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 founded, 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 corrobated 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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