman, Golding & Haith 1984) also looked at testimony about traffic offences and found that children aged between six and ten years were viewed as less critical witnesses than adults. This prejudice can even extend to judges - 'it is well known that women in particular and small boys are liable to be untruthful and invent stories' (Mr Justice Sutcliffe, Old Bailey, 8 April 1976).

For a child to be a good witness the child must have the mental capacity to observe and register the event accurately, sufficient memory to retain an independent recollection of that event and the ability to communicate this memory.

Memory in Children

There has been considerable research carried out on children's memory. As would be expected children's visual attention, which is closely linked to memory, improves with age (Enns & Cameron 1987). This concept is supported by Pezdek (1987) who argued from a theory of schematic processing and showed that younger children, not having the necessary schema on which to link memory, do not record in memory as much detail of a given stimulus as do older subjects. This appears to be one of the differences in memory between younger children and older children and adults.

However, while less detail is recalled, accuracy of recall seems to be less of a problem (List 1987). Young children from six to eight years appear to be just as accurate as older subjects in recall, but report significantly less information (Goodman & Read 1987). This means that if a free recall technique is employed in obtaining information from children, the age difference tends to relate not to accuracy but to the completeness of the account. It is the experience of adults who talk to children that children often say little in response to questioning. As it has been shown that children often remember more details than they choose to report (Flavell 1970), more systematic interview techniques such as prompting or questioning may be required. This technique raises its own problems. A recent Australian study of court transcripts in child sexual abuse cases (Brennan & Brennan 1988) has shown that children become quickly confused under cross-examination. This is partly because of the language used in the court situation and also because of the way in which some questions are multi-faceted - making a 'yes' or 'no' answer difficult. This study of transcripts also showed that questions would move quickly from one time frame to another, requiring rapid responses and an adult perception of time and events. This approach puts children at considerable disadvantage in a witness situation (Rowe 1974; Benedeck & Schetky 1986). The resulting confusion to the child by this type of questioning tends to confirm, to those observing, the impression that the child is not a reliable witness.

There is also a popular feeling that children tend to confuse imagined and real events. However Johnson and Foley (1984) have shown that children from as young as six years are no more likely than adults to confuse the real event with an imagined one as long as the event has been one which the child has been able to understand (Loftus & Davies 1984). One area where research would be useful and where no data is yet available, is whether a child's memory for events is better in the environment in which the event took place, with the environment acting as a memory cue.

A problem with the majority of studies on children's memory is that they record memory for events which were shown to the children on slides, in films or told to them as stories. In these studies the child is not actively involved in the events but is merely a neutral bystander. An exception is a study by Goodman and Helgeson (1985) where three-year-olds, six-year-olds and adults interacted with an unfamiliar man for five minutes and then had their memories of this event tested four or five days later. It was found that 93 per cent of the six-year-olds and 75 per cent of the adults could accurately identify the man in a photo line-up but only 38 per cent of three-year-olds could give very accurate eyewitness accounts. Jones and Krugman (1986) report an episode of a three-year-old child who was abducted from the front yard of a neighbour's home. Three days later she was found in the

cesspit of a deserted mountain outhouse, crying, bruised and suffering from exposure. Fourteen days after her abduction the police showed her a photo line-up of twelve people which included the suspect. The girl accurately and quickly identified the suspect as her abductor.

It seems that children's ability to recount events can be very accurate, particularly if free recall and simple direct questions are used. Using these techniques, the accuracy of recall of children six years of age and over is probably as good as that of adults, with some children under six also being quite accurate.

Stress

A court appearance can be an upsetting time for a child. The court appearance may be the culmination of a number of repeated interviews of the child carried out by police, social workers, doctors, welfare workers and other professionals. These interviews are often held at different times and conducted by different people, finally ending in the child being cross-examined in a courtroom situation. Those who are interested in how quickly children can become confused in court are strongly recommended to read *Strange Language*, (Brennan & Brennan 1988) an analysis of court transcripts of children under cross-examination.

As well as the strangeness of the situation, young children find it frightening to see the accused in court. Some children are concerned that the accused, who in sexual assault cases has often threatened the child with violence or death if the child tells anybody about the incident, may attack them in the courtroom. Children who are the victims of incest and who have to incriminate their own parent in court are often afraid that their parent will always hold this against them. Yates (1987) has reported that one five-year-old thought that the judge would put her in gaol for being 'bad' because she was not able to answer all of the questions.

A recent Australian study (Oates & Tong 1987) asked twenty-one non-offending parents whose children's cases of sexual assault had been to court, to rate how their child felt after the court hearing on a scale from 0-5, ranging from 'not upset at all' to 'extremely upset'. Eighteen of the twenty-one parents gave a rating of between four and five indicating that their child was very upset immediately after the hearing. When these parents were asked to rate how their child was at an average of two and a half years later, twelve of the parents still rated their child as being extremely upset about the court hearing. When the parents rated their own degree of satisfaction about the outcome of the court hearing, sixteen (76 per cent) rated themselves as being completely dissatisfied.

Some Suggestions

A number of suggestions have recently been made as to how to reduce the stress on children giving evidence. One particularly important way seems to be to improve the education of the legal profession. It is time for a specialty in child law to be developed where those undertaking this specialty can have some training in developmental psychology, child development, and experience in interviewing children. It has been suggested that in some cases children could be interviewed in judges' chambers to avoid the necessity of them appearing in court. While this suggestion has merit it will only be effective if those interviewing the children have developed skills in talking with children. Legal professionals who are not trained in child development, through no fault of their own, may ask questions which are too sophisticated or complex, thus confusing the child. Many young children, when they are bewildered, will answer questions as best they can without checking on the actual meaning, sometimes saying 'no' when they mean 'yes', especially in response to a double negative. To be understood, questions asked of children must be simple, brief and reasonably concrete. Younger children may recall more accurately with the use of props and may recall an incident more effectively if the question is asked in the original location

where the incident occurred. Courtroom surroundings need to be relaxed and informal when children are involved. If the parents are supportive and cooperative it may be helpful, depending on the legal aspects of the case, if the parents remain with the child during the interview.

A number of American states now allow children to be examined in a separate chamber with the judge and opposing counsel, while the accused views the proceedings on a video monitor or through a one-way screen. Other states in the USA have allowed video recordings to be used where the child is interviewed by a skilled therapist, this interview being used as evidence in court. In the United Kingdom closed-circuit television (by 'video link') has been approved by the Home Office to admit video recordings as evidence in trials.

Another way of reducing distress would be for children who have to testify in court to be prepared for this in advance by visiting the courtroom, by having the procedures and some of the language explained and perhaps even, for older children becoming involved in a role play prior to the hearing (although, of course, care would have to be taken to be assured that any of these interventions would not influence the child's attitude or testimony).

There is good evidence that children from as young as six years make reliable witnesses. The data about younger children are not as clear and more work needs to be done in this area, particularly looking at incidents in which the child was actually involved rather than merely a passive observer. At the same time more work needs to be done in finding effective ways of eliciting information from young children, ways of making court proceedings less intimidating and stressful to children and particularly ways of helping appropriate members of the legal profession to develop skills and understanding in child development and in talking with children.

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