THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 87

Evidence of Children and other Vulnerable Witnesses

REPORT

APRIL 1991

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The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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C W Ogilvie was a Commissioner until 28 February 1991. He approves the text of, and the recommendations made in, this Report, which was substantially completed during his term of office.

This Report was prepared with the special assistance of Marion Dixon, formerly Lecturer in Law at the University of Western Australia. The Commission is much indebted to her for her valuable work on the Report.

To: **HON J M BERINSON QC MLC**
ATTORNEY GENERAL

In accordance with the provisions of section 13 of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on the Evidence of Children and Other Vulnerable Witnesses.

J A THOMSON, *Chairman*

12 April 1991

Table of Abbreviations

Cross on Evidence	D Byrne and J D Heydon *Cross on Evidence* (Australian Edition) (1991)
Discussion Paper	Law Reform Commission of Western Australia *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Project No 87 1990)
Irish Report	Irish Law Reform Commission *Report on Child Sexual Abuse* (LRC 32 1990)
Pigot Report	*Report of the Advisory Group on Video Evidence* (UK Home Office 1989) (Chairman: Hon Judge Pigot QC)
Scottish Discussion Paper	Scottish Law Commission *The Evidence of Children and Other Potentially Vulnerable Witnesses* (Discussion Paper No 75 (1988))
Scottish Report	Scottish Law Commission *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Scot Law Com No 125 1990)
Spencer and Flin	J R Spencer and R Flin *The Evidence of Children: The Law and the Psychology* (1990)

Chapter 1
INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked to review the law and practice governing the giving of evidence in legal proceedings by children and other vulnerable witnesses.

2. DISCUSSION PAPER

1.2 In April 1990 the Commission published a Discussion Paper, which made provisional proposals for changes to the law and invited comments from interested groups and members of the public.

1.3 Concurrently with the release of the Discussion Paper, the work of the Commission in this area was publicized in a number of newspaper articles and radio talks, as well as in a seminar organised jointly by the Advisory and Co-ordinating Committee on Child Abuse[1] and the Child Abuse Unit.[2]

1.4 Formal responses to the Discussion Paper were received from persons whose names are listed in Appendix I of this Report. The Commission is most grateful to all who responded for the time and trouble they took. In addition, members of the Commission or its officers had ongoing discussions or correspondence with a number of persons, including the Chief Justice of Western Australia, the Chief Justice's Criminal Practice and Procedure Review Committee, members of the Child Abuse Unit and a number of other persons with a specialist knowledge or interest in the issues concerned.[3]

1.5 This reference comes at a time when many other jurisdictions in Australia and overseas have made, or are in the process of making, amendments to their own laws in this area. The

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1 Established to report to the Minister for Community Services and the Director General of the Department for Community Services on matters relating to child abuse and neglect.

2 Established to implement those reforms recommended by the Child Sexual Abuse Task Force which have already been endorsed by the Government of Western Australia. See Child Sexual Abuse Task Force *A Report to the Government of Western Australia* (1987).

3 The Commission's attention was also drawn to the tabling in Parliament of a petition bearing 79,567 signatures and urging the State Government to pass legislation to deal with sexual and other crimes against children: Petition No 50 tabled in the Legislative Council on 23 August 1990.

Commission has thus had the advantage of being able to learn from the experiences of those jurisdictions and to consider the merits of changes proposed or implemented elsewhere. The Commission is grateful to the many individuals and agencies in Australia, the United Kingdom, New Zealand and Canada who have supplied it with information and comment about the workings of their own law and practice.[4]

1.6 In the light of the research carried out by the Commission, of the comments received on the Discussion Paper and of the consultations and discussions referred to in the last two paragraphs, the Commission now submits this report.

3. CHILD WITNESSES

(a) General

1.7 The problems which are encountered when children are called upon to give evidence can arise in any kind of case, but are most often likely to arise where the witness is a child victim of alleged sexual abuse. The great majority of submissions were concerned with this problem. This is probably due in part to the incidence of sexual offences involving children. According to Western Australian police records for sexual offences reported during 1984-1989 (excluding reports of wilful exposure), in 25 per cent of cases the victim was under the age of 9, and in 47.3 per cent of cases victims were aged from 10 to 17.[5] The predominance of attention to child abuse victims reflects public dissatisfaction with present law and practice as they affect these witnesses.

1.8 The Commission in chapters 2 to 8 of this Report makes a number of recommendations for the reform of the law relating to child witnesses, including alterations to the rules relating to competency and corroboration, the admission of statements made out of court in certain circumstances, permitting the giving of evidence by closed-circuit television, and preparation and support of child witnesses. In some cases, such as competency and corroboration, and preparation and support, the recommendations apply to all cases where children give evidence.

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4 The Commission is grateful in this connection for the special assistance given by Dr J Cashmore (NSW), Mr J Szwarc (Vic), Ms L Clare (Qld), Professor G Davies (UK), Mr J R Spencer (UK), Ms P M Johnson (UK) and staff of the New South Wales Law Reform Commission, the Queensland Law Reform Commission and the New Zealand Law Commission.

5 R G Broadhurst and R A Maller *Sex Offending and Recidivism* Research Report No 3 (UWA Crime Research Centre 1991) 28-29

In other cases, such as the admission of out-of-court statements and the use of closed-circuit television, the recommendations are limited to cases of alleged sexual offences against or intra-familial assault on or abuse of children under 16.[6]

1.9 In making these recommendations the Commission is fully cognizant of the fact that, however desirable it may be to make it easier for children's evidence to be brought before the court, it is the accused who is on trial and who will be convicted if the prosecution case is proved beyond reasonable doubt. Improvement of the ability of courts to obtain evidence from children is highly desirable, but only if it can be done without affecting in any way the legal rights of the accused.

(b) Age limits

1.10 In making legal provision for "child witnesses" it is necessary to define what is meant by a "child" for this purpose.

1.11 The legal age of majority in Western Australia is 18,[7] but some legislation makes special provision for children younger than that and treats older children as equivalent to adults. For instance, section 101 of the *Evidence Act 1906* deals with the unsworn evidence of children under 12 and treats children of 12 and over as adults for the purposes of competency and corroboration.

1.12 The question is whether any special provision for the giving of evidence by children ought to apply to everyone under the age of 18 or only to younger children, and if the latter, what age limit should be applied.

1.13 Although it may be preferable for a single age limit to be applied to all special provisions for child witnesses, this has not been considered important in other jurisdictions. The trend is to treat issues of competency and corroboration as applicable to children under 12 or 14, and special procedures for the giving of evidence as applicable to children under 16 or 18.

1.14 In New Zealand, for instance, the age of 17 at the commencement of proceedings has been fixed as the upper limit of child witness provisions for the giving of evidence by videotape

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6 For an explanation of this term, see paras 3.46-3.50 below.

7 *Age of Majority Act 1972* s 5.

and closed-circuit television,[8] but in regard to the giving of unsworn evidence the age of 12 applies.[9] In England, a Bill proposes the age of 14 as the critical age in relation to competency,[10] and 17 in relation to the giving of evidence by videotape.[11] In New South Wales, the age of 16 has been fixed as the upper limit for the giving of evidence by closed-circuit television and otherwise.[12] In the Australian Capital Territory, the closed-circuit television provisions for children apply to all persons under 18.[13] In Victoria, 14 is the age below which a competency inquiry is appropriate,[14] and 18 is the age below which a witness may benefit from special provisions for the giving of evidence by alternative means, including videotape and closed-circuit television.[15]

1.15 In Queensland, all children under the age of 12 qualify as "special witnesses" for the purposes of giving evidence.[16] Older children have to qualify as special witnesses on other grounds, such as the likelihood that they would suffer severe emotional trauma or that they would be so intimidated as to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practice of the court.[17]

1.16 The tendency to treat competency issues as distinct from procedural issues is in accordance with the general approach of the law to children, which is that the age at which children may lawfully enter into certain activities or be held responsible for their conduct varies according to the activity in question. This is because the law recognizes that the gradually developing maturity of children gives them different capacities at different ages.[18]

1.17 Thus, where the issue is one of competency to take an oath or to give evidence unsworn, it is generally accepted that, except in cases of mental incapacity, a child who has reached the age of 12 or 14 may be assumed to be competent. On the other hand, where the question relates to special procedures for the giving of evidence, it may be that the special vulnerability of young

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8 The *Evidence Act 1908* (NZ) s 23C(b) provides that the complainant should not at the commencement of proceedings have attained the age of 17 years. See also *Summary Proceedings Act 1957* (NZ) s 185CA(1).
9 *Oaths and Declarations Act 1957* (NZ) s 13.
10 Criminal Justice Bill 1990 (UK) cl 43.
11 Id cl 45.
12 *Crimes Act 1900* (NSW) s 405D(5).
13 *Evidence (Closed Circuit Television) Act 1989* (ACT) s 3(1).
14 *Evidence Act 1958* (Vic) s 23.
15 Id ss 37B-37C.
16 *Evidence Act 1977* (Qld) s 21A(1)(a).
17 . Id s 21A(1)(b).
18 Discussion Paper para 2.2.

complainants in cases of sexual abuse merits the procedures being available up to the age of 16 or 18.

1.18 These views are reflected in the recommendations in chapters 2 to 7 below.

(c) An emerging problem

1.19 One aspect of the law which did not form part of the Commission's Discussion Paper, but on which comment was received, was the obtaining of a conviction in cases where an ongoing relationship involving sexual abuse has existed between a child and an adult. In such cases it is frequently impossible for the complainant to particularize an incident sufficiently for a conviction to be obtained under the present law. Because of the close connection between this issue and other issues in the present reference, the Commission has commented on it in chapter 8.

4. OTHER VULNERABLE WITNESSES

1.20 The terms of reference require the Commission to consider not only children, but also "other vulnerable witnesses". This could include any competent witness (either for the prosecution or for the defence) for whom the giving of evidence is likely to be especially traumatic, or even impossible. In chapter 9 the Commission suggests that there are a number of grounds on which witnesses may be regarded as falling into such a category, including a person's mental or physical condition, age, or relationship to any other party to the proceedings, and (in a criminal case) the nature of the offence. It therefore makes recommendations as to the circumstances in which a court could declare a person a "special witness".

1.21 The recommendations in chapters 2 to 8 of this Report are discussed in terms of children, but in chapter 9 the Commission makes recommendations as to the extent to which the reforms recommended in the earlier chapters should also apply to other witnesses who are declared to be "special witnesses".

5. PROCEDURAL AND OTHER MATTERS

1.22 A number of the Commission's recommendations require matters to be settled in advance of the case being taken to court. Under the recommendations concerning preparation of children

and other vulnerable witnesses, the mode by which evidence is to be taken needs to be known in advance. Prosecutors and defence counsel also need to know what special arrangements are to be used for the taking of evidence so they can prepare their case for presentation in court. Where permission has to be sought from the court for the admission of certain evidence or the use of some special procedure, the court's decision ought to be made in advance of the trial so that there is minimum delay and witnesses, jurors and counsel are not unnecessarily required to wait at court for proceedings to begin or resume.

1.23 In Chapter 10 the Commission therefore recommends that matters relevant to procedure should be settled at a special pre-trial hearing. This recommendation should be kept in mind when considering the recommendations made in the preceding chapters.

1.24 Finally, the report makes recommendations to encourage education about the problems encountered by all kinds of vulnerable witnesses.[19]

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19 See ch 11.

Chapter 2
COMPETENCY AND CORROBORATION

1. COMPETENCY

2.1 The present law in Western Australia distinguishes between children and adults in that:

* children are subjected to a special inquiry by the court before they can give evidence on oath;

* children under 12 who cannot take the oath may give unsworn evidence, but only if they are possessed of sufficient intelligence to justify the reception of the evidence;

* children may not affirm instead of giving evidence on oath.

These issues are discussed in turn below.

(a) Evidence on oath

(i) The present law

2.2 Children may give evidence on oath if they possess a sufficient understanding of the nature of an oath.[1] In Western Australia, the level of understanding required for taking an oath requires "something more than an understanding of the ordinary duty to speak the truth and the added responsibility to tell the truth imposed by the solemnity of the occasion"[2] and apparently imports a belief in God and in the divine sanction attached to swearing an oath.

2.3 In Western Australia, as a matter of practice, children of 12 or over are generally treated like adults and allowed to take the oath without special inquiry as to their religious beliefs.

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1 *R v Brasier* (1779) l Leach 199, 168 ER 202.

2 *Domonic v R* (1985) 14 A Crim R 418.

Children under 12, on the other hand, are in effect presumed not competent to give evidence on oath and are subjected to a special inquiry as to their understanding of the nature of an oath.[3]

(ii) Problems with the present law

2.4 The law and practice regarding competency to take the oath subjects children under 12 to a more stringent test than adults, who are routinely allowed to give evidence on oath without any inquiry as to their religious beliefs. The practice followed in regard to adults appears more in line with contemporary community standards, which may no longer require a belief in God before a witness can be expected to tell the truth.

2.5 Children who do not satisfy the test for taking the oath may give unsworn evidence,[4] but the unsworn evidence of a child requires corroboration before there can be a conviction.[5] Apart from this question, a witness who gives unsworn evidence may be regarded by the magistrate or jury as inherently less reliable than one who gives evidence on oath.[6]

2.6 The Commission has therefore examined the following issues:

(1) whether, as regards the evidence of children, the distinction between sworn and unsworn evidence should be abolished;

(2) if the distinction is retained, whether the test of competency to take the oath should be amended.

(iii) Should the distinction between sworn and unsworn evidence be abolished?

2.7 Most Australian jurisdictions, like Western Australia, retain the requirement that children may give evidence on oath provided they satisfy a competency requirement. However in South Australia children under 7 may not give evidence on oath.[7] In England, a Bill currently before Parliament provides that all witnesses under 14 must give evidence unsworn.[8]

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3 See id 419 and 421; cf *Khan v R* (1981) 73 Cr App R 190, 191.
4 *Evidence Act 1906* s 101(1). Unsworn evidence is dealt with in paras 2.17-2.37 below.
5 *Evidence Act 1906* s 101(2): see paras 2.42-2.43 below.
6 Pigot Report para 5.14.
7 *Evidence Act 1929* (SA) s 12 (as amended 1988).
8 Criminal Justice Bill 1990 (UK) cl 43.

2.8 In the view of the Commission, abolition of the distinction between sworn and unsworn evidence would not be desirable in Western Australia. Unsworn evidence may well be viewed by juries and others as less reliable than evidence given on oath. If children under 12 are capable of giving evidence on oath then they should be allowed to do so in the same way as adults. This will be assisted if the test of competency to take the oath is modified.[9]

2.9 The Discussion Paper proposed the retention of the distinction between sworn and unsworn evidence.[10] This view has been confirmed by consultations with the Chief Justice and the Criminal Practice and Procedure Review Committee, as well as responses from the Law Society of Western Australia and the Criminal Law Association, which indicate that neither the judiciary nor the broad membership of the practising legal profession favour the abolition of the distinction between sworn and unsworn evidence. This is because of the perception that, even in the absence of an acknowledged belief in God, both witnesses and the jury treat the swearing of an oath as a serious matter more likely to encourage a witness to speak the truth.

2.10 Accordingly the Commission recommends that

The distinction between sworn and unsworn evidence should be retained.

(iv) Should the test for competency to take the oath be modified?

2.11 In the Discussion Paper the Commission invited comment on a proposal that a child of any age should be able to take the oath where the child had a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.[11]

2.12 The Commission thus proposed the widening of the test for competency to take the oath sufficiently to include most children of school age, and possibly also some younger children

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9 As to which, see paras 2.11-2.15 below.

10 Para 6.2.

11 Discussion Paper para 6.2(i). Following the issue of the Discussion Paper, the Premier announced that State Cabinet intended to introduce legislation to enable children of any age to take the oath if they have sufficient appreciation of the solemnity of the occasion: Media Statement 18 June 1990.

who have been adequately prepared for giving evidence.[12] The test proposed was adapted from the modern English rule as set out in *R v Hayes*.[13] The position is broadly similar in Canada, where the competency of a witness under 14 to take the oath is based on whether the witness understands the nature of an oath or solemn affirmation, and whether the witness is able to communicate the evidence.[14] An inquiry into a child witness's beliefs and religious education is not necessary and no finding need be made that a child believes in God or a Supreme Being before the child may be permitted to take the oath. It is sufficient if the child understands that the oath involves a moral obligation to tell the truth.[15]

2.13 Submissions made in response to the Discussion Paper supported the provisional proposal. In particular, the Chief Justice and other members of the judiciary were in favour of the change proposed, to widen the basis on which children might be held competent to give evidence on oath. The judiciary are clearly mindful of the fact that present practice allows an adult witness without any religious belief to take the oath because there is in effect a presumption of competency.

2.14 These responses confirm the Commission's view that the test of competency to take the oath should be modified. There should be no necessity for children under 12 to profess belief in God, or in a divine sanction for telling a lie, before they are able to take the oath.

2.15 The Commission therefore recommends that

> **A child of any age should be able to take the oath where the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath, over and above the ordinary duty to tell the truth.**

2.16 This recommendation should not bring about any change to the present practice adopted in respect of children of 12 or over, who are generally treated like adults and allowed to take the oath without inquiry as to their religious beliefs, or as to their competency generally.[16] In the Commission's view it is important that there should be no change in this regard.

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12 As to preparation of witnesses, see paras 6.1-6.23 below.
13 [1977] 1 WLR 234, 237.
14 Canada *Evidence Act 1970* s 16(1).
15 *R v Fletcher* (1982) 1 CCC (3d) 370; *R v Green* (1986) 42 Man R (2d) 81; *R v Conners* [1986] 5 WWR 94.
16 See para 2.3 above.

(b) Unsworn evidence

(i) The present law

2.17 Under section 101(1) of the *Evidence Act 1906*, a child under 12 who does not satisfy the test for taking an oath may give unsworn evidence, but only if, in the opinion of the court, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth. Such a requirement is not imposed in the case of children over that age, or adults.[17]

(ii) Problems of the present law

2.18 The present test of competency to give unsworn evidence may have the effect of preventing the evidence of very young children from being received by the court. In the Discussion Paper the Commission therefore suggested that the test should be modified. It invited comment on a proposal that a child who was not competent to take the oath should be able to give unsworn evidence if the court was satisfied that the child had reached a stage of cognitive development where the child's evidence, though not on oath, might be of assistance to the court.[18]

2.19 Such a proposal is in line with developments in other jurisdictions. Legislative provisions in Queensland, South Australia and Victoria have recently been amended to modify the test of competency to give unsworn evidence.[19] In England, Parliament is considering a Bill to implement the recommendations of the Pigot Report[20] to facilitate the giving of evidence by children of any age.[21] In Scotland there is, in practice, an assumption "that a child of any age is legally competent to give evidence subject to his or her verbal abilities and understanding of truth and falsehood being adequately confirmed in the course of a preliminary conversation

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17 Adults who do not understand the nature of, or the obligation imposed by, an oath or affirmation may give unsworn evidence if they understand that they are required to speak the truth and will be liable to punishment if they do not do so: *Evidence Act 1906* s 100A.

18 Discussion Paper para 6.2(iii). Following the issue of the Discussion Paper, the Premier announced that State Cabinet intended to introduce legislation to allow the unsworn evidence of children or adults to be received if they understood what was meant by speaking the truth: Media Statement 18 June 1990.

19 *Evidence Act 1977* (Qld) s 9(1) (introduced 1989); *Evidence Act 1929* (SA) s 12(1) (introduced 1988); *Evidence Act 1958* (Vic) s 23 (introduced 1991).

20 Para 5.14.

21 Criminal Justice Bill 1990 (UK) cl 43, providing that all children under the age of 14 must give evidence unsworn, and abolishing the presumption that a child of tender years is not competent to give evidence.

between the judge and the child."[22] In Canada a child under 14 who does not understand the nature of an oath may, if able to communicate the evidence, testify on promising to tell the truth.[23]

2.20 The aim of the proposal in the Discussion Paper was to allow a child of any age to give unsworn evidence provided the presiding judge believed that the child had something relevant to tell the court. The question of the weight of the child's evidence in such a case would be a matter for the jury, properly assisted by directions from the trial judge.

2.21 The Commission is anxious to avoid the situation which arose in New South Wales in the *"Mr Bubbles" (Seabeach Kindergarten)* case. There the evidence of young children[24] who were alleged to have been sexually assaulted was ruled inadmissible because the children were unable to satisfy the competency test for admission of unsworn evidence.[25] Section 33 of the New South Wales *Oaths Act 1900* (as amended in 1985) stipulated that, before a child under 12 who was unable to swear an oath gave unsworn evidence, the court had to be satisfied that the child was "of sufficient intelligence to justify the reception of evidence" and "understands the duty of speaking the truth before the court." The court in the *"Mr Bubbles"* case was persuaded by expert evidence that children under the age of 6 could not be expected to meet this requirement, which implies some understanding by the child of the significance of giving evidence in court proceedings.

2.22 As a result, in 1990 the New South Wales Parliament enacted an amendment to the *Oaths Act* to facilitate the giving of unsworn evidence by young children not competent to take an oath.[26] The Attorney General acknowledged that "there is an almost unanimous conclusion that children under the age of 6 do have the capacity to tell the truth and their statements to a court can be of real value".[27]

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22 Scottish Report para 3.6.

23 Canada *Evidence Act 1970* s 16(3).

24 Mostly aged between 4 and 5 at the time of the committal proceedings.

25 The case was dismissed by a magistrate in July 1989 after he ruled that the children involved did not satisfy the requirements of s 33 of the *Oaths Act*. The case is discussed by Hunt J in *Attorney General v TCN Channel Nine Pty Ltd* (unreported) Supreme Court of New South Wales, Common Law Division, 6 July 1990, No 12946 of 1990, in which an injunction to restrain the showing of a television programme dealing with the case was refused. See also "The Wrong Time to Cry Rape" *The Australian* 26 October 1990 p 12.

26 See para 2.27 below. In the Commission's view, the amended provision is not entirely satisfactory: see para 2.33 below.

27 *Parliamentary Debates* (NSW), 1990 Vol 23 9667, Legislative Assembly (Second Reading Speech on Oaths (Children) Amendment Bill 1990 and Justices (Committal Proceedings) Amendment Bill 1990).

2.23 Public response to the Commission's provisional proposal overwhelmingly favoured reform to enable young children to be competent witnesses, but a sizeable number of respondents wanted more extensive reforms than were proposed by the Commission. In particular, the point was made that the determination of competency, if based on cognitive development, would require specialist skills and training not generally given to most judges. It was also pointed out that "cognitive development is not on its own a determinant of ability to give reliable evidence"[28] and that the use of cognitive development as an indication of competency was likely to lead to legal argument on the question, and to necessitate the use of expert witnesses to determine competency.[29] Some respondents indicated that they would prefer to see the abolition of all special competency requirements for children. This would be broadly in line with developments in a number of jurisdictions, which presume the competency of children to give evidence, rather than imposing a test of competency.[30]

2.24 One issue for the Commission is therefore whether a test of competency should be retained. If there is to be a test of competency, a second issue is what that test should be.

(iii) Should there be a test of competency?

2.25 The central issue here is whether it is more appropriate to provide a test of competency to determine whether children who are not competent to take the oath should be able to give unsworn evidence, or presume that children are competent to give unsworn evidence unless the contrary is established.

2.26 Several jurisdictions have moved in the direction of a presumption of competency, including Queensland[31] and New South Wales.[32] In the United Kingdom, a Bill before Parliament provides that children under 14 may give unsworn evidence subject only to the court having power to determine that a particular witness is not competent to give evidence.[33] In Scotland, there is already a presumption that a child of any age is legally competent to give

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28 Dr J Cashmore (Consultant psychologist with the Australian Law Reform Commission evaluating the use of closed-circuit television for the giving of evidence by children).

29 In addition, the point was repeatedly made that, if judges are to be the sole determiners of competency, they should receive training in child development and/or guidelines both to assist them in determining children's competency and to ensure that they appreciate the need for simple language to be used in court, so that child witnesses can understand what is required of them.

30 See paras 2.26 - 2.27 below.

31 *Evidence Act 1977* (Qld) s 9(1)(b).

32 *Oaths Act 1900* (NSW) s 33 (as amended 1990).

33 Criminal Justice Bill 1990 (UK) cl 43, implementing the proposals of the Pigot Report para 5.12.

evidence, subject to the child's verbal abilities and understanding of truth and falsehood being confirmed in the course of a preliminary conversation with the judge.[34]

2.27 Under the law now in force in New South Wales a child, though not competent to take the oath, may give unsworn evidence if the child understands the difference between the truth and a lie and is able to respond rationally to questions. This is presumed unless the contrary is established to the satisfaction of the court. The court will receive the child's evidence provided that the court tells the child that it is important to tell the truth, and the child makes a declaration that "I will not tell any lies in this court."[35]

2.28 The Irish Law Reform Commission has expressed a different view. It recommends that there should not be any presumption of competency, but that the court should continue to make a decision in each case. In the Irish Commission's view, the test of competency should be the capacity of the child to give an intelligible account of what he or she has observed.[36]

2.29 The Irish Commission noted two basic difficulties with the total abolition of any inquiry into the competency of young children.[37] The first is the fact that, where the trial is before a jury, the child witness may already have attempted to tell part of his or her story before it becomes apparent that the child is a witness whose competence is in question. In that event the jury would have to be discharged if the witness were afterwards ruled not competent, or it would have to be assumed that a judicial warning to disregard this evidence would sufficiently protect the accused. The second difficulty is the impossibility in practice of implementing such a presumption, which requires that a day old baby or child unable to speak be presumed competent.

2.30 This Commission agrees with the Irish Commission that a test for competency should be retained. A presumption that very young children are competent to give evidence does not seem workable or appropriate. The court should make an assessment in each case, though in practice the assessment process will be progressively easier as the age of the child increases.

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34 Scottish Report para 3.6.

35 *Oaths Act 1900* (NSW) s 33 (as amended 1990). The Evidence Bill introduced into the NSW Parliament in 1991 abolishes this provision but replaces it by a new provision (cl 16) in similar terms, applying to all persons who are not competent to give sworn evidence.

36 Irish Report para 5.8.

37 Id para 5.13.

2.31 The Commission therefore recommends that

A test as to the competency of children under 12 to give unsworn evidence should be retained.

(iv) What should the test be?

2.32 There remains the question of what the test of competency to give unsworn evidence should be. In the Discussion Paper the Commission invited comment on a proposal that a child should be able to give unsworn evidence if the evidence may be of assistance to the court.[38] The New South Wales legislation requires that a child be able to understand the difference between the truth and a lie, and be able to respond rationally to questions.[39] Under the Irish proposal, the child must be able to give an intelligible account of events which he or she has observed.[40]

2.33 In the Commission's view the shortcoming of the New South Wales approach is that a court will have to consider the question of a child's ability to grasp abstract concepts like truth and lies. This will make it difficult to admit the evidence of a very young witness such as the children in the *"Mr Bubbles"* case. The problem is exacerbated by the requirement that the child must declare that he or she will not tell lies in the court, since this again implies an understanding of the distinction between truth and lies. As the New South Wales Attorney General recognised in his second reading speech, there is no proven relationship between an understanding of the duty to tell the truth and the reliability of evidence. He said:

> "If the child does not understand the duty of telling the truth, then this is a matter which should go to the weight to be given to the evidence rather than its admissibility."[41]

2.34 Given the opportunity, children of 3 or 4 can be reliable witnesses.[42] Children of that age may not understand the difference between abstract concepts such as truth and lies but may be able to give an intelligible and accurate account of events - indeed, there is evidence that

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38 Para 6.2(iii).
39 See para 2.27 above.
40 See para 2.28 above.
41 *Parliamentary Debates* (NSW), 1990 Vol 23 9667, Legislative Assembly.
42 As in the case of "Susie", dealt with in D Jones and R Krugman "Can a Three Year Old Child Bear Witness to Her Sexual Assault and Attempted Murder?" (1986) 10 *Child Abuse and Neglect* 253.

children of such an age have not learnt how to lie or the reasons for lying.[43] The Irish Law Reform Commission was impressed by the force of the contention that the account of the victim of an offence, even where the victim is too young to understand the concept of being under an obligation to tell the truth, should at least be heard by the court. In their view the competency test should be confined to one of ascertaining whether the child is able to give an intelligible account of the relevant events. They were satisfied that there was no possibility of any serious miscarriage of justice occurring if the evidence of a child who satisfied this test was heard.[44]

2.35 The Commission therefore recommends that the test of competency to give unsworn evidence should be that:

> **A child under 12 who is not competent to swear an oath or affirm should be able to give unsworn evidence if the child is able to give an intelligible account of events which he or she has observed or experienced.**

(v) Perjury by child witnesses who give unsworn evidence

2.36 Section 101(3) of the *Evidence Act 1906* provides that a child under 12 who gives unsworn evidence "shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn". This provision will however apply only to those who are above the minimum age of criminal responsibility, which was raised from 7 to 10 in 1988.[45] Section 101(3) therefore applies only to children of 10 or 11. Despite its narrow field of application the Commission recommends that section 101(3) should be retained without any lowering of the age. The Pigot Report contemplated the retention of a similar English provision.[46]

2.37 The Commission therefore recommends that

> **Section 101(3) of the *Evidence Act 1906* should be retained.**

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43 See J E B Myers and others *Expert Testimony in Child Sexual Abuse Litigation* (1989) 68 Nebraska L Rev 3, 108-127; N J Taylor and others *Child Sexual Abuse (II): Obtaining Accurate Testimony from Child Victims* [1990] NZLJ 388.

44 Irish Report para 5.17.

45 *Criminal Code* s 29, as amended by the *Acts Amendment (Children's Court) Act 1988* s 44.

46 Para 5.16.

(c) Affirmation

2.38 Witnesses may affirm in lieu of swearing an oath.[47] However, it seems that this option is not available for child witnesses under 12. In *Domonic v R*[48] Franklyn J took the view that, since a child who did not satisfy the test for taking the oath could give unsworn evidence instead, it was not possible for the child to affirm. However, in the view of the Commission, since affirmation is an alternative to swearing an oath, it is not properly regarded as an alternative to giving unsworn evidence, which is a procedure limited by statute to witnesses who do not satisfy the test for taking an oath. Affirmation should be a possible alternative to taking the oath for children, just as it is for adults.

2.39 The Commission therefore recommends that -

A child of any age who is competent to do so but does not wish to take the oath should be entitled to make an affirmation in place of swearing an oath.

2. CORROBORATION

(a) Introduction

2.40 Evidence Acts in many jurisdictions contained a requirement that where children below a certain age give unsworn evidence, that evidence must be corroborated before there can be a conviction. Such a requirement is contained in section 101(2) of the Western Australian *Evidence Act 1906*.[49]

2.41 Even where a child gives evidence on oath, there is a general common law requirement that the judge should warn the jury about the dangers of convicting on the uncorroborated evidence of a young child.[50] However, in Western Australia the common law requirement has been abrogated by section 50 of the *Evidence Act*, which provides that a judge is not required to

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47 *Evidence Act 1906* s 99(1).

48 (1985) 14 A Crim R 418.

49 Three other Australian jurisdictions also retain the requirement: *Evidence Act 1910* (Tas) s 128(2); *Oaths Act 1939* (NT) s 25A; *Evidence Act 1971*(ACT) s 64(3).

50 *Cross on Evidence* para 15140. In Queensland, this was formerly a statutory requirement: *Evidence Act 1977* (Qld) s 9(2), before its amendment in 1989.

issue a corroboration warning. It appears that this covers corroboration warnings in respect of child witnesses as well as adult witnesses of particular classes.

(b) The legal requirement of corroboration

(i) The present law

2.42 Section 101(2) of the *Evidence Act* provides that the unsworn evidence of a child under the age of 12 must be corroborated before there can be a conviction. Although corroboration generally means confirmation by other independent evidence, the unsworn evidence of another child under 12 is insufficient.[51]

2.43 Thus many cases of child sexual abuse never get to court because the incidents complained of took place either in private or in the presence of other young children and corroboration is not available from other competent witnesses.

(ii) Research

2.44 In the Discussion Paper the Commission pointed out that research has changed the view of the reliability of children's evidence. Current research findings indicate that children's evidence is not inherently unreliable and that children are not therefore a class of witnesses on whom it is unsafe to rely.[52]

2.45 The theory of the unreliability of children's evidence has traditionally been based on a belief that, because of their immaturity, children have inferior powers of observation and recollection, are unable to comprehend or describe accurately what they have seen or experienced, and have no ethical sense or moral responsibility.[53] The general suspicions about children's evidence are summarized in the following passage:

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51 *Director of Public Prosecutions v Hester* [1973] AC 296; *Croft v R* (1917) 19 WALR 49.

52 See, for instance: R K Oates "Children as Witnesses" (1990) 64 *ALJ* 129; Spencer and Flin 236-276; N J Taylor and others "Child Sexual Abuse (II): Obtaining Accurate Testimony from Child Victims" [1990] *NZLJ* 388; D Thomson *Reliability and Credibility of Children as Witnesses* (paper presented at Australian Institute of Criminology Conference *Children as Witnesses* 1988); G S Goodman and R S Reed "Age Differences in Eye-witness Testimony" (1986) 10 *Law and Human Behaviour* 317; M K Johnson and M A Foley "Differentiating Fact from Fantasy: the Reliability of Children's Memory" (1984) 40 *J Soc Sc* 32.

53 *Kendall v R* [1962] SCR 469.

> "First, a child's powers of observation and memory are less reliable than an adult's. Secondly, children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely. Thirdly, they are also very egocentric, so that details seemingly unrelated to their own world are quickly forgotten by them. Fourthly, because of their immaturity they are very suggestible and can easily be influenced by adults and other children. One lying child may influence others to lie; anxious parents may take a child through a story again and again so that it becomes drilled in untruths. Most dangerously, a policeman taking a statement from a child may without ill will use leading questions so that the child tends to confuse what actually happened with the answer suggested implicitly by the question. A fifth danger is that children often have little notion of the duty to speak the truth, and they may fail to realize how important their evidence is in a case and how important it is for it to be accurate. Finally, children sometimes behave in a way evil beyond their years. They may consent to sexual offences against themselves and then deny consent. They may completely invent sexual offences. Some children know that the adult world regards such matters in a serious and peculiar way, and they enjoy investigating this mystery or revenging themselves by making false accusations."[54]

2.46 However, empirical studies clearly demonstrate that:

(1) there is no correlation between age and honesty and children are not more likely than adults to lie in court;[55]

(2) children's powers of observation and recall in the short term are not inferior to those of adults, though they may recall different things and their memory may perhaps fade faster;[56]

(3) the immature tendency to mix fact and fantasy does not apply to children after about the age of 6;[57]

(4) the form of adult abuse is not likely to be a theme of childish fantasy.[58]

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54 J D Heydon *Evidence: Cases and Materials* (2nd ed 1984) 84.

55 S Rozell "Are Children Competent Witnesses?: A Psychological Perspective" (1985) 63 *Wash ULQ* 815, 829; G B Melton "Children's Competency to Testify" (1981) 5 *Law and Human Behaviour* 73, 74 and 82; B Marin and others "The Potential of Children as Eyewitness" (1979) 3 *Law and Human Behaviour* 295, 304.

56 For a detailed discussion of the research findings on this and other points see Spencer and Flin 236-276.

57 S Rozell "Are Children Competent Witnesses?: A Psychological Perspective" (1985) 63 Wash *ULQ* 815, 828.

58 M De Young "A Conceptual model for Judging the Truthfulness of a Young Child's Allegations of Sexual Abuse" (1986) 56 (4) *Amer J Orthopsychiat* 558.

(iii) Reform of the law elsewhere

2.47 As a result of these findings corroboration requirements for child witnesses have been strongly criticized. In many common law jurisdictions legal requirements for corroboration have been abolished.[59]

2.48 In England, where the corroboration requirement was abolished in 1988,[60] the Commission has been informed that this has made "little practical difference",[61] and that the prosecution continues to look for corroboration because of the need to have sufficient evidence to prove the case before laying charges of child sexual abuse. In England, however, the judge still has a duty to warn the jury of the danger of accepting evidence of any sexual complaint.[62] This "largely nullifies the effect of s.34 of the *Criminal Justice Act* abolishing the duty to warn in respect of the evidence of a child".[63] In addition, until recently, it was believed that there was an absolute bar to receiving the evidence of children under the age of 6.[64] Most children over that age were able to satisfy the English competency requirements for taking the oath.[65] Therefore few children who could not be sworn gave evidence. The Pigot Report[66] has now recommended the abolition of the rule making it obligatory for the court to warn the jury of the danger of convicting the accused on the uncorroborated evidence of the complainant, whether a child or an adult.

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59 Eg *Crimes (Child Assault) Amendment Act 1985* (NSW) s 5 and Schedule 1(6); The *Criminal Code* (Qld), *Evidence Act* and *Other Acts Amendment Act 1989* s 61; *Evidence Act Amendment Act 1988* (SA) s 5 (abolished in part); *Criminal Justice Act 1988* (UK) s 34; (Canada) 1987 c 24 ss 15 and 18; *Crimes (Sexual Offences) Act 1991* (Vic) s 8.

60 *Criminal Justice Act 1988* (UK) s 34.

61 Information supplied by Mr J R Spencer, Lecturer in Law at Cambridge University and co-author of Spencer and Flin, in a letter to the Commission dated 16 November 1990.

62 Spencer and Flin 174.

63 J R Spencer n 61 above.

64 The belief was based largely upon the following statement of Lord Goddard CJ in *R v Wallwork* (1958) 42 Cr App R 153, 160-161 (a case involving alleged incest with a child of 5):

> "We now come to the point which has given the court considerable difficulty. The child was called as a witness, but said nothing. The court deprecates the calling of a child of this age as a witness. Although the learned judge had the court cleared as far as it can be cleared, it seems to us to be unfortunate that she was called and, with all respect to the learned judge, I am surprised that he allowed her to be called. The jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose that they could. Of course, the child could not be sworn .... but in any circumstances to call a little child of the age of five seems to us to be most undesirable, and I hope it will not occur again."

In *R v Z* [1990] 3 WLR 113 the Court of Appeal distinguished *R v Wallwork* and ruled that s 38(1) of the *Children and Young Persons Act 1933* (UK), as amended, governing the receipt of evidence by young children, did not require any minimum age before a judge could exercise discretion to allow a child of tender years to give unsworn evidence.

65 Competency to take the oath in England is based on an inquiry in the presence of the jury as to "whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct": *R v Hayes* [1977] 1 WLR 234, 237.

66 Paras 5.30-5.31 and recommendation 19.

2.49 In addition, the general question of corroboration in criminal trials has recently been examined by the Law Commission.[67] It provisionally concluded that existing corroboration rules are "unsatisfactory in so many respects that there is no alternative to abolishing the present law".[68]

(iv) The Discussion Paper Proposal

2.50 In the Discussion Paper the Commission invited comment on a proposal that the requirement that the unsworn evidence of a child should be corroborated before a conviction can be obtained should be eliminated.[69] Those who commented on the Discussion Paper were generally in favour of this proposal. However, the Criminal Law Association, by a majority, supported the retention of the corroboration requirement as a safeguard in the overall interests of justice. The Law Society of Western Australia, while supporting the elimination of the corroboration requirement, nevertheless wanted to retain a mandatory warning to the jury regarding the reliability of a child's uncorroborated evidence.

(v) Recommendation

2.51 The fear of abolition is that, in the absence of the requirement of corroboration, juries will unfairly convict accused persons charged with child sexual abuse.[70] The present law in Western Australia precludes a conviction in every case where a child under 12 gives unsworn evidence and there is no corroboration, no matter how believable the child's story may be. Dispensing with the legal requirement of corroboration will allow the jury or magistrate, where the alleged offence is proved beyond a reasonable doubt, to convict an accused person on the evidence of the child witness. It does not follow that all child witnesses will be believed by all juries and magistrates. It only means that the law leaves open the possibility that there could be

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67 The Law Commission *Corroboration of Evidence in Criminal Trials* (Working Paper No. 115 1990).

68 Id para 4.39.

69 Para 6.2(iv). The Government has since announced that it intends to introduce legislation to abolish the corroboration requirement: Media Statement 18 June 1990.

70 The Australian 2 July 1990 p 4 contained the following comment on the Government's announcement that legislation would be introduced to abolish the corroboration requirement: "Approved changes to the *Criminal Code* in Western Australia would make it almost impossible for an accused person not to be convicted of child sexual abuse charges', the Council for Civil Liberties claimed yesterday. The Council has condemned the proposed changes as disturbing and premature and it believes if they become law the mere laying of child abuse charges would most likely ensure a guilty verdict."

a conviction where the child's evidence convinces the jury or magistrate beyond reasonable doubt of the accused's guilt.

2.52 The Commission has concluded that the legal requirement of corroboration of the unsworn evidence of a child under 12 ought to be abolished. It therefore recommends that -

Section 101(2) of the *Evidence Act 1906* should be repealed.

(c) Corroboration warnings

(i) The present law

2.53 In Western Australia, it is uncertain whether it is necessary for a judge to warn the jury about the danger of convicting on the uncorroborated evidence of a young child who gives evidence on oath.

2.54 The *Evidence Act* was amended in 1985 to abolish mandatory warnings in respect of the uncorroborated evidence of a complainant in a sexual offence case and to provide that a warning might be given only where the judge was satisfied that the particular circumstances justified it.[71] This section did not affect the rule of practice according to which a judge is required to warn a jury of the danger of convicting on the uncorroborated evidence of a child who gives sworn evidence.[72]

2.55 In 1988 the 1985 amendment was repealed and replaced by a more general provision, section 50:

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71 *Evidence Act 1906* s 36BE (introduced by the *Acts Amendment (Sexual Assaults) Act 1985*), which provided:
"(1) On the trial of a person for a sexual assault offence or an offence under Chapter XXII of The *Criminal Code* -
(a) the judge is not required by any rule of law or practice to give in relation to any offence of which the person is liable to be convicted on the charge for the offence a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed; and
(b) the judge shall not give a warning to the jury of the kind described in paragraph (a) unless satisfied that such a warning is justified in the circumstances.
(2) Nothing in subsection (1) affects the operation of any law that provides that a person cannot be convicted of an offence upon the uncorroborated testimony of one witness or upon the evidence of a child whose evidence is admitted under section 101."

72 *Cross on Evidence* para 15140. In Canada this rule of practice has hardened into a rule of law as a result of the decision of the Supreme Court of Canada in *Kendall v R* [1962] SCR 469.

"(1) In this section "corroboration warning" in relation to a trial means a warning to the effect that it is unsafe to convict the person who is being tried on the uncorroborated evidence of one witness.

(2) On the trial of a person on indictment for an offence -

(a) the Judge is not required by any rule of law or practice to give a corroboration warning to the jury in relation to any offence of which the person is liable to be convicted on the indictment; and

(b) the Judge shall not give a corroboration warning to the jury unless the Judge is satisfied that such a warning is justified in the circumstances.

(3) Nothing in subsection (2) affects the operation of section 101(2)."[73]

2.56 This section was intended to implement the recommendations of the Murray Report on the *Criminal Code*[74] which favoured the repeal of all legal requirements for corroboration and commented, in relation to corroboration generally:

> "[T]he Court is required in any jury trial to make proper observations with respect to the facts and the witnesses for the assistance of the jury, and the Court always follows that course. Therefore, if in any type of case, any witness for any particular reasons appears to the Judge to be one about whom the jury ought to be warned to be careful, then that warning can be made and it can be made in terms which are sensible and useful to the jury having regard to the particular facts of the case before them. That is in fact a situation far more productive of the advancement of the cause of justice than

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73 *Criminal Law Amendment Act 1988* s 42. The warning authorized under s 50(2)(b) could be either what the English Law Commission calls a "full corroboration warning", in which the jury is warned of the "danger of convicting" on the sole evidence of a particular witness, or it could be a lesser warning, of the need for "special caution" in assessing the reliability of the testimony of the witness: The Law Commission *Corroboration of Evidence in Criminal Trials* (Working Paper No 115 1990) 25, 27.
In *Longman v R* (1989) 89 ALR 161 the High Court of Australia considered the meaning and effect of the predecessor to section 50(2)(b) (s 36BE, quoted in n 71 above, repealed in 1988) which was in somewhat similar terms, and Deane J discussed the appropriate wording for a warning of the kind permitted. He concluded (at 178) that, because of the element of disparagement of the witness involved in a warning about it being "dangerous" or "unsafe" to act on the uncorroborated evidence of the witness, his own preference was for a warning couched in terms that referred to the "need to scrutinise the complainant's evidence with great care and caution".
There is no judicial decision which sets out any definitive formulation of a corroboration warning under s 50(2)(b).

74 *The Criminal Code: A General Review* (1983) recommendation 17. See also discussion on pp 58-62.

> requirements of corroboration as a matter of law for selected offences, the very rigidity of which can cause injustice as often as it prevents that occurring."[75]

2.57 It appears that section 50 covers corroboration warnings in respect of child witnesses as well as adult witnesses of particular classes. Therefore, in Western Australia, there is no longer any legal requirement that the judge must issue a warning in respect of the evidence of a child witness.

(ii) Reforms elsewhere

2.58 Some other Australian jurisdictions have also abolished the general common law rule of mandatory warnings, but have retained a discretion to warn in respect of the evidence of children,[76] or in respect of sexual offences generally.[77] However, New Zealand expressly prohibits a judge from instructing a jury on the need to scrutinize the evidence of young children generally with special care and from suggesting to the jury that young children generally have tendencies to invention or distortion.[78] A related provision states that "the Judge shall not give any warning to the jury relating to the absence of corroboration of the evidence of the complainant if the Judge would not have given such a warning had the complainant been of full age".[79] In Victoria a recent amendment to the *Evidence Act 1958* achieves a similar result.[80]

2.59 In the Canadian *Criminal Code* corroboration is not required for a conviction in cases involving sexual offences against children, and the judge is not to instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.[81] This does not prevent a trial judge in his or her discretion, in reviewing the facts with a jury, from discussing the weight which the jury may see fit to attach to the unsupported evidence of the complainant.[82]

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75 Id 62.

76 *Evidence Act 1898* (NSW) s 42A.

77 *Crimes Act 1900* (NSW) s 405C; *Crimes Act 1958* (Vic) s 62(3); *Evidence Act 1929* (SA) s 34i(5); *Evidence Act 1971* (ACT) s 76F.

78 *Evidence Act 1908* (NZ) s 23H(c).

79 Id s 23H(b).

80 *Evidence Act 1958* s 23(2A) (introduced 1991), which provides:

> "On the trial of a person for an offence, the judge must not warn, or suggest in any way to, the jury that the law regards people with impaired mental functioning or children as an unreliable class of witness."

81 S 274.

82 *R v Saulnier* (1989) 48 CCC (3d) 301, 305.

(iii) The problems of corroboration warnings

2.60 In *Longman v R*[83] Deane J discussed the problem of a general rule requiring that a warning be given to a jury that it is unsafe to convict on the uncorroborated testimony of a particular class of witness.[84]

> "The main problem is that the universal proposition embodied in such a rule [the common law rule which requires that a corroboration warning be given in respect of witnesses who are complainants in sexual offence cases] is simply unjustified. Particularly in cases of sexual assault within a family unit where there are likely to be powerful influences favouring concealment rather than complaint, neither wisdom nor experience - be it judicial or otherwise - justifies the unqualified proposition that, in any case where the evidence of the complainant is uncorroborated about any element of the offence, it would be dangerous to convict on that uncorroborated evidence. In fact, the circumstances of the particular case may be such that it is not dangerous to convict on such uncorroborated evidence at all.
>
> Another problem about a general rule of practice requiring the giving of such an unqualified warning is that it inevitably involves an element of disparagement of the complainant in that it places the complainant in a special category of suspect witnesses. The effect of that is that a requirement that a jury be warned that it is dangerous to act on the uncorroborated evidence of a complainant inevitably represents a strong discouragement to the intelligent victim of a sexual assault, particularly one committed in a domestic context where corroboration of the complainant's testimony in relation to all elements of the alleged offence is unlikely, against complaining to the authorities or cooperating in the prosecution of the offender."

2.61 The English Law Commission have also criticized the existing common law rules about corroboration warnings on several grounds:

(1) They are "unduly inflexible" and "unduly complex" to the extent of making it extremely difficult for a judge to give a jury proper help when summing up.[85]

(2) They produce a substantial number of anomalies.[86]

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83 (1990) 89 ALR 161, 171-2.

84 The case was concerned with s 36BE of the *Evidence Act 1906*, introduced in 1985, which abolished mandatory warnings in respect of the uncorroborated evidence of a complainant in a sexual offence case: see para 2.54 above.

85 The Law Commission *Corroboration of Evidence in Criminal Trials* (Working Paper No 115 1990) paras 4.11-4.17.

86 Id paras 4.18-4.22.

(3) In some cases they not merely fail to protect accused persons, but actually work against them.[87]

(4) They are unjustified to the extent that they treat all witnesses of particular classes in exactly the same way.[88]

2.62 In Western Australia, though mandatory corroboration warnings have been abolished, the discretion to give a corroboration warning is retained where the judge is "satisfied that such a warning is justified in the circumstances".[89] If the age of the witness is to be a relevant factor, the effectiveness of the abolition of a mandatory corroboration warning may be undermined by a judicial tendency to warn whenever there is a young child witness. According to a leading text,[90] a rule making a warning discretionary in the case of a particular category of witness or in particular circumstances is probably best regarded as laying down a peremptory requirement because appeals have been allowed where no warning was given. If the age of the witness is a relevant factor, then the failure to warn where a child witness is involved may create the "perceptible risk of miscarriage of justice" which was held in *Longman v R*[91] to give grounds for allowing the appeal and ordering a new trial. Judges may therefore tend to warn whenever a young child is involved. This may encourage acquittals, and discourage prosecutions.

(iv) Recommendation

2.63 In the Commission's view section 50(2) abolishes mandatory warnings in respect of child witnesses (whether sworn or unsworn) but does not preclude a judge from issuing a corroboration warning on the basis that the witness is a child where satisfied that all the circumstances call for such a warning. Given the arguments for the elimination of corroboration requirements in respect of child witnesses, and for the abolition of mandatory warnings about their evidence, it follows that warnings based on the fact that the witness is a child and therefore belongs to a class of witness which is less trustworthy should be eliminated as inappropriate. This is the situation in New Zealand.[92] Warnings based on the immaturity of a particular child

87 Id paras 4.23-4.24.
88 Id paras 4.5-4.7.
89 *Evidence Act 1906* s 50(2)(b).
90 *Cross on Evidence* para 15125.
91 (1989) 89 ALR 161.
92 See para 2.58 above.

(as opposed to warnings based on the immaturity of children generally, or children of a particular age generally) would still be permitted.

2.64 The Commission therefore recommends that -

> **A judge should be prohibited from issuing a corroboration warning to a jury on the basis that the witness is a child and therefore belongs to a class of witness which is less trustworthy**.

Chapter 3
ADMISSION INTO EVIDENCE OF OUT-OF-COURT STATEMENTS

1. INTRODUCTION

3.1 Existing rules of evidence, and in particular the rule against hearsay, may prevent the admission of evidence which the court would otherwise have considered relevant to a particular case. In cases involving alleged sexual offences against or intra-familial assault on or abuse of children,[1] out-of-court statements by child witnesses may be the only or the best available evidence. In this chapter the Commission considers measures to enable the court in such cases to admit into evidence relevant out-of-court statements of children, whether oral, written or electronically recorded. In making its recommendations, the Commission has placed great importance on the need to protect the legal right of accused persons to a fair trial as well as on the need to protect child witnesses.

(a) The rule against hearsay

3.2 The rule basically states that an assertion, other than one made by a witness while testifying in court proceedings, is inadmissible as evidence of any fact asserted.[2] This rule applies to all kinds of assertion, whether made orally, in writing or recorded electronically. Thus, any out-of-court statement made by a witness will generally be inadmissible as evidence of the truth asserted in it.

(b) Exceptions

3.3 There are many common law and statutory exceptions to the hearsay rule. There is no general exception in Western Australia which would ordinarily allow a child's out-of-court statement, for example, to a parent, teacher, social worker or doctor to be admitted in criminal proceedings. However, special circumstances may allow such statements to be admitted as evidence by resort to narrowly based exceptions like

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1 The Commission's recommendations in chs 3-5 are limited to such cases. For discussion of these terms, see paras 3.46-3.50 below.

2 *Cross on Evidence* para 31010.

* the res gestae exception (which covers statements considered relevant on account of their contemporaneity with the matter under investigation);[3]

* recent complaints of sexual offences;[4]

* prior consistent statements introduced to rebut the suggestion that the witness's testimony is a recent fabrication.[5]

3.4 The res gestae exception allows a prior consistent statement to be admitted where it is sufficiently contemporaneous with the events complained of to be "part of the story".[6] The test for admissibility under this exception has been stated to be whether the statement was made so close to an unusual or startling event that the judge can answer yes to the question: "Can the possibility of concoction or distortion be disregarded?"[7]

3.5 As recently as 1989 the English High Court in *Bradford City Metropolitan Council v K (Minors)*[8] held that out-of-court statements in the form of complaints made by a young girl to her foster parent and to her teacher that she had been sexually abused by a member of her family did not fall within the res gestae exception to the hearsay rule even though the complaints were made "soon thereafter". The court held that the complaints were not "contemporaneous" with the incidents of abuse. The High Court in the *Bradford* case relied on the decision in *Sparks v The Queen*[9] in which the House of Lords upheld the decision of the trial judge to refuse to admit the evidence of a statement made by a young girl to her mother an hour and a half after the girl had been assaulted, that "It was a coloured boy". The accused was a white man. His conviction for indecently assaulting the girl was upheld. Although the girl's statement was exculpatory of the accused, it was excluded.[10] It was not part of the res gestae because it was not considered to have been sufficiently proximate in time to the assault.

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3 Id para 37001.
4 Id paras 17260 - 17295.
5 Id para 17305.
6 Id para 17300.
7 *R v Andrews* [1987] 1 AC 281, 300-301 per Lord Ackner.
8 [1990] 2 WLR 532.
9 [1964] AC 964.
10 *Cross on Evidence* para 31010 describes this case as an example of the harshness of the rule against hearsay.

(c) The rationale for excluding hearsay

3.6 The rationale for excluding hearsay evidence is generally that it is not given on oath and not subject to cross-examination, and is therefore prejudicial to the accused.[11] As Lord Bridge has stated:

> The rationale of excluding [hearsay] as inadmissible, rooted as it is in the system of trial by jury, is a recognition of the great difficulty, even more acute for a jury than for a trained judicial mind, of assessing what, if any, weight can properly be given to a statement by a person whom the jury have not seen or heard and which has not been subject to any test of reliability by cross-examination. As Lord Normand put it ... "The rule against admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination and the light which his demeanour would throw on his testimony is lost."[12]

3.7 Lord Bridge was referring to evidence in a criminal jury trial. In civil proceedings where there is no jury, the hearsay rule has many more exceptions.[13]

(d) Arguments for reform

3.8 A strict adherence to the rule against hearsay may result in relevant information being excluded as evidence.[14] Thus, in recent years the validity of maintaining the rule against hearsay in certain circumstances has been increasingly challenged.[15]

3.9 As far as the evidence of children is concerned, arguments for reform focus chiefly on the unavailability of other evidence. As Spencer and Flin recently suggested:

> "It is obviously sensible for the law to insist on hearing a story from a first-hand source when a first-hand source is available. But it is not at all sensible to take the next step, and to say that if there is no first-hand source available then in principle the story cannot be told at all."[16]

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11 *Cross on Evidence* para 31020.

12 *DPP v Blastland* [1985] 2 All ER 1095, 1099.

13 See *Cross on Evidence* ch 18.

14 See Spencer and Flin ch 6, especially at 135-138. In the United Kingdom some prior statements (for example, those contained in reports by doctors), are often accepted, as a matter of practice, as evidence of the facts contained in them.

15 See eg J McEwan *Documentary Hearsay Evidence - Refuge for the Vulnerable Witness* [1989] Crim L R 629; *R v Khan* (1990) 79 CR (3d) 11.

16 Spencer and Flin 135.

3.10 In their view, the hearsay rule, when taken in combination with other rules of criminal procedure, is "a disaster for justice" in cases where children are concerned.[17] As they point out:

> "The competency requirement and the rigours of the adversarial system often prevent children giving evidence in court themselves; and the hearsay rule makes it impossible for other people to repeat in court the accounts the children gave them. In consequence, the courts have to deal with offences committed against children without being able to hear the child's version of what happened." [18]

3.11 As a consequence of the court not being able to hear the child's story offenders may be acquitted - or, more probably, not even prosecuted - though the resulting gap in evidence can have the opposite effect, as *Sparks v R*[19] demonstrates.

3.12 Part of the hearsay rule called "the rule against narrative" (also referred to as the rule against self-corroboration) states that witnesses may not be asked during evidence-in-chief whether they have formerly made a statement consistent with their present testimony. *Cross* criticizes the rule, observing that "A consistent statement establishes credibility just as an inconsistent statement shakes credibility".[20] Spencer and Flin have also criticized this rule:

> "The orthodox reasons for refusing to listen to hearsay statements vanish when the person who made the statement is in court. Furthermore, by making the court ignore every account he gave of the incident before he got there, and accept nothing save what he says in court, this rule requires us to accept the following two propositions of psychology as valid: (a) that memory improves with the passage of time; (b) that stress improves the process of recall."[21]

2. THE PRESENT LAW AS TO ADMISSION OF OUT-OF-COURT STATEMENTS

(a) Oral statements

3.13 Prior oral statements of children are only admissible in a limited number of cases within the exceptions to the hearsay rule referred to earlier[22] - one of which relates to complaints in sex offence cases.

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17 Id 136.
18 Ibid.
19 [1964] AC 964 (see para 3.5 above).
20 Para 17250.
21 Spencer and Flin 135.
22 See para 3.3 above.

3.14 The present law in regard to complaints in sexual cases[23] would allow evidence to be admitted of a child's complaint to a parent, teacher, doctor, social worker etc, provided the complaint was made soon after the event and provided that the child victim also gave evidence. However, it would not constitute evidence of the facts of which the complaint was made, and could not constitute corroboration of the complainant's evidence where this is necessary.[24]

3.15 The rules relating to complaints in sexual cases have been developed in such a way as to have the following results:[25]

(1) the exception is limited to sexual offences and does not cover other forms of physical abuse; and

(2) there is uncertainty as to what lapse of time between the incident and the complaint is reasonable.[26]

(b) Written statements

3.16 There are only three exceptional situations in which a witness's out-of-court written statement may be received in evidence:[27]

(1) A witness's written statement may be adduced at committal proceedings.[28]

(2) The written record of a deposition given at committal proceedings may be read in evidence at the trial if the witness dies or is out of the state or becomes so ill as to be unable to travel.[29]

(3) Where it is not possible to take a deposition at committal proceedings because the person is dangerously ill and unable to travel, the written record of a statement

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23 *Cross on Evidence* para 17285.

24 Ibid. Spencer and Flin 116 comment that experience shows child victims sexually abused within the family frequently disclose the event only years after the event, shock, shame or fear of the offender inhibiting an early complaint.

25 Spencer and Flin 114-117.

26 See *Bradford City Metropolitan Council v K (Minors)* [1990] 2 WLR 532 and *Sparks v The Queen* [1964] AC 964 referred to in para 3.5 above.

27 Discussion Paper para 3.17.

28 *Justices Act 1902* s 69(2)-(3).

29 *Justices Act 1902* s 109; *Evidence Act 1906* s 107.

taken for the purposes of committal proceedings may be read in evidence at the trial.[30]

(c) Audio-recordings and video-recordings

3.17 Modern technology allows statements to be recorded on audiotape or videotape. However, the exceptional situations listed in the previous paragraph are limited to written statements, with one qualification - a deposition given at committal proceedings may be recorded by means of sound recording apparatus, but a written transcript must then be prepared from the recording.[31]

3. REFORM ELSEWHERE

3.18 In other jurisdictions further exceptions to the hearsay rule have been created, or are under discussion. Under these exceptions out-of-court statements by child witnesses are admissible in evidence.

(a) England

3.19 In England statements by any person, including a child, can be admitted as evidence where the person is unavailable to give evidence, by a special hearsay exception under section 23 of the *Criminal Justice Act 1988*. Under this provision a statement made by a person in a document (which includes a videotape or audiotape[32]) is admissible in criminal proceedings as evidence of the facts contained therein if:

(1) the statement is "first-hand hearsay" (that is, where the maker of the statement had personal knowledge of the matters dealt with or where direct oral evidence by the maker of the statement of the facts attested to would be admissible); and

(2) the maker of the statement is unavailable for reasons which include death, illness, absence abroad, or the disappearance of the witness; or

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30 *Justices Act* ss 110-112; *Evidence Act 1906* s 108.

31 *Justices Act 1902* s 109(1)(b); *Evidence Act 1906* s 107(1)(c)(ii).

32 So defined by *Civil Evidence Act 1968* (UK) s 10(1), made applicable by s 28(2) and Schedule 2 of the *Criminal Justice Act 1988*.

(3) the statement was made to a police officer or some other person charged with the duty of investigating offences or charging offenders, and the witness does not give oral evidence through fear or because he or she is kept out of the way.

3.20 Where the statement is prepared for the purposes of pending or contemplated criminal proceedings, there is an additional requirement that the leave of the court must be obtained for the statement to be admitted, and the court should not give leave unless of the opinion that the statement ought to be admitted "in the interests of justice".[33]

(b) Scotland

3.21 The Scottish Law Commission recently examined the whole question of "prior statements" and concluded that there would be no serious difficulty with the admission of prior statements as evidence of fact where the accuracy of the evidence about the prior statement was in some way assured, and the maker of the statement adopted its contents in the witness box.[34]

3.22 Accordingly, the Scottish Law Commission recommended general changes to the law to admit prior statements whether written or in the form of an audio- or video-recording provided that the maker of the statement gives evidence at the trial and adopts the statement in the course of his or her evidence.[35]

(c) Australia

3.23 Two Australian jurisdictions have recently enacted legislative provisions under which out-of-court statements by children can be admitted where the child is available to give evidence.[36]

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33 *Criminal Justice Act 1988* (UK) s 26. Note also s 25(1) where there is a discretion in the court to direct that the document should not be admitted where its exclusion is in the interests of justice. S 28(1)(b) also states that the court retains all its existing powers to exclude evidence. Evidence would not therefore be admitted if it seems more prejudicial than probative, or would have an adverse effect on the fairness of the proceedings.

34 Scottish Report paras 4.52 and 4.65.

35 Id recommendation 18(b). Oral statements are excluded from the Scottish Law Commission's recommendations by a requirement that the prior statement should be in some "permanent form from which it can reasonably be inferred that it accurately and completely records what was said by the witness on the previous occasion".

36 In addition, cl 54 of the Evidence Bill (NSW) introduced into the New South Wales Parliament in 1991 enables first-hand hearsay evidence to be given in criminal proceedings by a person who made a previous representation or a person who had personal knowledge of its making, if the maker is called to give evidence and at the time the representation was made the fact was fresh in the maker's memory.

3.24 In South Australia a 1988 amendment to the *Evidence Act*[37] allows the court in its discretion, in cases where the alleged victim of a sexual offence is a child under the age of 12, to admit hearsay evidence in the form of "evidence of the nature and contents of a complaint from a witness to whom the alleged victim complained of the offence", provided that the child is called or available to be called as a witness. In exercising its discretion the court must consider "the nature of the complaint, the circumstances in which it was made and any other relevant factors", and admit the evidence only if of the opinion that the evidence has sufficient probative value to justify its admission.

3.25 In Queensland, an amendment to the *Evidence Act* enacted in 1989 provides that in any proceeding where direct oral evidence of a fact would be admissible, a statement made by a child under 12, contained in a document (which is defined to include an audiotape or videotape[38]) tending to establish that fact is admissible as evidence of that fact if

* the child had personal knowledge of the matters dealt with by the statement;

* it was made soon after the occurrence of the fact, or was made to a person investigating the matter in question before or soon after it becomes apparent to that person that the child is a potential witness; and

* the child is available to give evidence in the proceedings.[39]

(d) The United States

3.26 In the United States of America there is a "general residual exception" to the hearsay rule which exists under the *Federal Rules of Evidence*.[40] Under this exception hearsay statements

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37 *Evidence Act 1929* (SA) s 34ca.

38 *Evidence Act 1977* (Qld) s 5.

39 Id s 93A.

40 Uniform Laws Annotated, vol 13A (as amended 1986), Rule 803(24) provides:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best

otherwise inadmissible (such as oral and written statements not falling within the exceptional circumstances referred to above) may be admitted if they possess "comparable circumstantial guarantees of trustworthiness".[41] Many United States jurisdictions have copied the Federal provision.[42]

3.27 The State of Washington has gone further. It has enacted a special statutory exception applicable only to victims of child sexual abuse. Under this exception any statement (oral, written or electronically recorded) may be admitted in evidence. The provision is in the following terms:

> "A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings ... and criminal proceedings in courts of the State of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.
>
> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement."[43]

3.28 A similar hearsay exception for child witnesses has been enacted in at least 27 jurisdictions in the United States.[44]

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be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance [of the trial] to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

41 Spencer and Flin 136.

42 Ibid.

43 Washington Revised Code Ann. s 9A.44.120 (added 1982).

44 R Eatman and J Bulkley *Protecting Child Victim/Witnesses: Sample Laws and Materials* (National Legal Resource Centre for Child Advocacy and Protection, American Bar Association, 1986) (1987 reprint) 9; J Bulkley *Updated Analysis of Reforms in Child Sexual Abuse Codes* id 51.

4. RECOMMENDATIONS: ADMISSION OF OUT OF COURT STATEMENTS

3.29 In the Discussion Paper the Commission requested respondents to consider a proposal that any out-of-court statement (whether oral, written or electronically recorded) by a child complainant under the age of 16 at the time of the proceedings in a case involving a sexual offence or intra-familial assault or abuse[45] should be admissible in any proceedings. Certain qualifications were proposed, which in the case of an oral or written statement were limited to the requirement of a notice of the statement and its contents being served on the opposing party.[46] The aim of this limitation was to allow the accused to consider and respond to the statement.

3.30 The Discussion Paper proposal was substantially similar to the Washington provision set out above.[47] This provision contains a mechanism for determining the reliability of such evidence, and protects the interests of the accused by requiring notice of the statement to be provided to the accused and by requiring the child either to testify or to provide corroborative evidence. To further prevent prejudice to the accused, all rulings on admissibility must be made outside the hearing of the jury. The provision enables a range of reliable statements to be admitted that would otherwise be summarily excluded.[48]

3.31 In one particular respect, the Washington provision goes further than any of the Australian provisions referred to above.[49] It allows a prior statement to be admitted even though the maker is not called or available to be called as a witness. It appears that the object of this provision is to avoid the witness having to confront the accused in court. However, there are other ways of dealing with this problem, for example by the use of closed-circuit television.[50] It

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45 As to this limitation, see paras 3.46-3.50 below.

46 See Discussion Paper para 6.3. Note that where an out-of-court statement was introduced at committal proceedings in place of the child's oral testimony the proposal would allow the child to be called only if the magistrate was of the view that, because of the special circumstances of the case he or she would be unable to reach a conclusion whether or not to commit the matter for trial without the assistance likely to be provided by the child's oral answers to particular questions.

47 Para 3.27.

48 The provision has been described as:

> "An approach that properly addresses the need for children's hearsay statements, realistically and effectively ensures their trustworthiness, and poses no threat to defendants' rights . . . ": J Yun *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases* (1983) 83 Columbia L Rev 1745, 1763.

49 Paras 3.23-3.25.

50 See paras 5.1-5.38 below.

is noteworthy that Washington is one of the United States jurisdictions in which closed-circuit television has not been introduced.[51]

3.32 The Commission is of the view that there will be circumstances in which complaints or other statements (whether oral, written or electronically recorded) by a child complainant ought to be admitted in cases involving a sexual offence or intra-familial assault or abuse. However, it is also important that the witness should be available to be cross-examined on the evidence given. It therefore recommends that a court should be empowered to admit in evidence a prior statement made by the complainant, provided that the complainant is called or available to be called as a witness. Notice of intention to offer the statement in evidence should be served on the accused in advance, so that the accused has a sufficient opportunity to consider the statement and if necessary, prepare a defence.

3.33 The Commission therefore recommends that:

In a case of an alleged sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated,[52] the court should be empowered to admit in evidence any prior statement, whether oral, written or electronically recorded, made by the complainant provided that:

(i) the complainant is called or available to be called as a witness; and

(ii) a notice is served in advance on the accused of the proponent's intention to offer the statement and of the particulars of the statement so that the accused has a sufficient opportunity to prepare to meet the statement.

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51 See the Appendix to the Scottish Discussion Paper.

52 See paras 3.46-3.50 below.

5. ADMISSION OF OUT-OF-COURT STATEMENTS AT COMMITTAL PROCEEDINGS

3.34 In the Discussion Paper the Commission invited comment on a proposal that where an out-of-court statement was introduced at committal proceedings[53] in place of the child's oral testimony, the presiding magistrate should not permit the child to be called to give evidence unless the magistrate is of the view that, because of the special circumstances of the case, he or she would be unable to decide whether or not to commit the accused for trial without the assistance likely to be provided by the child's oral answers to particular questions. In contrast to the situation previously dealt with,[54] this would allow an out-of-court statement to be admitted even though the child was not made available to give evidence in court.

3.35 The reason behind this proposal was the desirability of ensuring that children were not necessarily subjected to being examined and cross-examined both at committal and at trial. Some respondents to the Discussion Paper expressed concern at the fact that a child witness often had to give evidence on both occasions. They suggested that cross-examination at committal proceedings could be more stressful to the child than cross-examination at trial, where there is the constraining effect of the jury's presence on defence counsel.

3.36 Under the proposal in the Discussion Paper, the child would still be able to be cross-examined at committal proceedings where, because of the special circumstances of the case, there is good cause for an oral examination. The magistrate, taking all the circumstances of the case into account, would be able to determine whether good cause exists. This view was accepted by the judicial members of the Chief Justice's Criminal Law Practice and Procedure Committee in discussion between the Commission and the Committee. Such a procedure was considered to be in keeping with a movement to reform all committal proceedings to allow cross-examination only by leave of the presiding magistrate "on good cause shown".[55] Members of the Committee who represent accused persons were not as attracted to the proposal, preferring retention of the present position, under which the child could be cross-examined both at committal and at trial.

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53 Para 6.3(iii). The *Justices Act 1902* uses the term "preliminary hearing". In this Report the Commission uses the term "committal proceedings" to avoid confusion with the "pre-trial hearing" recommended in ch 10.

54 See paras 3.29-3.33 above.

55 *Second Interim Report of the Criminal Law Practice and Procedure Review Committee* (1990) paras 9B.5.3 and 10.

3.37 The Commission considers that the proposal made in the Discussion Paper should be adopted, because of the importance of ensuring that a child witness is not cross-examined at committal proceedings without good cause when available to be cross-examined at trial.

3.38 The Commission therefore recommends that:

> **In a case of an alleged sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated,[56] the court should be empowered to allow the child's evidence at committal proceedings to be given in the form of a previously made written statement, audiotape or videotape; and where such a statement is admitted, the child complainant should not be called or summoned to appear unless the magistrate is satisfied that because of the special circumstances of the case, there is good cause for oral examination of the complainant.**

6. OUT-OF-COURT STATEMENTS OF CHILDREN UNABLE THROUGH PHYSICAL OR MENTAL DISTRESS TO GIVE ORAL EVIDENCE

3.39 Under section 108 of the *Evidence Act 1906*, if a person who would be called as a witness in legal proceedings for an indictable offence is dangerously ill and unable to travel and unlikely to recover, so that it is not practicable for the witness to give evidence in the normal way, the witness's evidence may be received on oath or affirmation by a justice of the peace. Provided that the person against whom the evidence is to be read has had (or might have had, if he or she had chosen to be present) a full opportunity of cross-examining the person who made the deposition, that deposition may be received in evidence at the trial to which the evidence relates.

3.40 The Discussion Paper[57] invited comment on a proposal that section 108 should be amended to allow a sworn deposition of a child witness in a sex offence case to be received in evidence if attendance of the witness would be injurious or dangerous to the child's health.

3.41 The proposal was based on analogous provisions in the United Kingdom and New South Wales. In the United Kingdom, under sections 42 and 43 of the *Children and Young Persons*

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56 See paras 3.46-3.50 below.

57 Para 6.3(ii).

Act 1933, a sworn deposition is admissible in evidence if the court is satisfied by the evidence of a duly qualified medical practitioner that the attendance at court of a child in a sexual offence case would involve serious danger to the child's life or health.[58] It has been observed that this procedure is little used - possibly because of limitations in the provisions themselves, because of the strength of the oral tradition of justice, and a feeling shared by lawyers and judges that a written transcript of an interview does not enable a court to listen to the witness's tone of voice and see his or her demeanour when giving evidence.[59]

3.42 In New South Wales, section 122 of the *Children (Care and Protection) Act 1987* extended the New South Wales equivalent of section 108 of the *Evidence Act 1906*[60] to cover cases where the attendance of a child witness at court would be injurious or dangerous to the child's health. Section 122 allows a child's evidence to be taken in a written deposition signed by a justice of the peace, and to be admissible whenever attendance at court is otherwise required of a child victim of certain offences, if a medical practitioner certifies that attendance at court would be injurious or dangerous to the child's health. The provision applies to proceedings for child abuse[61] or any other offence under the Act.

3.43 Public response to the proposal in the Discussion Paper was generally favourable. Among the issues referred to by particular respondents were whether the circumstances would include factors other than the child's physical health, and whether other health professionals, such as clinical psychologists, or others such as social workers should be able to satisfy the court that attendance would be injurious to the child's health.

3.44 The Law Society and the Criminal Law Association opposed the proposal "because of the implications that there will be no opportunity to cross-examine". However, the proposal involved an amendment to, rather than replacement of, section 108 of the *Evidence Act*, and under that section the court may receive evidence by deposition only if there has been full

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58 When these provisions were first enacted they were, according to their Parliamentary history, apparently intended to cover the risk of mental as well as physical harm, although this has been subsequently overlooked: Spencer and Flin 74.

59 Spencer and Flin 75 refer to an unsuccessful attempt in 1988 to alter ss 42 and 43 to allow them to cover electronically recorded depositions. That failure is explicable in terms of Parliamentary resistance at the time to any form of videotaped evidence. The Criminal Justice Bill, which seeks to amend the *Criminal Justice Act 1988* to allow video-recordings of testimony from child witnesses to be admitted in evidence on indictment and in certain proceedings in youth courts, requires that the child witness be available at the trial: cl 44. It does not include a similar amendment to ss 42 and 43 of the *Children and Young Persons Act 1933*.

60 *Crimes Act 1900* (NSW) s 406.

61 An offence under s 25.

opportunity for cross-examination (or would have been if the person against whom the evidence is made had chosen to be present when the deposition was taken).

3.45 The Commission has concluded that section 108 of the *Evidence Act* should not be amended in the way proposed. The proposed amendment would go much further than the New South Wales provision, which is limited to offences under the equivalent of the *Western Australian Child Welfare Act 1947*. The English provision is wider, but is little used. Section 108 of the *Evidence Act* is aimed at cases where children are dangerously ill and unable to travel to give evidence in court. To extend it to cases where attendance at court is injurious or dangerous to the child's health is to make it serve a different purpose - one which can be achieved by other recommendations in this Report, such as those concerned with support,[62] closed-circuit television[63] and informal hearings in advance of the trial.[64]

7. SEXUAL OFFENCE AGAINST OR INTRA-FAMILIAL ASSAULT ON OR ABUSE OF A CHILD UNDER 16

3.46 The recommendations for admission of out-of-court statements made in this chapter, and other recommendations made in chapters 4 and 5, apply only in cases of a sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated. In such cases, out-of-court statements may be the only evidence, or the best evidence available. It is also in such cases that the need to confront the accused may make it impossible for the child to give evidence in court. This problem can be dealt with by resort to closed-circuit television[65] or informal hearings in advance of the trial.[66]

3.47 By "sexual offence" the Commission means offences under sections 181 to 198 of the *Criminal Code* (which deal with unnatural offences, indecent dealing, unlawful carnal knowledge, procuration and incest) or under sections 324B to 324E (which deal with indecent assault and sexual assault).

3.48 "Assault" and "abuse" signify all offences against the person of a non-sexual nature, principally the relevant offences in chapters 28 (homicide), 29 (offences endangering life or

62 See paras 6.24-6.35 below.
63 See paras 5.1-5.38 below.
64 See paras 4.30-4.40 below.
65 See paras 5.1-5.38 below.
66 See paras 4.30-4.40 below.

health) and 30 (assaults) of the Code, plus offences under sections 332 (kidnapping), 333 (deprivation of liberty), 336 (procuring the apprehension or detention of a person not suffering from mental disorder), 337 (unlawful custody of persons suffering from mental disorder) and 343 (child stealing).

3.49 In relation to assault and abuse, the Commission is of the view that the special rules should apply only where they are intra-familial - that is, when committed by a member of the child's immediate family[67] (such as a parent, grandparent, brother or sister, uncle or aunt, or cousin), or some other person living in the same household, temporarily or permanently (such as the de facto spouse of a parent) or some person who exercises authority over the child in the household on a regular basis (such as a domestic employee or a regular babysitter). In cases of assault or abuse where the intra-familial element is absent, procedures such as closed-circuit television and an informal hearing in advance of the trial should remain available, but only where the child is declared to be a "special witness".[68]

3.50 The recommendations in chapters 3 to 5 apply only when the offences described above are committed against a child who is under 16 at the time when the proceedings are initiated. This age is broadly in line with similar provisions in other jurisdictions, both in Australia and overseas.[69]

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67 This term is intended to include step and foster relationships.

68 See ch 9.

69 See paras 1.14-1.15 above.

Chapter 4
VIDEOTAPE EVIDENCE

1. THE ADMISSION OF VIDEOTAPED STATEMENTS

(a) Introduction

4.1 The Anglo-Australian criminal justice systems recognized the possible advantages of using recording technology with the invention of the magnetic tape in the mid-20th century.[1] Audio-recordings of police interviews with accused persons, made on magnetic tapes, have become accepted by police and defendants in many jurisdictions as a record of proceedings.

4.2 The magnetic tape enables images as well as sounds to be recorded. During the 1970's the use of video-recorded interviews with children by police and social workers became widely used in the United States. The purpose of video-recording interviews was originally to help interviewers to remember what the child had said and to enable other agencies who had to deal with the child to learn about the child's experiences at first hand without the need to carry out further, possibly stressful, interviews.

4.3 By the mid-1970's some United States jurisdictions had already changed their rules of court to permit the use of video depositions taken from witnesses who were unavailable to give live evidence at trial. Some United States courts were also experimenting with the "pre-recorded video trial" where all the evidence of a witness is recorded in advance of the trial, the judge erases all inadmissible parts, and the jury is shown what it is permissible to see.

4.4 As at March 1991, the video-recorded evidence of children was receivable (with variations as to the conditions) in the United States (33 states),[2] Canada,[3] New Zealand,[4] Queensland,[5] South Australia[6] and Victoria.[7] The admissibility of such evidence had been

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1 See generally Spencer and Flin 140-141.
2 Figures taken from Appendix to the Scottish Discussion Paper.
3 *Criminal Code* (Canada) s 715.1.
4 *Evidence Act 1908* (NZ) s 23E(1)(a),(2)-(3); *Summary Proceedings Act 1957* (NZ) s 185CA.
5 *Evidence Act 1977* (Qld) s 21A(2)(e).
6 *Justices Act 1921* (SA) s 106(2).
7 *Evidence Act 1958* (Vic) s 37B; *Magistrates' Court Act 1989* Schedule 5 cl 1(1AA).

recommended by law reform bodies in Scotland,[8] Ireland,[9] and Tasmania,[10] and legislation had been introduced to permit their use in the United Kingdom.[11]

(b) Arguments in favour of the admissibility of videotaped statements

4.5 There are three reasons generally advanced for the use of videotapes of children's evidence:

(1) capturing a fresh account;
(2) reducing the number of interviews;
(3) encouraging admissions of guilt.

(i) Capturing a fresh account

4.6 While young children can often remember quite accurately what has happened to them, their memories fade faster than those of most adults.[12] A video-recorded interview can capture a fresh account of recent events from a young child that will be superior to any re-telling of events which the young child could give in court many weeks or even months later.[13]

4.7 In Western Australia there is at present normally a lapse of approximately 6-8 weeks between the initial court appearance of a person charged with a criminal offence and the "election date" when the accused may elect either committal proceedings or that committal proceedings be dispensed with.[14] In most cases the accused opts for committal proceedings, which usually do not take place for a further 16 weeks.[15] Thus, 6 months generally elapses between the laying of a charge and committal proceedings. If after the committal proceedings the accused is committed for trial there is a further 2-3 months' delay before trial in the Supreme Court and 4-6 months in the District Court.[16]

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8 Scottish Report recommendation 10.
9 Irish Report recommendations 55 and 56.
10 Law Reform Commissioner of Tasmania *Child Witnesses* (Report No 62 1990) recommendations 3-5.
11 Criminal Justice Bill 1990 (UK) cl 45.
12 See para 2.46 above.
13 Pigot Report para 2.16.
14 *Second Interim Report of the Criminal Practice and Procedure Review Committee* (1990) para 4.1.
15 Id paras 4.1-4.2.
16 Crown Law Department Court Listing Statistics.

4.8 At present, there is no procedure for "fast-tracking" a trial by elimination of committal proceedings,[17] although such a proposal was made by the Chief Justice's Criminal Practice and Procedure Review Committee in August 1990.[18]

4.9 For a young child such a delay could very well be critical. The younger the child, the greater the likelihood is that memory for details will fade and the child's capacity to give a comprehensive account of events be reduced.

(ii) Reducing the number of interviews

4.10 The use of a videotape of a child's evidence can reduce the number of times that the child has to re-tell, and so re-live, a traumatic experience.

4.11 Whether admission of videotaped evidence will have this effect is, in fact, doubtful. A draft paper prepared by a Child Abuse Unit Working Party on the subject of video-recorded interviews with suspected victims of child sexual abuse concludes that "video taping of interviews does not, in itself, reduce the number of interviews experienced by the child", and that reduction of interviews is best achieved by closer co-ordination of agency services.[19] Nevertheless the Working Party considered that videotaping of interviews was desirable for other reasons - namely, the possible benefits to the child in reduced stress; the increased possibility of probative evidence being available to the court; and any increase in admissions by alleged offenders making it unnecessary for the child to appear in court.[20]

(iii) Encouraging admissions of guilt

4.12 The existence of a videotaped statement or interview in which a child makes allegations of child abuse, when shown to the accused, may result in an admission of guilt, thereby eliminating all need for a trial.[21]

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17 *Second Interim Report of the Criminal Practice and Procedure Review Committee* (1990) para 6.4.2.

18 Id para 9A. Should the Committee's proposal be adopted, for example by an amendment to the *Justices Act 1902*, the Commission's recommendations will still be relevant to any form of committal proceedings that remain.

19 *The Video Recording of Interviews with Suspected Victims of Child Sexual Abuse: A Discussion Paper on Recommendation 20 of the Child Sexual Abuse Task Force (1987)* (1991) 19.

20 Id 23.

21 Spencer and Flin 162-163. In a study of 235 people charged with child sex abuse crimes in Fort Worth, Texas in 1985-1986, 221 pleaded guilty after viewing the child's videotaped statement: Child Abuse Unit Interdepartmental Working Party *The Videorecording of Interviews with Suspected Victims of Child Sexual*

(c) Arguments against the admissibility of videotaped statements

4.13 A number of arguments have been advanced against the use of videotapes as evidence in criminal proceedings.[22] The main arguments are referred to below.

(i) Increased stress

4.14 One objection is that, if a videotape of an interview with a child were put in evidence, the child witness would suffer increased stress because of cross-examination about discrepancies between the videotape and the child's live evidence. This difficulty was discussed (and dismissed) by the Pigot Committee.[23]

4.15 Depending on the particular arrangements according to which the videotape is made, there may be no additional stress. If, for instance, the proposals of the Pigot Report were adopted, the videotape would be a substitute for the child's live testimony.[24] Furthermore, the possibility of cross-examination as to discrepancies in a videotaped statement or interview is not an argument against changing the law,[25] because that can already happen under existing law, which permits a previous inconsistent statement to be used for the purpose of contradicting a witness's evidence in court.[26] Without legislation to prohibit anyone from making a videotape of an interview with a child or banning all videotapes in evidence, the problem of cross-examination as to discrepancies cannot be avoided.

Abuse: A Draft Discussion Paper on Recommendation 20 of the WA Sexual Abuse Task Force (1987) (1991) 23.

22 Spencer and Flin 155-161.

23 Pigot Report paras 2.20-2.21.

24 Id recommendation 3.

25 Spencer and Flin 158-159.

26 In WA s 21 of the *Evidence Act 1906* expressly permits this:

> "Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding, and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he made such statement, proof may be given that he did in fact make it.
>
> The same course may be taken with a witness upon his examination in chief or re-examination, if the Judge is of opinion that the witness is hostile to the party by whom he was called and permits the question."

(ii) Method of conducting the videotaped interview

4.16 Another serious objection relates to the way in which videotaped interviews are conducted. In England early attempts to introduce legislation to admit videotaped evidence failed due to disquiet over the use of videotapes in a number of Family Court matters. The tapes were made for clinical or therapeutic purposes at the Great Ormond Street Hospital. Subsequently they were admitted as evidence, by consent of the parties, in custody and access cases. The tapes were criticized by the judges in those cases as containing many leading questions.[27]

4.17 If videotapes were generally admissible, this would not mean that all videotapes would have to be admitted. In addition to the general discretion of judges to exclude evidence which they consider prejudicial,[28] express statutory provision can be made:

(1) for the making of videotapes under prescribed conditions;

(2) for videotaped evidence to be viewed in advance of the trial by counsel and the judge; and

(3) for the judge to rule that unduly prejudicial portions be excised.

(d) The Discussion Paper proposal

4.18 In the Discussion Paper the Commission invited comment on a proposal that out-of-court statements (including videotapes) should be admissible in evidence both in committal proceedings and at trial.[29] If the out-of-court statements were considered an adequate basis for a magistrate to commit the accused for trial, then the child would not ordinarily be called to give evidence in person at committal proceedings. The defence could not insist (as it can at present) that the child be called and cross-examined. However, at trial the child witness would be available for such further questioning and cross-examination as the judge allowed.

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27 See [1987] 1 FLR 269-346 which contains 7 reports of such cases.
28 P Gillies *Law of Evidence in Australia* (1987) 10.
29 Para 6.3(i) and (iii).

(e) Videotaped interviews and videotaped testimony

4.19 The proposal considered in the Discussion Paper for admission of out-of-court statements did not distinguish between so-called "disclosure videotapes" (that is, videotaped interviews) and "videotaped testimony". Given the difficulties of obtaining an early and full "disclosure" on a single videotape, disclosure videotapes are rarely likely to be offered as evidence, but in the exceptional case a disclosure videotape might nevertheless be suitable to be shown in court and allowance should be made for that possibility. On the other hand, a structured videotaped interview in which the child gave a "statement" is considered more likely to provide a substitute for oral testimony (in the same way as if the child gave a statement which was afterwards reduced to writing). The proposal referred to in the Discussion Paper was directed to allowing either form of videotaped statement to be admitted as evidence, whether at committal proceedings or at a trial.

4.20 The submissions received by the Commission in response to the Discussion Paper did not generally distinguish between videotaped interviews and videotaped testimony.

2. THE USE OF VIDEOTAPED STATEMENTS

4.21 Responses to the proposal in the Discussion Paper were generally favourable. In line with its recommendations about the admission of out-of-court statements generally,[30] the Commission is in favour of admitting into evidence videotaped statements of children made out of court. It should be possible to use a videotaped statement both at committal proceedings and at trial. At the trial stage, an additional alternative is to have the child give evidence at a special hearing.

(a) Videotaped statements at committal proceedings

4.22 It should be possible for a magistrate to allow a videotaped statement or interview to act as a substitute for written depositions at committal proceedings and to limit the circumstances in which the child witness may be called to give oral evidence. This is the model employed under the *South Australian Justices Act 1921*. There the statement of a child witness for the prosecution may be in the form of a videotaped record of interview taken by the police, provided

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30 See paras 3.33 and 3.38 above.

that a written transcript of the interview accompanies the videotape.[31] Where a videotape is admitted, the child complainant will not be called or summoned to appear at the committal proceedings unless the magistrate is satisfied that there are "special reasons" for the oral examination of the child.[32]

4.23 A provision along these lines would be consistent with the general recommendations of the Chief Justice's Criminal Practice and Procedure Review Committee for a new procedure for committal proceedings.[33] The Committee recommended that no witness should be required to attend for cross-examination at committal proceedings unless "good cause" is shown. "Good cause" is required to safeguard against the unnecessary attendance and cross-examination of witnesses, especially where the witness is very young, elderly, ill or an alleged victim of serious assault.[34]

4.24 Therefore, as previously recommended,[35] in a case of an alleged sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated,[36] the court should have power to direct that the child's evidence at committal proceedings be given in the form of a previously made videotape. In such cases, the child complainant should not be called or summoned to appear unless the magistrate is satisfied that, because of the special circumstances of the case, there is good cause for oral examination of the complainant.

(b) Videotaped statements at trial

4.25 It should also be possible for a videotaped statement or interview to be used at trial, as a substitute for evidence-in-chief. The child would be available for cross-examination and re-examination under conditions laid down by the trial judge.[37] This was the basis of the proposal on which the Commission invited comment in the Discussion Paper.[38] The Commission

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31 *Justices Act 1921* (SA) s 106(2)(c).
32 Id s 106(7).
33 *Second Interim Report of the Criminal Practice and Procedure Review Committee* (1990) para 9B.5.3.
34 Ibid.
35 See para 3.38 above.
36 See paras 3.46-3.50 above.
37 The child witness could be cross-examined and re-examined over closed-circuit television, or with the accused viewing proceedings by closed-circuit television, or with the aid of a screen, or by whatever other appropriate alternative arrangements are permitted: see ch 5 below.
38 Para 6.3(i).

envisaged that the videotaped statement or interview would be employed both at committal proceedings (as described above) and at trial.

4.26 A similar scheme was introduced in New Zealand in 1989. In any committal proceedings involving an offence of a sexual nature against a child under 17, the complainant's evidence may be given in the form of a videotape if the court is satisfied that the videotape has been made, and is identified, in the prescribed manner and form.[39] Where a videotape of the complainant's evidence has been shown at committal proceedings, the trial judge may direct that the videotape be admitted at the trial.[40] In such cases, the judge must view the videotape before it is shown to the jury and may order any evidence which would be excluded under normal conditions to be excised from the tape.[41] The right of counsel for the accused to cross-examine the complainant is not affected,[42] but the judge may give such directions as the judge thinks fit as to the manner of cross-examination or re-examination.[43]

4.27 The United Kingdom Criminal Justice Bill 1990 follows a broadly similar scheme.[44] In cases involving assaults or offences of a sexual nature against children, a video-recording of an interview with the child may, with the leave of the court, be given in evidence unless it appears that the child witness will not be available for cross-examination or that, having regard to all the circumstances of the case, in the interests of justice the recording ought not be admitted. The court may direct that parts of the recording shall not be admitted. The child must be called to give evidence, but may not be examined in chief on any matter which, in the opinion of the court, has been dealt with in the videotape. Where leave to admit a video-recording is to be sought at the trial, the video-recording may be considered by a magistrate's court conducting committal proceedings even though the child witness is not called at the committal proceedings.

4.28 Videotape evidence is also admissible at trial stage in Canada. In cases involving a sexual offence against a child under 18 a videotape, in which the complainant describes the act complained of and which is made within a reasonable time after the alleged offence, is

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39 *Summary Proceedings Act 1957* (NZ) s 185CA(1).
40 *Evidence Act 1908* (NZ) s 23E(1)(a).
41 Id s 23E(2).
42 Id s 23F(2).
43 Id s 23E(3).
44 Criminal Justice Bill 1990 (UK) cl 45. This falls considerably short of implementing the proposals of the Pigot Report, which are discussed in paras 4.31-4.34 below.

admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.[45]

4.29 The Commission recommends that:

> **In a case of an alleged sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated,[46] the court should have power to direct that the prosecution should be permitted to present a child's evidence in video-recorded form at trial in lieu of evidence-in-chief. The child would be available for cross-examination and re-examination by counsel. Such examination would take place under conditions laid down by the judge.**

(c) Special hearing for children's evidence

4.30 As an alternative to the previous proposal, it should be possible for a child to give evidence in an informal hearing in advance of the trial. This hearing would be videotaped, and the videotape would be shown at the trial. The child would not have to be present at the trial.

(i) England: the Pigot proposals

4.31 Such a proposal was made by the Pigot Committee.[47] The Report proposed, in essence, that any child under the age of 14 who is a complainant in a sexual assault case could give evidence in an informal hearing in advance of the trial at which no one would be present other than the judge, counsel for the prosecution and defence, the child witness and any person whom the judge allowed (such as a support person for the child witness). The accused would observe proceedings by closed-circuit television from outside the room in which the child gives evidence and would be able to communicate with counsel by audio-link.

4.32 At these proceedings both the prosecution and counsel for the accused would have the opportunity to question the child, but the judge would carefully control questioning (presumably to ensure that the child was not unduly harassed and that the child understood what was being

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45 *Criminal Code* (Canada) s 715.1 (introduced 1985).

46 See paras 3.46-3.50 above.

47 Pigot Report paras 2.25-2.38.

asked). The hearing in advance of the trial would be presided over by the trial judge and would be subject to the normal rules of evidence, with one exception: if a videotape existed of the child making a statement or being interviewed concerning the alleged offence, then that videotape (being admissible at the trial under a new exception to the hearsay rule) could be shown to the child at the hearing in advance of the trial and the child invited to confirm the account which it gives and to expand upon any aspects which the prosecution wishes to explore. Counsel for the accused would have the opportunity to cross-examine the child, also under the control of the judge. Before the videotaped interview was admitted, and prior to the hearing in advance of the trial, it would have been viewed by the judge, the accused and counsel in chambers or some other suitable place, and, after argument from both sides, a decision would have been made by the judge whether the recording should be admitted in whole or in part.

4.33 The whole of the hearing in advance of the trial at which the child gave evidence would also be videotaped, and at the trial this video-recording and any videotaped interview would be shown to the jury in lieu of the child's evidence-in-chief. The child would not be called to give evidence. The child would not be required to appear in court during a trial unless he or she wished to.[48]

4.34 Where it is necessary to recall a child who has been cross-examined at a hearing in advance of the trial, a further special out-of-court hearing would take place which would be subject to the same conditions as the first.

(ii) The Tasmanian proposals

4.35 The Law Reform Commissioner of Tasmania has proposed a similar scheme.[49] The Commissioner made the following recommendations:

> "That, in an appropriate case, a police officer may on notice to the person charged apply to a Children's Magistrate for the evidence of a child to be taken prior to committal proceedings. The magistrate may, if satisfied that such a course is appropriate, convene a hearing in a suitable place at which the examination-in-chief, cross-examination and re-examination will proceed. The dress of all parties should be informal, and the proceedings should be recorded electronically. I recommend that subject to the other rules of evidence, the videotape of the hearing be admissible on the trial of the accused; and that the child not be called as a witness unless the presiding judicial officer considers

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48 This procedure is analogous to taking evidence on commission.

49 Law Reform Commissioner of Tasmania *Child Witnesses* (Report No 62 1990) recommendations 4-5.

> that there are exceptional circumstances which require his recall in the interests of justice. I envisage that, without any change in the law, the video tape would be subject to scrutiny in the trial court, and that any parts of it which offended against the laws of evidence, or which a judicial officer considered, in the exercise of his discretion, should be excluded, could be edited out.
>
> That a similar procedure be implemented whereby, after committal proceedings have been completed, a Judge can authorise a judicial officer to preside at a special hearing in advance of trial during which the child's evidence may be taken . . . with the same provisions as to admissibility of the video tape."

(iii) Queensland Evidence Act

4.36 An alternative to the Pigot proposal is provided by the Queensland *Evidence Act*,[50] under which a videotape of the evidence of a "special witness" (including a child under the age of 12), or any portion of it, may be admitted and heard instead of the direct testimony of the special witness, provided that the videotape has been made under conditions specified by the court, either in the particular case or generally under Rules of Court.

4.37 The legislation provides that in the first instance an application may be made to the trial court for a videotape to be made. The court will make an order setting appropriate conditions for the making of the videotape. Those conditions can include the exclusion from the room in which the witness gives evidence of anyone not specified in the order. The section allows for the witness to be examined and cross-examined before the trial and for those proceedings to be video-recorded and to form part of the videotape shown at the trial, so that at no time need the witness appear in open court.

4.38 A number of difficulties have been observed with the Queensland legislation:

(1) Because conditions have not yet been prescribed in Rules of Court, in some cases where a young child gives evidence in an informal setting on a videotape the child has been examined and cross-examined while alone in a room with the prosecutor or defence counsel (as the case may be). One commentator felt that the extreme informality of the situation can work against effective evidence being given by a very young child, since the child may not fully appreciate the situation and be more susceptible to the desire to please the sole adult in the room with

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50 *Evidence Act 1977* (Qld) s 21A(2)(e), (3) and (5)-(7).

him or her (and therefore more susceptible to answer leading questions in the way he or she perceives is wanted).[51]

(2) There is no provision for an early pre-trial hearing at which conditions can be prescribed for the making of a videotape. As a result 6 months or more may elapse before any examination or cross-examination of a child on videotape is authorized, and the freshness of the evidence is therefore lost, unless a complaint has been made on videotape to an investigating officer "soon after" the event and that videotape is admitted.[52] Comment was made to the Commission that an early decision by the trial court to allow videotaping would render the legislation far more effective.

(3) A difficulty arises from the fact that a videotape of evidence forms an exhibit at the trial and as such is permitted in the jury room. If the videotape contains only the child witness's evidence or statement and no cross-examination, then its availability in the jury room may be prejudicial to the accused and undesirable.[53]

(iv) Recommendation

4.39 Since there will be cases in which children will be unable to testify in court, in the Commission's view it should be possible in appropriate cases for the child's evidence to be given at a special out-of-court hearing, thus making it unnecessary for the child to appear in court. The Commission prefers the proposal put forward by the Pigot Committee (and followed by the Tasmanian Law Reform Commissioner) to that adopted in Queensland, especially in view of the difficulties with the Queensland legislation which have been identified above.

4.40 The Commission therefore recommends that:

(1) In a case of an alleged sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated,[54] the court should have power to direct that a child be permitted to give evidence

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51 Ms L Clare, (Qld) Office of Director of Prosecutions.
52 Under s 93A of the *Evidence Act 1977* (Qld), as to which see para 3.25 above.
53 Mrs D Richards, Barrister-at-Law, Queensland.
54 See paras 3.46-3.50 above.

in advance of the trial at an informal hearing conducted according to the usual rules of evidence, with only the judge, counsel for both sides and the witness (together with any approved support person[55]) present, the accused observing proceedings over closed-circuit television from another room. The child could be examined, cross-examined and re-examined by counsel, subject to control by the judge.

(2) In such cases:

(a) the hearing would be videotaped;

(b) where a videotaped statement has already been admitted (in whole or in part) at a pre-trial hearing,[56] the prosecution may invite the child to confirm or expand upon the statement, and defence counsel would have the opportunity to cross-examine;

(c) at the trial, the videotape of the hearing referred to in (a) above and any videotaped statement referred to in (b) above would be presented in lieu of the child's evidence in chief, and the child would not be required to appear at the trial unless he or she wishes to do so;

(d) where it is necessary to recall a child who has been cross-examined at the hearing in advance of the trial, a further informal hearing should be convened.

3. PROTECTION OF THE RIGHT OF THE ACCUSED TO A FAIR TRIAL

4.41 While the Commission recognizes the importance of making it possible for the court to receive the evidence of child witnesses, it also recognizes the importance of the right of accused persons to a fair trial. There are a number of ways in which the accused's right to a fair trial can be protected if and when videotaped statements of child witnesses are admitted in evidence. Safeguards are built into the legislative models referred to above, for example the right of the

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55 See paras 6.24-6.35 below.

56 See ch 10 below.

accused to view and participate by way of cross-examination in the informal hearing in advance of the trial recommended by the Commission. Other safeguards which the Commission recommends are referred to below.

(a) A Code of Practice

4.42 The Pigot Report[57] recommended the development of a Code of Practice for the making of videotapes of interviews with child victims of sexual abuse and other vulnerable witnesses. The development of a Code of Practice for videotaping, and for interviewing children by videotape, has also been considered by a Child Abuse Unit Working Party set up to implement a recommendation of the Report of the Western Australia Child Sexual Abuse Task Force.[58] The Working Party has provisionally recommended that a Code of Practice for the video recording of interviews should be developed. The Code of Practice should contain directions relating to:

* timing of initial and supplementary interviews;
* standard of equipment used;
* persons permitted to be present;
* use of interviewing aids;
* circumstances under which the videotape is shown to the accused;
* custody, copying, storage and destruction of videotapes;
* structure of interviews;
* location of interviews; and

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57 Para 4.8.

58 The Working Party has representatives from the Princess Margaret Hospital, the Department for Community Services, the Police Child Abuse Unit, the Sexual Assault Referral Centre and the Child Abuse Unit.

* style of interviews.[59]

4.43 Training of personnel and controls over videotaping procedures are essential to the effectiveness of the use of videotapes as evidence. The Commission supports the Working Party's recommendation, and recommends that a Code of Practice be developed by a committee on which the various bodies involved in this process - for example, the Police Department, the Department for Community Services, the Child Abuse Unit and the Law Society - are represented.[60]

4.44 The Commission therefore recommends that -

A Code of Practice for the use of videotapes in judicial proceedings and for interviewing child witnesses be developed by an inter-agency committee with representation from, for example, the Police Department, the Department for Community Services, the Child Abuse Unit and the Law Society.

(b) Special pre-trial hearing to determine admission of videotape

4.45 Where a videotape is to be introduced as evidence in legal proceedings, the Commission considers it desirable that challenges to portions of a videotape, or to the whole videotape, or to the conditions under which the videotape was made, should be made at a pre-trial hearing.[61] For example, such challenges might be based on a failure to conform to the Code of Practice for the making of videotaped statements.

(c) Editing videotapes

4.46 The Commission is of the view that recorded statements should not be edited, altered or mixed in any way from the time of recording, until the relevant case goes to a hearing, except by

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59 Interdepartmental Working Party convened by the Child Abuse Unit (WA) *The Video Recording of Interviews with Suspected Victims of Child Sexual Abuse: A Discussion Paper on Recommendation 20 of the Child Sexual Abuse Task Force (1987)* (1990) para 6.3.

60 Note that videotaped confessions are now used in Western Australian courts. The procedures and practices adopted for conducting such interviews may be of assistance in the development of a Code of Practice for videotaping childrens' statements: see *Second Interim Report of the Criminal Practice and Procedure Review Committee* (1990) para 9.1; Police Department of Western Australia *Video Recording of Police Interviews: the First 12 Months* (1990).

61 See ch 10 below.

leave and at the direction of the court at a pre-trial hearing. Given the distortion which might be created should uncontrolled editing be permitted, this is an essential protection for the accused.

4.47 The Commission therefore recommends that -

In any case where a videotaped statement is sought to be introduced at trial as part or all of the evidence of a child witness, an edited or altered version of the statement should be admitted only if such editing or altering was directed by the presiding judicial officer at a pre-trial hearing[62]

(d) Cross-examination

4.48 The right to cross-examine is vitally important to the accused. The Law Society, in seeking to protect this right, expressed the opinion that videotapes should never be used, either at committal proceedings or trial, as a substitute for a child witness's testimony without the consent of the accused. However, the Commission's recommendations for the presentation of a child witness's evidence safeguard the right of cross-examination:

(1) Child witnesses will be available for cross-examination at committal proceedings where their videotaped statements are admitted if "good cause" is shown.

(2) The child will be available for cross-examination at trial where a videotaped statement has been admitted.

(3) The child will be available for cross-examination at any informal hearing in advance of the trial at which the child's testimony is to be presented.

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62 Ibid.

Chapter 5
CLOSED-CIRCUIT TELEVISION AND SCREENS

1. CLOSED-CIRCUIT TELEVISION

(a) Introduction

5.1 In a number of jurisdictions employing the English adversarial style of criminal proceedings, courts have been empowered in recent years to allow child victims of sexual abuse to give evidence "live" over closed-circuit television (CCTV) from a room outside the court. One purpose of using this procedure has been to facilitate the giving of evidence in criminal proceedings by child victims who would otherwise not be able to do so because of fear or shyness, so that all relevant evidence would be available to the court. Another aim has been to reduce stress for the child by removing the element of confrontation with the accused, and avoiding the need to give evidence in open court in the presence of the jury and of other strangers.

(b) Legislation permitting CCTV

5.2 Outside the United States, where it was first introduced in 1983,[1] the use of CCTV is relatively new. Legislation permitting its use was enacted in Canada[2] and New South Wales[3] in 1987, in the United Kingdom in 1988,[4] in New Zealand,[5] Queensland[6] and the Australian Capital Territory[7] in 1989, and in Victoria in 1991.[8] In Western Australia in 1987 a variation of the typical procedure in the use of CCTV was authorized in the East Perth Children's Court.[9]

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1 Spencer and Flin 85.

2 *Criminal Code* (Canada) s 486(2.1).

3 *Crimes Act 1900* (NSW) s 405D, introduced by the *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW). Before it came into force it was replaced by a new ss 405D and 405E, introduced by the *Crimes (Child Victim Evidence) Amendment Act 1990*.

4 *Criminal Justice Act 1988* (UK) s 32.

5 *Evidence Act 1908* (NZ) s 23E(1)(b).

6 *Evidence Act 1977* (Qld) s 21A(2)(a) and (c).

7 *Evidence (Closed Circuit Television) Act 1989* (ACT).

8 *Evidence Act 1958* (Vic) s 37C(3)(a).

9 *Child Welfare Act 1947* ss 23A-23C. This resulted from a recommendation of the Child Sexual Abuse Task Force: *A Report to the Government of Western Australia* (1987) recommendation 37.

5.3 The use of CCTV in courts has not yet been fully evaluated. Studies of the effectiveness of CCTV are currently being undertaken in the United Kingdom and the Australian Capital Territory.

(c) Research on the effect of CCTV

5.4 There are situations in which the use of CCTV may assist the court in receiving the evidence of a child witness. Early indications are that, where systems of CCTV operate, there are no insuperable difficulties from the point of view of the judge, the jury, prosecution and defence counsel, the accused or the child witness.[10] Thus the Scottish Law Commission, which initially was unpersuaded of the merits of CCTV in reducing stress for child witnesses,[11] has changed its view and recommended that provision be made to enable courts in Scotland to receive evidence from children by CCTV.[12]

5.5 A pilot study of the use of CCTV in six trials in New Zealand involving allegations of sexual abuse of children concluded that "the advantages in the use of CCTV do not on balance appear to be with the accused or the prosecution but, insofar as protection is afforded, with the witness".[13]

5.6 The New Zealand researchers concluded that the overall effect of the use of CCTV was not unfair to either the accused or the prosecution.[14] Among the perceived benefits of CCTV were:

* cases being brought to trial that might otherwise not have been prosecuted;

* more comprehensive evidence (because witnesses were less distracted and better able to concentrate);

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10 See, for instance: Scottish Report paras 4.29 and 4.31; Department for Community Services *Closed-Circuit Television in the Perth Children's Court* (1990) 17; (NZ) Department of Justice *The Use of Closed-Circuit Television in New Zealand Courts: The First Six Trials* (1990) 15.

11 Scottish Discussion Paper paras 5.70-5.72.

12 Scottish Report paras 5.28-5.33 and recommendation 12.

13 (NZ) Department of Justice *The Use of Closed-Circuit Television in New Zealand Courts: The First Six Trials* (1990) 15.

14 Ibid.

* the fact that the jury are better able to hear the witness and have a better view of facial expressions.[15]

On the other hand, CCTV reduced the emotional impact of the victim's evidence and made the victim appear less "real" than when giving evidence "live" in court.[16]

(d) Issues involved in the use of CCTV

5.7 Two issues are frequently raised in connection with the use of CCTV, namely:

(1) the right of the accused to confront the witness; and

(2) the effect of the technology on the evidence.

(i) The right of confrontation

5.8 In the United States the Constitution guarantees to an accused person the right "to be confronted with the witnesses against him".[17] In *Coy v Iowa*[18] the United States Supreme Court held that this precluded the use of a translucent screen which blocked the complainants' view of the accused and gave the accused only a fuzzy view of the complainants. By a majority of 6-2, the court held that the right of confrontation required that there be face-to-face contact in which the witnesses see the accused and the accused sees them.[19] Nevertheless, the Supreme Court acknowledged that the right to confront witnesses is not absolute and that among the exceptional circumstances in which the right might be abrogated was the situation where a court makes a finding that in an individual case a particular witness requires protective trial procedures in order to give evidence.[20] This exception is based on considerations of public policy.[21] Thus a State law authorizing the use of CCTV in a child sexual abuse case does not violate the constitutional right to confrontation if it provides for the giving of evidence by CCTV only when the particular

15 Ibid.
16 Ibid.
17 *United States Constitution*, Sixth Amendment.
18 (1988) 108 S Ct 2798.
19 Id 2801-2802.
20 Id 2802-2803.
21 *Craig v State of Maryland* (1989) 316 Md 551.

victim will, by testifying in the courtroom, suffer emotional distress to the extent that he or she cannot reasonably communicate.[22]

5.9 In the United Kingdom, by contrast, there is no right to confrontation. The Pigot Report[23] cites the case of *Smellie v R*[24] as authority for the view that an accused has no right to a face-to-face confrontation with witnesses. In that case the appellant had been convicted of assaulting, ill-treating and neglecting his 11 year old daughter. At the trial the judge ordered the appellant to sit on the stairs leading out of the court, out of sight of his daughter, while she gave her evidence, because the judge believed that the presence of the appellant would terrify the child. The appeal was based on:

(1) an alleged common law right of an accused to "be within sight and hearing of all the witnesses throughout his trial"; and

(2) the likely prejudicial effect on the jury of the removal of the appellant from the court when the complainant gave evidence.

The Court of Criminal Appeal dismissed the appeal, holding that:

> "If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter."[25]

5.10 In Western Australia, section 635 of the *Criminal Code* provides that the trial must take place in the presence of the accused person, unless the accused so conducts himself or herself as to render the continuance of the proceedings in the accused's presence impracticable. In such a case the court may order the accused to be removed, and may direct the trial to proceed in the accused's absence.[26] However, the use of CCTV in court proceedings could not have been contemplated when section 635 was enacted. The Commission does not see it as an insuperable objection to the use of CCTV.

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22 Ibid.

23 Para 2.30.

24 (1919) 14 Cr App R 128.

25 Id 130 per Lord Coleridge CJ.

26 See *Thomas v R (No 2)* [1960] WAR 129, 136. The Court of Criminal Appeal considered whether the absence of the accused resulted in any possibility that his defence could thereby have been prejudiced or his chances of conviction increased. They rejected both of these possibilities and dismissed an appeal based on s 635.

(ii) Effect of the technology on the evidence

5.11 One reason some lawyers and commentators have been uneasy about the giving of evidence by CCTV or videotape is the possible distorting effect of the medium on the message. Concern has been expressed that the use of a television link may enhance or diminish the quality and impact of the child's evidence given on screen.

5.12 Thus, in a New Zealand study defence counsel observed that victims appeared more emotionally detached when giving evidence over CCTV and their demeanour could not easily be assessed.[27] In the Scottish Research Paper[28] an American judge is reported as being strongly opposed to the use of CCTV where the victim gives evidence from outside the courtroom because, over the period of time it takes to try a case, the jury becomes familiar with the defendant and develops pity and concern for someone who looks just like members of the jury or their relatives.

> "If this pity and concern are not tempered in the jury's collective mind by the victim and the victim's pain, then human nature will favour the person who has become real to them [ie the defendant]."[29]

5.13 A recent study by Westcott, Davies and Clifford[30] raises a number of issues in relation to the design of any CCTV system for use in court. They undertook three separate studies to explore aspects of this problem. The first study sought to discover whether jurors can successfully distinguish true from false testimony given by children on television. The second study looked at whether children can give as full an account of events they have witnessed when telling their story over television as they could face-to-face. The third study examined the impact of the type of television shot (close-up or medium-distance; fixed or moving) on the witness's perceived credibility.

5.14 In relation to the first question, there was nothing in the findings from the study to suggest that adult jurors watching a witness giving evidence over CCTV would produce

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27 (NZ) Department of Justice *The Use of Closed-Circuit Television in New Zealand Courts: The First Six Trials* (1990) 12.

28 25.

29 Id, citing S B Smith *The Child Witness* in: *Representing Children: Current Issues in Law Medicine and Mental Health* (1987) 3.

30 H Westcott, G Davies and B Clifford *The Credibility of Child Witnesses seen on Closed-Circuit Television* Adoption and Fostering (1991) Vol 15 No 1.

decisions or judgments on credibility radically different from those made under conventional court conditions. The major attribute in assessing truth and deception was shown to be the "richness and consistency of verbal content" of the testimony, qualities not closely related to in-person observation of the witness.

5.15 Given this finding, the researchers considered it important in the second study to discover whether the use of television as a medium constrained or otherwise affected the information content of the evidence. The results of the study produced no significant difference in communication for "live" interviews of children as against those over CCTV.

5.16 In the third study the researchers examined the effect of style of television shot on perceptions of a witness's credibility and found a rather complex picture. Style of shot does apparently have some impact on a witness's credibility, but the impact was not found to be consistent. While children seen in medium-distance were perceived by adult observers as more honest than those in close-up, close-up shots produced higher overall ratings of attractiveness and also appeared to reduce or eliminate perceived differences in credibility based on the age of the witness. Older children were perceived as generally more credible than younger children.

5.17 These results suggest that, in order to eliminate any bias resulting from one or other fixed television image of a witness (whether medium-shot or close-up), a jury should ideally be presented with more than one view or type of shot of a witness giving evidence over CCTV.

5.18 If there are real and insuperable difficulties with television images, one option is to allow the child witness to give evidence in court while the accused observes proceedings from another room. This option is already a possibility in Queensland.[31]

(e) The Commission's recommendation

5.19 In the Commission's view, the experience of other jurisdictions in using CCTV for the giving of evidence by children in cases of sexual abuse or assault, together with the experience gained from the use of CCTV in the East Perth Children's Court in 1987, suggests that the court should have power to order that CCTV be used in cases where child witnesses give evidence.

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31 Under the "special witness" provisions of the *Evidence Act 1977* (Qld) s 21A(2)(a) and (4).

5.20 Following its general approach to the giving of evidence by children in cases of sexual offences or intra-familial assault or abuse, the Commission considers that the court should have power to order the use of CCTV in all cases where a child witness is under 16 at the time the proceedings are initiated. Other jurisdictions which have permitted child witnesses to give evidence by CCTV have imposed comparable age limits.[32]

5.21 In line with the Commission's earlier recommendation for a Code of Practice regulating the interviewing of children on videotape, a Code of Practice for the use of CCTV should be developed. Among other issues which should be dealt with, the Code of Practice should ensure that the jury is presented with more than one view or type of shot of a witness giving evidence over CCTV.

5.22 The Commission therefore recommends that:

In all cases involving sexual offences against or intra-familial assault on or abuse of children under 16 at the time the proceedings are initiated:[33]

(a) the court should have power to order that closed-circuit television be used to facilitate the giving of the child's evidence;

(b) a Code of Practice should be developed for the use of closed-circuit television, which should, inter alia, ensure that a jury would be presented with more than one view or type of shot of a witness giving evidence over closed-circuit television.

(f) Should CCTV be mandatory or discretionary?

5.23 If the use of CCTV is accepted as appropriate for child witnesses, the question arises as to whether it should be used in all cases or only in particular cases.

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32 18 in Canada and the ACT: *Criminal Code* (Canada) s 486(2.1); *Evidence (Closed Circuit Television) Act 1989* (ACT) s 3(1); 17 in NZ and Vic: *Evidence Act 1908* (NZ) s 23C(b); *Evidence Act 1958* (Vic) s 37C(2); 16 in NSW: *Crimes Act 1900* (NSW) s 405D(5); 14 in UK: *Criminal Justice Act 1988* (UK) s 32(1).

33 See paras 3.46-3.50 above.

5.24 In all Australian jurisdictions where the use of CCTV is authorized by legislation, such use is in the discretion of the trial judge.[34] This is so even in New South Wales, where in 1987 the legislature provided for mandatory use of CCTV in criminal proceedings involving an assault or abuse of a child under 10 at the time of giving evidence unless the court certified that the appropriate facilities were unavailable.[35] This legislation was never proclaimed. In 1990, a new Act was passed, substituting for the mandatory use of CCTV a discretion in the court to permit a child's evidence to be given by means of CCTV.[36] In introducing the 1990 Bill, the New South Wales Attorney General summarized the arguments against mandatory use:

(1) "A child may feel remote and isolated from those with whom he or she is communicating. The witness may also be daunted and distracted by the presence of the camera and sophisticated electronic equipment, and may have difficulty in concentrating on a video image for a prolonged period."[37]

(2) "There may be a significant difference between the effect on a jury of testimony given by CCTV and testimony given face to face. Depending on the quality of the equipment used and the image reproduced, visual evidence and nuances, including important changes in witness demeanour, may be excluded or distorted."[38]

(3) "[C]ourts should be able to take account of the varying interests and capacities of individual children . . . for certain children, testifying in court may be therapeutic; they may wish to have their day in court. Some children may be unaffected by the court experience. For such children, and others who could not be assisted by the use of CCTV, ordinary court procedures should prevail so that any risks of unnecessary prejudice to the rights of the accused or diminution in the impact of the child's evidence is avoided."[39]

5.25 The main difficulty with mandatory use of CCTV is that individual differences cannot be taken account of. In addition there is the cost factor, since CCTV equipment would have to be installed in many courts both in metropolitan and country areas.

5.26 However, there are arguments in favour of the mandatory use of CCTV. In particular, if the removal of a child witness from the court is potentially prejudicial to an accused, in that a jury may infer that the witness has cause to be frightened of the accused, then it would appear

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34 *Evidence (Closed Circuit Television) Act 1989* (ACT) s 5(1); *Crimes Act 1900* (NSW) s 405D; *Evidence Act 1977* (Qld) s 21A(2).

35 *Crimes Act 1900* (NSW) s 405D, as introduced by the *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW) s 3 and Schedule 3.

36 *Crimes Act 1900* (NSW) ss 405D-405I, introduced by the *Crimes (Child Victim Evidence) Amendment Act 1990* (NSW).

37 *Parliamentary Debates* (NSW), 1990 Vol 5 1683, Legislative Assembly.

38 Id 1684.

39 Id 1684-1685.

that a jury is less likely to be so influenced if the absence of the witness is routine. In such a situation the trial judge can instruct the jury that removal of the witness and the hearing of the witness's evidence by CCTV is routine for witnesses of a certain age and that no inference should be drawn from the mode in which the evidence is taken. Where a discretion to allow the use of CCTV exists, it may be more difficult for a trial judge to persuade the jury that no adverse inference should be drawn from the witness's absence from the court.

5.27 Of course, it is possible that a child witness's fear of the accused and desire to avoid a confrontation with the accused in court is due to something other than a belief that the accused committed the offence. A witness who had knowingly made a false charge against the accused would be afraid of testifying on that ground. The witness's fear of confronting the accused is not determinative of the accused's guilt or innocence and a judge exercising a discretion to allow the use of CCTV could properly draw a jury's attention to that fact.

5.28 Another difficulty with a completely discretionary approach to the use of CCTV is the potential for prolonged legal argument, and appeals, on the question whether the discretion was properly exercised. This possibility is probably greater where (as in the Australian Capital Territory[40] and Queensland[41]) the legislation lays down fixed grounds on which a court may allow the use of CCTV. These statutes require that the court must make a finding as to a witness's emotional state or ability to give evidence in the normal way, and it is to be expected that the trial judge will hear evidence on the question on voir dire and invite cross-examination of witnesses and legal argument on the issue to be decided.[42]

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40 *Evidence (Closed Circuit Television) Act 1989* (ACT) s 6, which reads -

"(1) An order may be made only if the Court is satisfied that -

(a) it is likely that the child would suffer mental or emotional harm if required to give evidence in the ordinary way; or

(b) it is likely that the facts would be better ascertained if the child's evidence is given in accordance with such an order.

(2) The matters that the Court may take into account include -

(a) the age, personality, intelligence, education and maturity of the child;

(b) any disability to which the child is or appears to be subject; and

(c) the nature and importance of the matters on which the child is being called to give evidence."

41 *Evidence Act 1977* (Qld) s 21A(1)(b), which requires children over 12 to qualify as "special witnesses" on the ground of either severe emotional trauma or being so intimidated as to be disadvantaged as a witness.

42 In addition, the Australian Capital Territory and Queensland legislation has an express provision that an order permitting the use of CCTV shall not be made if it would be unfair to a party to the proceedings: *Evidence (Closed Circuit Television) Act 1989* (ACT) s 7; *Evidence Act 1977* (Qld) s 21A(3). A provision along these lines seems superfluous, because any unfairness in the proceedings arising from the use of CCTV alone is impliedly authorized by the legislation. Any other unfairness would be appealable without express provision on the basis of "miscarriage of justice" under s 689(1) of the *Criminal Code*.

5.29 In the United Kingdom, where the courts have an unfettered discretion to allow a child witness to give evidence by CCTV,[43] no difficulties have been reported from the exercise of the discretion in favour of allowing its use. In the initial trial period from January 1989 to August 1989, the Lord Chancellor's Department noted that 115 applications were made to use CCTV and only 9 were not granted, mostly on the grounds of lateness of the application. There are, as yet, no official guidelines for the exercise of judicial discretion in this regard.[44] However, in one case a judge laid down the following principles:

(1) a judge should not grant permission for CCTV automatically, but should balance the risk of harm to the child against the risk of creating prejudice to the defendant by allowing CCTV to be used;

(2) in principle, if the prosecution want CCTV to be used it is up to them to produce some evidence that it is likely to be harmful to this particular child to give evidence in the traditional way;

(3) but in the case of a very young child "there must come a time when the very fact of the child's age is almost sufficient in itself to show that it would be detrimental for the child to have to give evidence in open court and to be cross-examined in the usual way".[45]

If these principles were adhered to, the effect would be to create a presumption against the use of CCTV and to encourage legal argument, demands for expert evidence, and the appearance of the child in court.

5.30 It is undesirable that a procedure introduced to facilitate the giving of evidence by young children should itself generate delays, uncertainties and additional issues to be determined at trial. The introduction of expert evidence to assist a judge in determining whether a child should give evidence by some alternative procedure inevitably leads to these kinds of problems. The Commission appreciates that there may be value in expert evidence in particular cases. However, it appears that in general a case should be decided by the trial judge without the assistance of experts, on the submissions of prosecuting and defence counsel at a pre-trial

43 *Criminal Justice Act 1988* (UK) s 32.
44 Spencer and Flin 87.
45 Herrod J in *R v Guy* (Unreported) Leeds Crown Court, 21 December 1989.

hearing[46] or on the basis of affidavits. Because the issue of how evidence is to be given may very well determine whether it is given at all, it seems imperative that the matter be decided as early as possible - both for the witness's sake and for the sake of proper preparation for trial by everyone involved. In some cases where the discretion exists to allow the use of CCTV, judges have wanted to delay the decision until after they have themselves seen the child witness in court. This might appear reasonable, but has been found to be unsatisfactory in that once a child witness "freezes" or is sufficiently upset for a judge to allow the use of CCTV, the witness has sometimes been unable to continue at all, whatever the conditions.

5.31 The proposal considered in the Commission's Discussion Paper[47] sought to address these problems by providing for a presumption in favour of CCTV (as opposed to an open discretion) so that -

(1) a jury could properly be told that this was normal procedure in cases of this type and that no inference should be drawn from its use;

(2) no legal argument would precede the decision to use CCTV;

(3) at the same time, the trial judge could, in a particular case, dispense with the use of CCTV if the witness was comfortable with traditional procedure, or vary the procedure.

5.32 Having given further consideration to these matters in the light of the submissions on the Discussion Paper, the Commission remains of the view that CCTV should be used as a matter of routine, rather than being discretionary. This would avoid the problems of protracted legal argument over its use and the conclusions which the jury might draw from a decision to order its use. It would be unwise to make such use mandatory in all cases. From a practical standpoint this would be impossible, because of the difficulty and cost of equipping sufficient courtrooms with the necessary equipment, not only in Perth but in other parts of the State. More importantly, the mandatory use of CCTV would make no provision for the case where the child witness is able to confront the accused and give evidence in court in the normal way.

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46 See ch 10 below.

47 Para 6.4(i)-(iv).

5.33 The Commission therefore recommends that:

(1) The use of closed-circuit television should be routine, and should be departed from only if the court is satisfied that the child is able, and wishes, to give evidence in the presence of the accused.

(2) Whenever closed-circuit television is used in a trial on indictment, the judge should be required to instruct the jury that the procedure is routine and that no inference as to the accused's guilt should be drawn from its use.

(g) Should the child or the accused be removed from the courtroom?

5.34 In its provisional proposal the Commission suggested, for discussion purposes, that the presumption in favour of the use of CCTV be linked with a procedure whereby the child remains in the courtroom to give evidence while the accused observes proceedings over CCTV from another room. The Commission recognized, however, that there would be occasions when the child witness would be unable to give evidence in court, even without the accused there, but might be able to give evidence over CCTV from outside the courtroom.[48] The Commission's provisional proposal therefore suggested that the court be empowered to vary the presumed procedure on application of the prosecution or some other person on behalf of the child.[49]

5.35 A majority of responses to the Discussion Paper expressed support for the proposal. The Law Society and the Criminal Law Association, however, expressed opposition without commenting on whether it would be preferable to have the child or the accused in the courtroom. Members of the Chief Justice's Criminal Practice and Procedure Review Committee were divided on the question. The Chief Justice felt that there was room for both possibilities, though he expressed a preference for the child being out of the courtroom because of possible prejudice to the accused in the eyes of the jury if a court used its discretion to remove the accused.

5.36 It is this last factor - concern that the absence of the accused will create the impression in the jury's mind that the accused is a person whom the witness has good reason to fear - which

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48 Discussion Paper para 4.55.

49 Id para 6.4(ii).

has influenced most lawyers and judges to favour removal of the child witness. This concern would probably discourage a judge with a choice about whom to remove from electing to remove the accused.

5.37 In addition, it is probable that most child witnesses, given a choice, will elect to give evidence from outside the court. The Commission therefore envisages that in the ordinary case the child witness will give evidence over CCTV while the accused remains in court. However there may be cases in which the factors pointing to removal of the accused and allowing the child to give evidence in court outweigh any possible prejudice to the accused. It may also be that future experience with CCTV will show that juries are not influenced by removal of the accused. The Commission is of the view that legislation authorizing the use of CCTV should allow for the possibility of either option. Juries should be directed by judges not to convict an accused merely on the basis of arrangements made for the hearing of the evidence.

5.38 The Commission therefore recommends that:

Where closed-circuit television is used in accordance with the previous recommendation, the court should have power to:

(1) permit the child to give evidence over closed-circuit television from a room outside the courtroom from which all persons other than those specified by the court are excluded; or

(2) permit the child to give evidence in court and make provision for the accused, in a room outside the courtroom, to see and hear the child giving evidence by closed-circuit television.

2. SCREENS

5.39 Another device to facilitate the giving of evidence by child witnesses is the use of screens to partition the witness from the accused. The Commission mentioned these only briefly in the Discussion Paper because it appeared that suggestions for the use of such screens had in Australia been largely overtaken by the introduction of CCTV. However, given the likely cost

of introducing CCTV systems in all courts,[50] the possible use of screens deserves further consideration. In Queensland[51] and New Zealand[52] legislative provision for the use of screens has existed since 1989. New South Wales added this option in 1990[53] and Victoria in 1991.[54] In England, where screens have been used without statutory authority since 1986, the Home Office has issued a circular[55] encouraging the use of screens in magistrate's courts (where under the *Criminal Justice Act 1988* CCTV is not available) in cases of violence and/or sexual abuse involving child witnesses and pointing out that:

(1) In *R v X*[56] the Court of Appeal ruled that the use of screens to prevent child witnesses from being intimidated by their surroundings was not unfair or prejudicial.

(2) The Pigot Report recommended the use of screens in proceedings in magistrate's courts involving cases of violence against and/or sexual abuse of children.

The Scottish Law Commission, though initially reluctant to approve the use of screens,[57] has revised its initial reservations and instead recommended regulation of their use.[58]

5.40 The initial concerns expressed in the Scottish Discussion Paper reveal the potential disadvantages of screens. The first objection concerns their effectiveness in reducing a child's fear or anxiety about giving evidence in the presence of the accused. The Scottish Law Commission thought it unlikely that screens would be very helpful, since the child would be bound to know that the accused was behind the screen. In the second place the Scottish Commission was concerned that the erection of a screen was, more than any other technique, likely to be prejudicial to an accused. By its very nature, the screen would be likely to appear an ad hoc arrangement which, despite warnings to the contrary, would lead a jury to conclude that the child had good reason to be afraid of the accused.

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50 One 1990 estimate for equipping a single court in New South Wales completely with the best available quality of hardware was $100,000 (telephone conversation with NSW Attorney General's Department).
51 *Evidence Act 1977* (Qld) s 21A(2)(a).
52 *Evidence Act 1908* (NZ) s 23E(1)(c).
53 *Crimes Act 1900* (NSW) s 405F.
54 *Evidence Act 1958* (Vic) s 37C(3)(b).
55 Home Office Circular 61/1990.
56 *The Times* 3 November 1989.
57 Scottish Discussion Paper paras 5.60-5.65.
58 Scottish Report recommendation 11 (see also paras 4.17-4.27).

5.41 Although about half their consultees rejected the use of screens, the Scottish Law Commission in its Report revised its opinion in the light of the fact that screens had already been used in the Scottish High Court and in sheriff courts, where they had been seen to be very helpful.[59] Their regular use in courts in England and Wales, with apparent success (measured in terms of enabling a fearful child to give evidence, without prejudice to the accused), also encouraged the Scottish Law Commission to recommend regulation of the use of screens rather than their suppression.[60]

5.42 The Scottish Law Commission recommended that the matters requiring regulation were:

(1) whether the use of a screen could be authorized against the wishes of the accused (as to which their own view was that this should be possible);[61]

(2) the question of what the grounds should be for authorizing the use of screens;[62]

(3) the nature of the screens themselves, which should be so constructed that the accused is able to watch the witness and observe the witness's demeanour while giving evidence;[63]

(4) procedures for applications to use screens.[64]

5.43 It appears that screens have become accepted in Anglo-Australian systems of law as a legitimate way of reducing a witness's anxiety without prejudice to the accused.[65] The Commission considers that in Western Australia the use of screens should be authorized in courts where CCTV is not available and where the court is satisfied that the use of a screen in a particular case is desirable, provided that the screen is so constructed as not to obstruct the accused's view of the witness while the witness is giving evidence.

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59 Id para 4.18. The Scottish Commission noted that statutory authority did not appear to be necessary for the use of screens: para 4.19.

60 Id para 4.20.

61 Scottish Report para 4.21.

62 Id para 4.22.

63 Id paras 4.23-4.25.

64 Id para 4.26.

65 Despite the fact that the use of a screen has been held unconstitutional in the United States on the basis that it interfered with the accused's right to confront the accused's witnesses: *Coy v Iowa* (1988) 108 S Ct 2798, as to which see para 5.8 above.

5.44 The Scottish Law Commission discussed the nature of screens.[66] Shielding the accused from the child was considered important, but equally important was preserving the ability of the accused to see the child's demeanour and hear the child at all times. This could be achieved by a screen constructed from one-way glass. An alternative is the use of opaque glass with the accused being able to see the witness through CCTV. The facilities available to the court and the circumstances of individual cases would assist the court in determining the best method for enabling the child to give evidence and not to have to see the accused. The procedures to be adopted by the courts in using CCTV and/or screens should be developed by the courts. The judiciary may, for instance, consider it appropriate for such procedures to be the subject of a Practice Direction.

5.45 The Commission therefore recommends that:

(1) Legislation should authorise the use of screens in cases where closed-circuit television would otherwise be used but such facilities are unavailable, provided that the screen is so constructed as not to obstruct the accused's view of the witness while the witness is giving evidence.

(2) The type of screens to be used and procedures to be used in any particular case should be set out in Practice Directions developed by the courts.

3. IDENTIFICATION OF THE ACCUSED

5.46 Normally, witnesses who make allegations about an accused person will be required to identify the accused in court by pointing to the accused in response to a question from the prosecutor such as "Do you see the person you are referring to in court?"

5.47 In cases where the child witness is not to give oral evidence in the presence of the accused,[67] consideration needs to be given to the most appropriate way for the child to identify a particular person as the accused. If the identification is to be done in the traditional way - by looking at, and pointing to, a person in court - this may be as upsetting to a child witness as giving evidence in the presence of the accused.

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66 Scottish Report paras 4.23-4.24.

67 See the recommendations in paras 3.38, 4.40 and 5.22 above.

5.48 The Scottish Law Commission considered this issue in its report.[68] They drew attention to the decline of "dock identifications" in England since 1914.[69] Since that time it has become normal practice in England for identification of an accused to be established by other means - usually "by an identification parade coupled with other evidence sufficient to link the person picked out at the parade with the person in the dock".[70] The justification for the change is based on the view that:

(1) A witness's memory is likely to be more accurate and reliable shortly after the event, at the time of the identification parade, rather than when the hearing takes place, possibly many months later.

(2) Identification at an identification parade is likely to be much fairer to an accused, in that an accused stands where he or she chooses in a line of people of similar age and physical characteristics (whereas in court the accused is placed prominently in the dock).[71]

5.49 In Scotland, dock identification is still regarded as necessary. The Scottish Law Commission recommended that identification at an identification parade or other recognized identification procedure should be a substitute for a dock identification unless the accused challenges the earlier identification. Where an accused has been identified in advance of a trial by a child witness, either at an identity parade or where identity is non-contentious, through the use of photographs, a report of the identification parade or other identification procedure would be lodged with the court. A copy of the report would be served on the accused at least 14 days before the trial. The lodging of the report would give rise to a presumption that the person named in the report as having been identified by the witness is the person named in the complaint or indictment and answering the charge in court, unless the accused challenges the facts stated in the report at least 6 days before the trial.

5.50 Although the Scottish Law Commission does not say so, presumably a challenge as to the facts stated in the report would give rise to a need for the witness to identify the accused in person in court. It is this latter part of the process which may give rise to difficulties, if it results

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68 Scottish Report paras 3.7-3.20.
69 *R v Cartwright* (1914) 10 Cr App R 219.
70 Scottish Report para 3.10.
71 Ibid.

in a confrontation between a child and an accused which might have been avoided by the use of CCTV or other evidence.

5.51 In 1991 the Crown Law Department indicated to the Commission that in Western Australia the identity of an accused is rarely an issue in child abuse cases.

5.52 However, identification may be essential in some cases. In those situations oral evidence will normally be required to link the child's evidence of particular acts to the accused. This requirement may be met in one of the following ways:

(1) Where the accused is related to the child, another family member or familiar adult may be able to identify the accused person in the courtroom.

(2) There will be cases where the accused is not related to the child and where it would therefore be inappropriate or impossible for another member of the child's family to identify the accused in court. However, an identification parade may have taken place before the trial. If so, evidence of the identification would have been given by the police at the trial.

5.53 In most child abuse cases identification of the accused by a child witness in court will therefore be unnecessary. Even so, in some cases it may still be essential for the child witness to confirm the identity of the accused in the courtroom. One possible way of conducting such an identification is by the use of CCTV. However, in some circumstances this may be unsatisfactory, for example because of possible image distortion. Where there are insurmountable problems in relation to the use of CCTV, the child and the accused would have to be present in the courtroom at the same time for the sole purpose of identification. If this were to occur, it should take place only after the child's examination-in-chief, cross-examination and re-examination.

5.54 The Commission recommends that

In cases where it has been determined that the child will be able to present evidence out of the presence of the accused, and identification of the accused is an issue:

(1) where the accused is a member of the child's family, the identification should if possible be undertaken by another family member or familiar adult;

(2) where from the circumstances of the particular case it is necessary for the child to identify the accused at the trial, the child should be able to identify the accused by way of closed-circuit television;

(3) if the use of closed-circuit television for identification of the accused by the child witness is considered by the presiding judicial officer to be inappropriate in the circumstances of the particular case, the child witness should be in the presence of the accused solely for the purpose of identification and only after the child's examination-in-chief, cross examination and re-examination are complete.

Chapter 6
PREPARATION AND SUPPORT

1. PREPARATION OF CHILD WITNESSES

(a) Introduction

6.1 Among the factors identified as contributing significantly to the level of stress experienced by a child witness attending trial is "lack of legal knowledge resulting in misunderstanding and fear of the unknown".[1]

6.2 In a 1988 study[2] child witnesses interviewed in the court waiting-room frequently expressed anxiety about their forthcoming appearance in court. Their anxiety arose partly from ignorance: "They did not know what would happen in the courtroom, they did not comprehend the role of the various professionals involved in the trial and they did not always understand their own role in the proceedings." The majority of children had not been briefed or prepared for court and a significant number of parents reported having great difficulty in explaining to their child what would happen in the courtroom due to their own lack of knowledge.[3]

6.3 Examples cited by Spencer and Flin make clear how fundamental may be the confusion and ignorance of a child who has not been properly prepared for court:

> "One five-year-old boy, who was in tears as he waited to give evidence, repeatedly asked his mother if he would be able to go home afterwards, and when she enquired what he meant, he replied, 'I don't want to go to the jail'. An eight-year-old girl involved in the same case said anxiously, 'I don't like the witches', indicating a coven of begowned defence agents (lawyers) who were cackling at the other end of the waiting-room. These findings, which showed that child witnesses were ill-informed, are confirmed by anecdotal reports; a social worker told us of a four-year-old girl who had just given evidence and said on leaving the courtroom 'Who were all those big children?' (the jury); another social worker recalled a small boy who was very distressed in the witness-box because he thought the jury were the defendant's friends".[4]

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1 Spencer and Flin 297.

2 R H Flin, G Davies and A Tarrant *The Child Witness* Final Report to the Scottish Home and Health Department (1988).

3 Spencer and Flin 291.

4 Id.

(b) A preparation scheme

6.4 Recognizing these difficulties, the Commission in its Discussion Paper[5] invited comment on a proposal that an "officer of the court" be appointed, with appropriate skills and training, to prepare child witnesses under 16 for the giving of evidence, to be present at the trial, and to provide ongoing information about court processes until the proceedings in which a child witness has been involved are complete and the accused either acquitted, or convicted and sentenced. The proposal included suggestions for some matters which might need to be addressed by a person preparing a child witness to go to court. These covered:

(1) an explanation of the significance of an oath;

(2) a visit to the courtroom in which the proceedings will take place;

(3) an explanation of the child's role in the proceedings and the roles of the various officers of the court, including the judge, jury and counsel;

(4) a description of the "uniforms" which the judge, counsel and others will be wearing at the trial;

(5) an opportunity to understand the sorts of questions that may be asked of the child in the witness box.

Public response to this proposal was overwhelmingly favourable.

6.5 Apart from a perceived need for a child witness to have preparation for a court appearance shortly before the appearance itself, the Commission's Discussion Paper envisaged that the person concerned with preparation should be available to assist the child throughout the duration of proceedings and afterwards. Several respondents indicated that this involvement should begin early enough to include support for a child at interviews with prosecutors. The suggestion was also made that preparation of this kind could be beneficial to other persons involved, such as the family of the child complainant.

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5 Para 6.6(i).

6.6 The Commission stressed that the proposal was not intended to be a substitute for any psychological counselling which the child witness might otherwise have. Therefore the proposal was strictly confined to matters directly relevant to the child's appearance in court. However, the Commission envisaged that the person appointed to prepare witnesses would need to have the requisite training and experience to ensure that some rapport developed between that person and the witness, which would assist in post-trial counselling - particularly in cases where an accused has been acquitted.

6.7 Several respondents were concerned that the person chosen to prepare witnesses should have appropriate training and experience in both child communication and court processes. The Commission agrees that, as a minimum, the person concerned would need to be well versed in child development, be skilled at communicating with children and have a sufficient knowledge of court procedures.

6.8 In many cases, child witnesses would require professional counselling, and the preparer-for-court would have to be able to identify witnesses in need of such help and be able to refer them or their families to an appropriate agency.

6.9 Several respondents emphasized the need for written materials to be available as adjuncts to personal preparation of child witnesses.[6] The Commission is aware of proposals for preparation in Western Australia of two age-appropriate cartoon type videotapes with accompanying booklets.[7]

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6 The Commission's attention was drawn to two publications available in Australia for use in preparing child witnesses for going to court. One, geared to younger children and entitled "Your Day in Court", is an information and colouring-in book for children aged 5-10 years (Victorian Court Information and Welfare Network 1989 - can be obtained from Victorian Court Information and Welfare Network Inc, 241 William Street, Melbourne 3000). The other, "Tell it Like It is", designed for older children, is a joint publication of the Children's Interests Bureau of South Australia and the South Australian Attorney General's Department ("Tell It Like It Is: Your Guide to Being a Witness in Court" Children's Interests Bureau 1989 - can be ordered from Children's Interest Bureau, 68 Grenfell Street, Adelaide).

7 The Child Abuse Unit has informed the Commission that a Working Party is currently considering suitable material and seeking the necessary funding.

(c) Choice of responsible agency

(i) Introduction

6.10 The chief difficulty in proposing a system of witness preparation for Western Australia is in identifying an existing body or person to undertake the role.

6.11 A submission from the judiciary was of the view that, although the role of preparation for court was a valuable one, it ought not to be undertaken by a person hired and supervised by the court. The person appointed should be independent of the court in order for the court's impartiality not to be compromised. Public responses also emphasized the need for independence. There is, however, also a need for close co-operation with legal personnel and other persons (such as social workers or psychologists) who might be working with the child.

(ii) Models

6.12 The Commission's attention was drawn to several models which might assist in development of a scheme for witness preparation, such as a court-appointed guardian ad litem or children's advocate, who would be appointed as soon as possible after the decision was taken to proceed and who would be responsible for protecting the child witness's interests before, during and after proceedings by:

(1) advising the court on the best way of presenting the child's evidence;

(2) keeping the child (and family, where appropriate) informed about what is happening;

(3) assisting a support person if necessary[8] (such as where the witness's support person is another child); and

(4) ensuring that a child's right to victim compensation is taken up

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8 On support persons, see paras 6.24-6.35 below.

6.13 Recognizing the objections to appointment of a court official to prepare witnesses for court, the Commission considered this suggestion and two alternative schemes for witness preparation in operation in other jurisdictions.

* *Victorian Court Network*

6.14 In Victoria a comprehensive programme of witness support and preparation is provided by the Victorian Court Information and Welfare Network Inc, which is a non-government, voluntary agency concerned with providing assistance to all people who are in contact with the Victorian courts, whether as defendants, accused, victims, witnesses or family members of any of these.[9] The organization began at Prahran Magistrates' Court in 1980 with one voluntary worker. In 1990 it employed a Director and three other professional staff, while continuing to use the services of approximately 220 volunteers in a variety of roles, including "court duty", in 47 courts in Victoria. Funding of services to State courts is by grants from the Victorian Government through their Social Justice Strategy programme.

6.15 The Court Network has devised a four-phase programme of preparation and support for anyone requiring it:

(1) *Pre-court phase* (7-10 days before trial)

In which the "client" is offered information on procedures, the trial process and the roles of court personnel.

(2) *Court phase* (during proceedings)

In which personal support and ongoing information are provided; the client is assisted in making contact, where necessary, with the prosecutor or a lawyer; the client may be referred to other community agencies for assistance; and sensitive "debriefing" is afforded.

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[9] The Commission has also received information on a similar programme operating from the London Family Court Clinic, London, Ontario, Canada. A Child Witness Project being undertaken at the clinic has concluded that certain kinds of court preparation reduce legal system induced trauma and improve child witnesses' court performance: *Reducing the System-Induced Trauma for Child Sexual Abuse Victims through Court Preparation, Assessment and Follow-up* (Child Witness Project, London Family Court Clinic 1991) 120.

(3) *Post-court phase*

In which information regarding the jury verdict (and presumably sentencing) are provided; and personal support and counselling are offered to a victim after an acquittal.

(4) *Community phase*

In which referral to other community agencies may be offered, a follow-up telephone call and counselling given where appropriate.

6.16 Volunteers participating in the scheme work under the supervision of professional staff and complete a 17-week primary training programme, with monthly continuing education workshops thereafter.

6.17 Western Australia has a similar agency, the Honorary Court Welfare Service Inc, which is based in the Central Law Courts building in Perth. This organization has for nearly 20 years been offering assistance to persons attending the courts as witnesses, accused persons or family members. The organization is staffed entirely by 75 trained volunteers who operate on a roster system at the Central Law Courts, Children's Court, Supreme Court and courts in Bunbury, Geraldton and Mandurah. The service does not at this stage provide pre- or post-court advice or assistance, but will refer people in need to other community agencies. It is not ordinarily called upon to assist child witnesses in sexual abuse cases.

6.18 Were a programme of preparation of witnesses to be developed in Western Australia along the lines of that in Victoria, one important issue would be co-ordination of agencies (such as the Crown Law Department, the Child Abuse Unit, the Sexual Assault Referral Centre and the Department for Community Services) to avoid replication of services and to make sure that children required to give evidence did not "slip through the net" in being offered assistance. In Victoria this problem is overcome to some extent by the fact that, when the Director of Public Prosecutions issues a subpoena to a witness, an accompanying letter goes to the witness giving relevant information, including the name and contact telephone number of the Court Network.

However, unless a witness contacts the Court Network the organization does not ordinarily know about the witness.

* *Child Victim Witness Advocacy Programme*

6.19 In a number of United States jurisdictions programmes have been, or are being, developed to provide comprehensive advocacy and support services to child victims of crime who are witnesses in legal proceedings. The Commission has received information about three such programmes, in Florida,[10] Texas[11] and California.[12] The Florida centre was established as a branch of the State Attorney's office and has a multi-disciplinary team of social workers, police co-ordinators and lawyers, plus technical and support staff. The programme's aim is to provide multiple services to children under the age of 12 who have been witnesses to, or victims of, a crime of physical or sexual abuse. The Children's Centre is involved in interviewing of children for forensic purposes and assessment of the child's evidence for filing of charges. Thereafter a "child advocate" meets with the child and the child's family members or other appropriate persons to assess the child's needs and provide continuing support until after the trial is over. The child advocate may refer a child for counselling where appropriate. The advocate's task includes practical preparation for the giving of evidence in the form of information about court processes.

(iii) A programme for Western Australia

6.20 Discussions of the above models with the Child Abuse Unit in Western Australia led to the drafting of a proposal for a Victim Witness Support Unit. The proposal is set out in Appendix II. The Unit's main aim would be to provide a co-ordinated approach to preparation of children (and other vulnerable witnesses) for the experience of giving evidence in court. Related purposes would include researching the needs of victim witnesses and investigating ways of reducing the psychological trauma for children and vulnerable witnesses.

6.21 The proposal envisages establishment of a special unit, located in the Crown Law Department, but reporting to the Attorney General through an interdepartmental advisory

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10 The Children's Centre, Office of the State Attorney, Miami, Florida.

11 The Dallas Children's Advocacy Centre, City of Dallas, Youth and Family Crime Investigations Section, Dallas, Texas

12 Information supplied by Ms S Bellett, Department for Community Services.

committee. The staff of the unit would have a blend of legal and social work qualifications, be experienced in interviewing children and persons who might be considered vulnerable witnesses, and have knowledge and experience of the criminal justice system.

6.22 The Western Australian Government has recently established a Crime Victims Support Unit which began operating a pilot programme in Fremantle in April 1991. The Unit is designed chiefly for information and referral to victims who have suffered crimes against the person. Its staff includes an Executive Officer, Police Liaison Officer, Counsellor-Advocate and support staff.

(iv) Recommendation

6.23 The Commission recommends that:

(1) The Attorney General, in consultation with interested persons and organizations (such as the Crown Law Department, the Department for Community Services, the Law Society, the Crime Victims Support Unit, the Honorary Court Welfare Service Inc and the Child Abuse Unit), and taking into account the Child Abuse Unit proposal for a Victim Witness Support Unit, establish a programme for the preparation of children under 16 who have to give evidence in court proceedings.

(2) Under the programme persons with appropriate training and experience in child communication and court processes be appointed to prepare child witnesses for the giving of evidence, and to be available to assist them wherever appropriate before, during and immediately after the trial process.

(3) Written publications and videos be produced and be readily available to child witnesses and other interested persons.

2. SUPPORT FOR CHILD WITNESSES

(a) General

6.24 In its Discussion Paper the Commission considered a proposal that legislation should allow a child witness under 16 the right to have a support person, approved by the court and chosen by or otherwise acceptable to the witness, present and seated nearby while the witness is giving evidence. However, the support person should not be a person to be called as a witness in the same proceedings.[13]

6.25 This proposal was directed to enabling children to give evidence in court despite the difficulty of doing so. It was also directed to reducing the trauma of a court appearance for a child witness by ensuring that the child is accompanied at all times by an adult with whom the child is comfortable and whose presence will be helpful if the child feels unduly stressed.

6.26 Recognition of the importance to a child witness of emotional and practical support during a time of stress has led some courts to allow the presence of support persons without legislative authority. However, in some Australian jurisdictions the practice has been given legislative authority.[14]

6.27 In the Commission's view there should be a similar legislative provision in Western Australia. The court should have a discretion to permit a child witness under the age of 16 to have a support person present and seated nearby while the child is giving evidence, whether at committal proceedings, at trial or in an informal hearing in advance of the trial.[15]

(b) Suitability of the support person

6.28 The suitability as a support person of various categories of people was canvassed by a number of respondents to the Discussion Paper. Several were opposed to the use of family members or friends, favouring the appointment of a professional or a person with adequate training for the role. Others were concerned that the support person should have no emotional or professional interest in the outcome of the case. Some respondents were in favour of choice

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13 Discussion Paper para 6.5.

14 *Evidence Act 1977* (Qld) s 21A(2)(d); *Evidence Act 1929* (SA) s 12(4)-(5); *Evidence Act 1958* (Vic) s 37C(3)(c); *Magistrates' Court Act 1989* Schedule 5 cl 15(3)(ba).

15 See paras 3.38, 4.29 and 4.40 above.

on the part of the child. These differences of opinion suggest that the identity of an appropriate support person is an important matter, and one which will vary from case to case.

6.29 Inherent in the idea of a "support person" is the need for the child to feel comforted by that person's presence while giving evidence. To that extent there must be some rapport between the child and the support person, based on that person's relationship with the child and sympathetic understanding of the difficulties children may have in giving evidence. The support person will need to be:

* sufficiently informed about court proceedings to be aware of a support person's obligations and to behave appropriately;

* sufficiently acquainted with the child to be a familiar element in what may otherwise be a strange environment;

* not personally involved in the proceedings, for example as a witness or as a person with any interest in the outcome.

6.30 There may be difficulties with allowing a member of the child's family to act as the support person. For example, in cases of intra-familial child abuse, a close family member may have an emotional interest in the outcome of proceedings. In such circumstances, a close family member could not be an impartial support person. In particular, if the accused person is a parent of the child witness, it would not be appropriate for the other parent to be the support person. If a family member is to be permitted to act as support person, a brother or sister may in some cases be the most helpful. Research indicates that children can find the presence of another child helpful in answering questions about what they remember.[16]

6.31 If the child has a therapist or counsellor, then that person may very well be the best possible support person. If not, the child may be able to nominate a neighbour, teacher or personal friend whose presence would be comforting.

6.32 The child's wishes should be an important consideration in determining the identity of the support person. However, the final decision as to an appropriate support person in a

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16 S Moston *The Effects of the Provision of Social Support in Child Interviews*, paper presented at the British Psychological Society Development Section Conference, York, September 1987.

particular case should be made by the court. It should, if possible, be settled in advance of the trial at a pre-trial hearing.[17]

6.33 Several respondents suggested that the role of the person appointed to prepare a child witness for a court appearance might comfortably merge with that of support person at the hearing. In cases where a child witness has no other suitable support person, the Commission would agree. However, ideally the child and the support person should meet the person preparing the child witness for court to receive information and practical assistance on an ongoing basis during a trial.

(c) Support persons and the use of closed-circuit television

6.34 Where a support person accompanies a child witness into a room outside the courtroom from which the child will give evidence over closed-circuit television, the question arises whether the support person should also be visible on the television monitor and observable by the judge, jury and counsel. The judge and counsel should be able to see the support person, because it is necessary for the support person to be restrained from any coaching of, or hints to, the child witness, for example as to an appropriate answer to a question. If observable by judge and counsel, the support person could be warned if the need arose. The jury should also be able to see the support person. A child's demeanour may be influenced by the presence and/or actions of the support person. If the child were to give evidence in court with a support person present, the jury would see the latter - there should be no difference merely because the child and the support person are out of the court room and the child is giving evidence by way of closed-circuit television.

(d) Recommendation

6.35 To facilitate the process of support, the Commission recommends that:

> **Legislation should permit a child witness under 16 to have a support person, approved by the court, present and seated near to the child while the child is giving evidence. The support person should not be a person to be called as a witness in the same proceedings.**

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17 See ch 10 below.

3. QUESTIONING OF CHILDREN

(a) General

6.36 The public's view of courts is that they are places where "strange language" or "legalese" is spoken,[18] a language with which children and most adults are unfamiliar.

6.37 In particular, children may experience difficulties when being cross-examined. It has been argued that the basic technique of cross-examination - leading questions - is that least likely to extract the truth from children. Research shows that children are more likely than adults to give unreliable information in response to suggestive questioning, and the younger the child the more pronounced this effect.[19] Another tactic of cross-examination is that of juxtaposing unrelated topics in the hope of tripping up a lying witness. With children, the effect of this is likely to be disorientation and an inability to answer questions because of confusion as to the direction of the cross-examination.

6.38 Samples of transcripts of children being questioned demonstrate the difficulties with cross-examination of children.[20] Some methods of cross-examination are inappropriate for the examination of young children. As a Canadian psychologist wrote:

> "One needs only to witness a single instance of the cross-examination of a child witness to realise that the procedure is illsuited to children. It is easy to confuse a young child with the use of inappropriate language, long and circuitous questions, and a confrontational style. The adversial system creates as many problems as it solves in the area of child abuse."[21]

6.39 However, in any trial the judge has control of the proceedings and must ensure they are conducted fairly. The same is true of a magistrate conducting committal proceedings. If questions are asked of a child witness which the judge considers the child cannot understand, or

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18 M Brennan and R E Brennan *Strange Language - Child Victims under Cross-Examination* (1988) chs 8-9.

19 Spencer and Flin 224.

20 M Brennan and R E Brennan *Strange Language - Child Victims Under Cross Examination* (1988) 64-65.

21 J C Yuille *Expert Evidence by Psychologists: Sometimes Problematic and Often Premature* (1988) 7 Behaviour Sciences and the Law 181, 191.

are unfair, they can be controlled by the judge. Indeed, it is the judge's duty to exercise such control.[22]

(b) Child interpreters

6.40 If a child giving evidence is being asked questions in language which the child does not understand, the court could be given power to appoint an interpreter who is able to put the words of counsel into words the child understands. The Pigot Committee discussed the use of an "interlocutor" with skills in child communication[23] and recommended that "the court should have discretion to order exceptionally that questions advocates wish to put to a child should be relayed through a person approved by the court who enjoys the court's confidence".[24] This recommendation has not as yet been implemented.

6.41 Child interpreters would need to possess appropriate professional and practical skills in communicating with children, and would also need to be able to comprehend the language counsel use in examining or cross-examining witnesses.[25] The function of a child interpreter would be analogous to that of a foreign language interpreter in a case where the witness does not have sufficient understanding of English.[26]

6.42 In cases where it was thought necessary to make use of a child interpreter, the interpreter would ordinarily be appointed in advance. An application to appoint a child interpreter would normally be made at the pre-trial hearing.[27] The child interpreter would then be available when the child was giving evidence (either in court, or over closed-circuit television, or at an informal hearing in advance of the trial). Where the judge is satisfied that the child is unable to understand a question put by counsel, the judge would ask the child interpreter to translate it to the child. If necessary, the child interpreter might also have to translate the child's answer.

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22 See eg *Evidence Act 1906* ss 25 (cross-examination as to credit), 26 (indecent or scandalous questions); P Gillies *Law of Evidence in Australia* (1987) 21, 126-127.

23 Pigot Report paras 2.32 - 2.33.

24 Id recommendation 6.

25 The Human Rights and Equal Opportunity Commission *Report of the National Inquiry into Racist Violence in Australia* (1991) 312 recommended that a national registration system for interpreters be established, to include specialist registration of legal interpreters, who would be required to meet strict standards in language skills and adequate knowledge of the judicial system, legal terminology and the role and ethical responsibilities of interpreters.

26 On interpreters see *Cross on Evidence* para 33805.

27 See ch 10.

6.43 The Commission recommends that

The court should have power to appoint "child interpreters" to facilitate the giving of evidence by children under 16, where the court is satisfied that the child is unable to understand questions put by counsel.

(c) Use of intermediary where accused unrepresented

6.44 Cross-examination of a child witness by an unrepresented accused may be particularly stressful for the child. In such cases, it would be desirable for questions to be put through an intermediary, such as a child interpreter or other person approved by the court.

6.45 The Pigot Report stated that "defendants should be specifically prohibited by statute from examining child witnesses in person or through a sound or video-link".[28] The United Kingdom Criminal Justice Bill 1990 proposes an express prohibition on an accused person cross-examining a child complainant in a sexual offence case.[29]

6.46 In New Zealand, the *Evidence Act* prohibits an unrepresented accused from putting questions directly to a child complainant. The questions are put by the accused to some other person approved by the judge, and that person repeats the questions to the complainant.[30]

6.47 The Commission recommends that

An unrepresented accused person should not be permitted to cross-examine a child witness. In such cases the court must appoint an intermediary to facilitate cross-examination.

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28 Para 2.30.
29 Cl 46.
30 *Evidence Act 1908* (NZ) s 23F(3).

Chapter 7
COURTROOM PROCEDURES FOR CHILD WITNESSES

1. EXCLUDING THE PUBLIC FROM HEARINGS

(a) The present law

7.1 There is a fundamental rule that a criminal trial must be conducted in a public court with open doors.[1] In Western Australia there are the following exceptions to this rule:

(1) Under the common law, a judge may exclude the public where it is necessary for the administration of justice - such as in a situation of "tumult or disorder, or the just apprehension of it."[2] In such a situation the judge may exclude "all from whom such interruption is expected, or if such discrimination is impossible the exclusion of the public in general".[3]

(2) Under section 635A of the Criminal Code the court may in its discretion exclude all or any persons not directly interested in the case from the courtroom or place of trial where either:

(a) the accused is under the age of 18; or

(b) the charge is an offence of an indecent character against a person under the age of 18.

(3) Under the *Justices Act 1902* section 65, the court may exclude all or any persons where the interests of public morality so require.

7.2 Of particular relevance to cases of alleged child sexual abuse is the exception under section 635A of the Criminal Code.

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1 *Criminal Code* ss 608, 612; *Justices Act 1902* s 65; *Scott v Scott* [1913] AC 417, 420; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 50-55. See article 14(1) of the International Covenant on Civil and Political Rights contained in *Human Rights and Equal Opportunity Commission Act 1986* (Cth) Schedule 2

2 *Scott v Scott* [1913] AC 417, 435 per Viscount Haldane.

3 Id 445-446 per Earl Loreburn.

(b) The law elsewhere

7.3 In South Australia an amendment to the *Evidence Act* has reversed the presumption of a public trial in child sexual abuse cases in favour of a hearing where the only persons permitted to be present are:

(1) those whose presence is required for the purposes of the proceedings;

(2) a support person for the child; and

(3) "any other person who, in the opinion of the court, should be allowed to be present."[4]

7.4 Except in South Australia, even in those Australian jurisdictions where special provision has been made for alternative modes of giving evidence by children in sexual abuse cases, the trend is to treat closure of the court as a matter for judicial discretion.[5]

7.5 The United Kingdom Criminal Justice Bill contains no provision for closure of the courts, although the Pigot Report recommended to the contrary.[6]

7.6 In New Zealand, the *Evidence Amendment Act 1989*, which reforms the way in which children may give evidence in criminal proceedings, does not provide for closure of the courts.

7.7 The Scottish Law Commission discussed the question of whether the existing discretionary power of a judge to clear from the court all those not directly involved while a child is giving evidence should become a mandatory requirement, and concluded that the clearing of the court should remain discretionary.[7]

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4 *Evidence Act 1929* (SA) s 69(1a).

5 Eg *Evidence Act 1977* (Qld) s 21A(2)(b); *Supreme Court Act 1986* (Vic) s 19(e); *Magistrates' Court Act 1989* s 126(1)(d).

6 The Committee did not specifically address the question of closing courts where a child gives evidence in a courtroom in the traditional way, since it recommended that evidence should be taken in advance of the trial at a special informal hearing convened for the purpose. However, the Committee did recommend that "No child witness to whom our proposals apply should be required to appear in open court during a trial unless he or she wishes to do so." (recommendation 3).

7 Scottish Report paras 2.6-2.7.

7.8 In Canada the position is somewhat different. Section 486(1) of the *Criminal Code* provides that criminal proceedings shall be held in open court unless the presiding judicial officer is of the opinion that "it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the courtroom for all or part of the proceedings." Where the prosecutor or the accused applies for closure of the court and the presiding judicial officer refuses the application, the latter must give reasons for not making an order for closure.[8] It has been held that an order excluding the public may properly be made where the complainant in a sexual offence case would otherwise be too nervous to give evidence, since such an order is necessary for the proper administration of justice.[9]

(c) Possible reform of the law

7.9 The 1987 Child Sexual Abuse Task Force Report concluded that judicial discretion was not sufficient to protect child witnesses from the trauma associated with public hearings. It recommended that there should be mandatory closure of the court in all criminal proceedings involving sexual offences against a child. The recommendation exempted a "person who might provide support to the child".[10]

7.10 In its Discussion Paper the Commission considered a proposal that the judicial discretion to exclude the public remained the most appropriate solution.[11] Public response to this proposal was mixed. Professionals in the field of child sexual abuse, and persons concerned that unfavourable publicity should not be given to an accused person who may afterwards be acquitted, wanted courts closed as far as possible. Civil libertarians and lawyers mostly favoured public trials. A middle ground seemed to be the suggestion from several respondents that courts should be routinely closed only while the complainant gives evidence in a case alleging sexual abuse against a child under 18.

7.11 The Commission's attention was specifically drawn to the embarrassment that may be caused to a child complainant giving evidence in court when, for instance, a group of school

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8 S 486(2).

9 *R v Lefebvre* (1984) 17 CCC (3d) 277.

10 Child Sexual Abuse Task Force *A Report to the Government of Western Australia* (1987) recommendation no 30 and p 108. The Government has announced its intention to introduce legislation to close courts in child sexual offence cases as a matter of routine, to protect the identity of the victims: Media Statement 20 January 1991.

11 Discussion Paper paras 4.72-4.75 and 7.9.

children is sitting in the public gallery. One commentator also mentioned, as a factor to consider, "the regular presence of a small group of unsavoury males who clearly derive some sexual satisfaction from attendance at cases of this kind."[12] Their exclusion, it was suggested, would obviously be beneficial to a child witness in presenting evidence at a trial. There was no suggestion in response to the Discussion Paper that courts should not have the discretion to exclude the general public in individual cases. The belief on the part of many respondents seemed to be that judges and magistrates do not readily exercise the discretionary power which they have to close the court. That conforms with the experience of the Crown Law Department.

7.12 If the approach is taken that closure of the courts ought not to be routine, it might be possible for guidelines to be issued to judges and magistrates regarding the proper exercise of this discretion.

7.13 Alternatively, a statutory provision might be enacted along the lines of that in the Canadian *Criminal Code*,[13] requiring a judge to whom an application is made to close the court to give reasons when refusing the application.

7.14 The Commission considers that there should be no legislative interference with a judicial discretion which, when appropriately exercised, is adequate to deal with the situation of embarrassment or trauma to a witness occasioned by giving evidence in the presence of the general public.

7.15 The Commission recommends that

There be no change to the present law in Western Australia regarding the closing of courts to the public in cases where children are required to give evidence in court.

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12 Professor G Davies, Psychology Department, University of Leicester, England, in a letter to the Commission dated 8 November 1990.

13 See para 7.8 above.

2. INFORMAL COURT DRESS

7.16 One of the issues raised in the Commission's Discussion Paper[14] was that of formal court dress and, in particular, whether it is desirable to dispense with wigs and gowns when young children give evidence in order to put the children at their ease as far as possible.

7.17 The Commission invited comment on a proposal to the effect that, until reliable evidence is available that formal court dress is on its own an intimidatory factor influencing the quality of a child's evidence, no change should be made to the normal practice - which allows the court to dispense with robes and wigs in an exceptional case.[15]

7.18 A sizeable majority of the respondents to the Discussion Paper who commented on this issue were in favour of retaining formal court dress. The belief was repeatedly expressed that, generally speaking:

* children appreciate the seriousness of the occasion more fully when court uniforms are worn; and

* formal court dress is useful for children in identifying the various participants in the court process.

7.19 There was some support for courts having a discretion to dispense with formal dress in an individual case, for example where it was evident that a child was likely to be adversely affected. Some respondents wanted research undertaken to discover what effect formal court dress has on child witnesses before committing themselves to a position on the subject. A few respondents were opposed to continued use of formal court dress in courts while children are giving evidence.

7.20 The Scottish Law Commission initially recommended mandatory removal of wigs and gowns in all cases involving witnesses under the age of 16.[16] It subsequently concluded that the matter ought to remain at the discretion of the presiding judge.[17] They expressed the hope that

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14 Para 6.7.
15 View of the Chief Justice expressed in consultations with the Commission.
16 Scottish Discussion Paper para 5.4.
17 Scottish Report paras 2.3-2.5.

judges would be "as sensitive as possible to the need to put children, and particularly young children, at their ease when giving evidence in court."[18]

7.21 The Commission recommends that

There be no change to the present practice concerning formal court dress in cases where children are required to give evidence in court.

18 Id para 2.5

Chapter 8
DRAFTING INDICTMENTS IN CHILD SEX ABUSE CASES

1. INTRODUCTION

8.1 A decision of the High Court of Australia, *S v R*,[1] poses problems in certain kinds of intra-familial sexual abuse cases.

8.2 The *Criminal Code* requires that an indictment should set out the offence with which the accused is charged in such a manner and with such particulars as to the alleged time and place of committing the offence as may be necessary to inform the accused of the nature of the charge.[2] However, in a typical case of sexual abuse within the family, like *S v R*, this may be difficult. It is not uncommon in those cases for indecent assaults to have commenced when the child was very young and to have been subsequently followed by intercourse. Such offences may be continually repeated with nothing particular to distinguish one act of sexual assault or intercourse from another. This is especially likely in younger children who attempt to put the memory of the acts out of their minds - as was the case in *S v R*. By the time the victim complains and a charge is laid years may have passed, and the child may be an adult. The greatest difficulty in drafting an indictment in such cases is specifying a particular date for each act of assault or intercourse. It may even be difficult to specify the first act and the date of its occurrence unless in the circumstances of the particular victim this can be done by reference to another event (for example, "It was after my sixth birthday" or "It was in the winter time").

2. THE CASE OF *S v R*

8.3 *S v R* was such a case. The indictment in the District Court of Western Australia charged the accused with three counts of carnal knowledge of his daughter. Each count charged one act of carnal knowledge on a date unknown within a specified period of 12 months. The daughter gave evidence that her father indecently assaulted her from when she was 9 or 10, and that by the time she was 14 he was having sexual intercourse with her. Thereafter he had intercourse with her intermittently until she left home when she was 17. She was able to describe the initial act of a sexual kind which he committed with her and also the first occasion he had sexual

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1 (1989) 89 ALR 321.

2 S 582.

intercourse with her. However, her evidence was in general terms and she could not specify the dates for particular acts. None of the counts in the indictment was linked to either of two specific acts of intercourse mentioned by the daughter in evidence. The evidence was equivocal as to whether the first act of intercourse occurred before or during the period mentioned in the first count of the indictment. As it was described by Brennan J in the High Court appeal:[3]

> "The Crown case was simply that an incestuous relationship existed during each of the periods mentioned in the three counts, but the acts of intercourse constituting the alleged incestuous relationship were not distinguishable one from another save as to the different occasions of their occurrence."

8.4 The trial judge had directed the jury simply that:

> "You have to be satisfied beyond reasonable doubt that at least on one occasion during each of these years there was such penetration".[4]

8.5 The jury convicted on all three counts. The applicant's appeal was dismissed by the Court of Criminal Appeal. An appeal to the High Court was successful on a majority decision and a new trial was ordered.[5] The decision turned on the issue of uncertainty as to the dates of particular incidents. The reasons of the majority are set out in three different judgments.

8.6 According to Dawson J:

> "The evidence revealed a multiplicity of offences with nothing to identify any one of them as the offence with which the applicant was charged in any particular count. . . . Had the evidence revealed only one offence in each of the years in question, there could have been no complaint about the form of the indictment. But the evidence disclosed a number of offences during each of those years, any one of which fell within the description of the relevant count. Because of this there was what has been called a 'latent ambiguity' in each of the counts. . . . That ambiguity required correction if the applicant was to have a fair trial."[6]

8.7 Dawson J relied on a dictum of Dixon J in *Johnson v Miller*[7] that:

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3 Id 324.
4 Ibid.
5 Dawson, Toohey, Gaudron and McHugh JJ (Brennan J dissenting on the basis that the error caused no substantial miscarriage of justice). A new trial has not taken place.
6 Id 327.
7 (1937) 59 CLR 467.

> "[A] defendant is entitled to be apprised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge". [8]

8.8 Toohey J held that this did not mean that the prosecution must specify a particular date as the occasion on which it relies, but it did mean that:

> "As soon as it appears that a count in the indictment is equally capable of referring to a number of occasions, each of which constitutes the offence the legal nature of which is described in the count, the prosecution should identify the occasion which is said to give rise to the offence charged." [9]

8.9 According to Gaudron and McHugh JJ,[10] the court is to consider:

(1) the orderly administration of justice, which requires that a court know what charge it is entertaining in order:

* to ensure that evidence is properly admitted;

* to instruct the jury properly as to the law to be applied;

* to know the offence for which the defendant is to be punished, if convicted; and

* to enable a person acquitted or convicted of an offence to avail himself or herself, should the need arise, of the plea of autrefois acquit or autrefois convict.[11]

(2) fundamental fairness, which requires that an accused should know what case he or she has to meet.

They concluded in the circumstances of *S v R* that:

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8 Id 489.

9 *S v R* (1989) 89 ALR 321, 333.

10 Id 334-335.

11 Autrefois acquit is a plea in bar to a prosecution to the effect that the prisoner has already been tried for the same offence and acquitted and so cannot be retried for that offence. Autrefois convict is a similar plea to the effect that the prisoner has already been tried and convicted for the same offence.

> "it is impossible to say, in relation to any one count in the indictment, that the jury as a whole was satisfied as to the applicant's guilt of an individual act answering to the description of the offence charged."[12]

8.10 Counsel for the Crown submitted that it was impossible to particularize or identify any individual act as the offence which was the subject of any count in the indictment, and unless the case could be left to the jury on the basis allowed by the trial judge, no case could be prosecuted. Gaudron and McHugh JJ rejected the submission and said:

> "While the evidence as given by J at the trial suggests that there may be practical difficulties in particularising or identifying one or all of the offences charged, it is not obvious that it is wholly impossible so to do. Whatever practical difficulties may exist, those difficulties (even if amounting to an impossibility) cannot justify a criminal trial attended with such uncertainty that the verdict or verdicts must also be seen as uncertain."[13]

3. THE CONSEQUENCES OF *S v R*

8.11 Where the offences alleged are all similar in nature and circumstances it may be impossible to particularize or identify any individual act by reference to a precise date or to some other event or to surrounding circumstances. As a consequence of *S v R* there may be serious difficulties in prosecuting such cases of intra-familial abuse beginning at an early age.

8.12 These difficulties are highlighted in a 1990 Report of the Western Australian Crown Law Department which states that, in a sexual assault case where:

(1) the victim is very young at the commencement of the period of the violations; and/or

(2) those violations have occurred regularly over a period of time; and

(3) there is no distinction as between separate violations; and

(4) no complaint has been made for some time after the commencement of the chapter of events,

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12 Id 337.

13 Ibid.

prosecution of the alleged offender is "virtually impossible". [14]

8.13 In the Western Australian case of *Podirski*[15] Malcolm CJ commented, in relation to this situation, that:

> ". . .unless the law is changed there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed."

8.14 Malcolm CJ suggested that "some reform would seem desirable to cover cases where there is evidence of such a course of conduct."

4. THE POSITION ELSEWHERE

(a) Queensland

8.15 In Queensland an attempt to address such problems was made in 1989 with the introduction of a new offence of "Maintaining a sexual relationship with a child under sixteen". [16] Section 229B of the Queensland *Criminal Code*[17] provides:

> "(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of sixteen years is guilty of a crime and is liable to imprisonment for seven years.
>
> A person shall not be convicted of the offence defined in the preceding paragraph unless it is shown that the offender, as an adult, has, during the period in which it is alleged that he maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in paragraph (5) or (6) of section 210,[18] on three or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the

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14 Crown Law Department *Update of Sexual Assault Laws: A Report to the Attorney General of Western Australia* (1990).

15 *Podirski v R* (Unreported) Court of Criminal Appeal, 28 February 1990, Nos 221 and 222 of 1989, 13.

16 The *Criminal Code, Evidence Act and Other Acts Amendment Act 1989*.

17 Added by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* s 23.

18 S 210(5) deals with wilful exposure of a child to indecent objects, films, etc; s 210(6) deals with taking indecent photographs, etc of a child without legitimate reason.

relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.

If in the course of the relationship of a sexual nature the offender has committed an offence of a sexual nature for which he is liable to imprisonment for five years or more but less than fourteen years, the offender is liable in respect of maintaining the relationship to imprisonment for fourteen years.

If in the course of the relationship of a sexual nature the offender has committed an offence of a sexual nature for which he is liable to imprisonment for fourteen years or more, the offender is liable in respect of maintaining the relationship to imprisonment for life.

If the offence defined in the first paragraph is alleged to have been committed in respect of a child of or above the age of twelve years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of sixteen years at the commencement of the period in which he maintained the relationship in issue.

(2) A person may be charged in one indictment with an offence defined in subsection (1) and with any other offence of a sexual nature alleged to have been committed by him in the course of the relationship in issue in the first-mentioned offence and he may be convicted of and punished for any or all of the offences so charged:

Provided that where the offender is sentenced to a term of imprisonment for the first-mentioned offence and a term of imprisonment for the other offence an order shall not be made directing that one of those sentences take effect from the expiration of deprivation of liberty for the other.

(3) A prosecution for an offence defined in subsection (1) shall not be commenced without the consent of a Crown Law Officer."

8.16 In order to prove the offence the prosecution must show that:

* the offender is an adult;

* while an adult, the offender has on three or more occasions (which need not be particularized as to dates or the exact circumstances) done an act which is defined to constitute an offence of a sexual nature in relation to the same child.

8.17 One difficulty with the Queensland provision is the necessity of proving that an act constituting an offence was done on three separate occasions. Even if no specificity as to dates or circumstances is required by the Act, three separate "occasions" must somehow be identified.

It is not clear whether the disclosure of "multiple occasions" would be sufficient. The Crown Law Department's Report[19] refers to the possibility that, when tested on appeal, the Queensland provision may be held to suffer from the same "latent ambiguity" as was the case in *S v R*. Nevertheless the Report recommended that legislation based on the Queensland model should be introduced, with the proviso that a limitation period be placed on the time allowed for commencement of proceedings. The limitation period selected is 6 years from the date of the last violation. The purpose of the limitation period is to restrict the potential for injustice to the accused.[20]

8.18 In March 1991 the Interim Report of the Queensland *Criminal Code* Review Committee recommended that section 229B be repealed on the ground that "the conduct prescribed is covered by other specific offences in the Code." However, it is not clear how other existing or recommended provisions in the Queensland *Criminal Code* would overcome the difficulties highlighted by *S v R*.

8.19 The Commission has been informed by the Queensland Attorney General's Department that the repeal of s 229B is likely to have little practical effect. Quite often the prosecution and defence will agree to the indictment referring to a time-span rather than to specific dates - for example, that certain offences occurred between April 1990 and April 1991. Such an agreement is more likely if there is compelling evidence that child was abused and that the accused is most likely the offender. If the parties do not agree to the wording of the indictment in terms of a time-span for alleged offences, then it will be left to the prosecution to discover the appropriate particulars. It would appear that the *Criminal Code* Review Committee did not consider it necessary to assist the prosecution in this task. That Committee was more concerned with the problems of s 229B, such as the need to identify three separate "occasions", the unwieldy wording of the section and the fact that the "unlawful relationship" will itself involve offences under the Criminal Code.

(b) Victoria

8.20 In April 1991 Victoria enacted a provision similar to Queensland, albeit in less ambiguous terms. The provision states:

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19 See para 8.12 above.

20 As a general rule there is no limitation period in criminal proceedings.

> (1) A person who maintains a sexual relationship with a child under the age of 16 to whom he or she is not married and who is under his or her care, supervision or authority is guilty of an indictable offence.
>
> (2) To prove an offence under subsection (1) it is necessary to prove -
>
> (a) that the accused during a particular period (while the child was under the age of 16 and under his or her care, supervision or authority) did an act in relation to the child which would constitute an offence under a particular provision of this Subdivision or Subdivision (8A) or (8B); and
>
> (b) that such an act also took place between the accused and the child on at least two other occasions during that period.
>
> (3) It is not necessary to prove the dates or the exact circumstances of the alleged occasions.
>
> (4) A person who is guilty of an offence under subsection (1) is liable to a penalty not exceeding the maximum penalty fixed or prescribed by law for the offence which the relevant act would constitute.
>
> (5) If on the trial of a person charged with an offence against subsection (1) the jury are not satisfied that he or she is guilty of the offence charged but are satisfied that the accused did an act during that period which constitutes an offence against Subdivision (8A), (8B), (8C), (8D) or (8E) of Division 1 of Part I, the jury must acquit the accused of the offence charged but may find him or her guilty of that other offence and he or she is liable to punishment accordingly.
>
> (6) Subsection (5) does not restrict the operation of section 421 or 422.
>
> (7) A prosecution for an offence under subsection (1) must not be commenced without the consent of the Director of Public Prosecutions.[21]

8.21 The accused need not be an adult. The child must have been under the accused's "care, supervision or authority" during the period in question. As in Queensland, the prosecution has to prove that the accused did a particular act in relation to the child and that such an act also took place between the child and the accused on at least two other occasions during the period.

(c) England

8.22 The *S v R* situation does not appear to present a problem to prosecutors in England. The courts in England have determined that the date and place at which a sexual offence with a child

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21 *Crimes Act 1958* (Vic) s 47A.

took place is an "immaterial averment" in the indictment.[22] Thus, if the prosecution alleges in the indictment that an offence took place on date A and at place B, and if it is proved at the trial that the offence actually took place on a different date and at a different place, the prosecution will not necessarily lose the case. The averment of time and place in the indictment will only be material if an issue at the trial turns on the difference of time and place - for example, where the defendant had a good defence for one date and place but not for another.[23]

8.23 Thus, the English practice is either to aver the offence to have taken place "at a place unknown between X date and Y date," or, less commonly, to aver a precise date that is known to be pulled out of the air, in the knowledge that it will not avail the defence to object that the date, if the offence really happened, was different.[24]

5. RECOMMENDATION

8.24 As a result of in *S v R*, the lack of particularity in the wording of indictments in cases of sexual abuse of children spanning a substantial period of time may result in the acquittal of the accused. The High Court of Australia has not adopted the position of the English courts. The attempt to address the problem by legislation in Queensland seems to likely to have little practical effect. The Victorian provision has yet to be tested.

8.25 There is an urgent need to address the problems posed by *S v R* for the drafting of indictments. The Commission therefore recommends that:

(1) Legislation be enacted to address the difficulties associated with prosecuting offences of child sexual abuse arising from *S v R*.

(2) The matters raised in this chapter should be taken into account in the drafting of such legislation.

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22 Mr J R Spencer, letter to the Commission dated 29 March 1991. See also Archbold Pleading, *Evidence and Practice in Criminal Cases* (43rd ed 1988) vol 1, paras 5.1-1.55; *Indictments Act 1915* (UK) s 3; *Indictment Rules 1971* (UK) rr 4 and 5 and Schedule 1.

23 *Wallwork v R* (1958) 42 Cr App R 153.

24 Mr J R Spencer, letter to the Commission dated 29 March 1991

Chapter 9

OTHER VULNERABLE WITNESSES

1. INTRODUCTION

9.1 The Commission's terms of reference require it to review the law and practice governing the giving of evidence in legal proceedings not only by children but also by other vulnerable witnesses. There may be other categories of witness, apart from children, who are disadvantaged by having to give evidence in court in the traditional manner. Reforms recommended in this report, if applied to such witnesses, may enable them to give evidence, or improve the quality of the evidence available to the court.

2. THE DISCUSSION PAPER PROPOSAL

9.2 In the Discussion Paper[1] the Commission invited comment on a proposal that certain alternative procedures should be available to witnesses, other than children, who are identified as "special witnesses".

9.3 The proposed definition of "special witness" was:

> "a person who, taking into account:
>
> (a) the person's
> - age
> - mental or physical condition
> - cultural background
> - relationship to any other party to the proceedings;
>
> (b) the nature of the proceedings; and
>
> (c) any other relevant factor

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1 Para 6.10.

would in the court's opinion be likely either:

* to suffer unusual emotional trauma from giving evidence in the normal manner; or

* to be so intimidated or stressed as to be unable to give effective evidence in the normal manner."

9.4 The proposal suggested that the alternative procedures available to a "special witness" should include:

(1) allowing the special witness to give evidence and be cross-examined by closed-circuit television from another room while all other parties to the proceedings remained in the courtroom; or

the removal of an accused from the courtroom during the giving of evidence by the special witness and the use of closed-circuit television to allow the accused to observe the proceedings;

(2) having a support person of the witness's choice present and seated near to the witness while the witness gives evidence, subject only to the requirement that the support person should not be a person to be called as a witness in the same proceedings;

(3) appropriate preparation for the experience of giving evidence by an officer of the court.

9.5 The Commission's proposal was designed to allow a court, in its discretion, to identify cases in which it was appropriate to make use of one or more special provisions for the giving of evidence, because of problems likely to be experienced by the witness in giving evidence in court in the traditional manner. The Commission in the Discussion Paper[2] said that general rules were not appropriate to define which witnesses required special protection on account of their

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2 Para 5.5.

vulnerability, or which form of special protection should apply. Those decisions should be made by the court in each case.

3. REFORMS ELSEWHERE

(a) Queensland

9.6 In Queensland, the *Evidence Act* was amended in 1989 to make provision for the giving of evidence by children under 12 and other "special witnesses". Apart from children under 12, a "special witness" was defined as:

> "a person who, in the court's opinion -
>
> (i) would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness;
>
> (ii) would be likely to suffer severe emotional trauma; or
>
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness,
>
> if required to give evidence in accordance with the usual rules and practice of the court."[3]

9.7 The Queensland courts are given a discretion to order any one or more of the following:

- the use of closed-circuit television or screens;
- the excluding of the public from proceedings;
- the provision of a support person;
- the use of video-recorded evidence in place of direct testimony from the witness.[4]

9.8 The Queensland government has recently given the Queensland Law Reform Commission a reference on people with disabilities, including competency rules under the *Evidence Act*.[5]

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3 *Evidence Act 1971* (Qld) s 21A(1)(b).

4 S 21A(2).

(b) Victoria

9.9 Victoria has recently enacted legislation making provision for the evidence of persons with impaired mental functioning. Such witnesses may give unsworn evidence under specified conditions.[6] In cases involving a charge of a sexual offence committed against such witnesses, a number of special rules apply if the court so directs. These include

- the use of video-recordings, closed circuit television and screens;
- the presence of a support person;
- excluding the public;
- the removal of robes.[7]

Special provision is also made for the questioning of a complainant with impaired mental functioning who is not competent to give evidence, sworn or unsworn.[8]

(c) Scotland

9.10 The Scottish Report recommends that a court should, on cause shown, be entitled to authorize the use of a videotaped pre-trial deposition, a screen, or a live closed-circuit television link as a means of taking the evidence of an adult witness.[9] Matters which the Scottish Law Commission recommends a court could take into account in granting permission for the use of such procedures include:

- the age of the witness;
- the physical condition and mental capacity of the witness;
- the nature of the offence;
- the relationship between the witness and the accused;
- the possible effect on the witness if required to give evidence in open court;

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5 Fourth Programme of QLRC, Item 11(d).
6 *Evidence Act 1958* (Vic) s 23.
7 Id s 11.
8 Id s 9.
9 Recommendation 23.

- the likelihood that the witness may be better able to give evidence if not required to do so in open court.[10]

(d) England

9.11 The Pigot Report recommended that in a small number of serious cases "other vulnerable witnesses" - the elderly, the mentally or physically handicapped, badly traumatized and similarly affected persons - should be able to give evidence on the same terms as proposed by the Report for child witnesses.[11]

4. WHO SHOULD BE SPECIAL WITNESSES

(a) Intellectually and physically handicapped persons

(i) Persons suffering from intellectual handicaps or other mental conditions

9.12 The Discussion Paper suggested that intellectually handicapped persons were one category of witnesses who could be regarded as vulnerable. In its submission to the Commission, the Authority for Intellectually Handicapped Persons drew attention to the problems experienced by intellectually handicapped witnesses:

(1) Some people with an intellectual handicap are unlikely to be taught about religion or, if taught, they are unlikely to understand an abstract concept such as "the nature of an oath". However, many have the skills to understand and describe accurately what has happened to them, provided questions are framed appropriately. They do not tell lies any more readily than anyone else.

(2) "Just as common law was made without the modern knowledge of child and developmental psychology, it was also made without modern knowledge about intellectual handicap and rehabilitation. As a result legal personnel are as much in need of training in aspects of interacting with intellectually handicapped witnesses as with children."

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10 Recommendation 24.

11 Para 3.14.

(3) Because of their handicap, intellectually handicapped people are likely to be particularly confused or upset by unfamiliar surroundings and rituals, strange people and the court milieu. Careful preparation for court and the presence of a familiar support person are therefore very important.

(4) Because of their special difficulties with memory and recall, with expressing themselves coherently and with performing well in strange situations, intellectually handicapped witnesses face special difficulties in giving evidence in court.

9.13 Reports in other jurisdictions have recommended making special provision for intellectually handicapped witnesses. The Scottish Law Commission has recommended that a court may take "mental capacity" into account when authorising the use of pre-trial deposition, screens or a live closed-circuit television link for an adult witness.[12] The Pigot Report considered that a mentally handicapped person would fall within the class of "other vulnerable witnesses".[13]

9.14 In Queensland, adults may qualify for the use of alternative procedures for the giving of evidence by reason of "intellectual impairment" if they are likely to be disadvantaged as a witness on this ground.[14] In Victoria, special provision is made for persons with "impaired mental functioning".[15]

9.15 In Western Australia, the *Equal Opportunity Act 1984* was amended in 1988 to cover discrimination on the ground of "impairment", which includes what may be described as an "intellectual handicap"[16] as well as a "mental disability" due to illness.[17]

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12 Scottish Report paras 5.16-5.22.

13 Ch 3.

14 *Evidence Act 1977* (Qld) s 21A(1)(b).

15 *Evidence Act 1958* (Vic) ss 23, 23A, 37B and 37C.

16 The *Authority for Intellectually Handicapped Persons Act 1985* s 3 defines "intellectually handicapped person" to mean "a person who has a general intellectual functioning which is significantly below average and concurrently has deficits in his adaptive behaviour, such conditions having become manifest during the developmental period".

17 "'Impairment', in relation to a person, means one or more of the following conditions -
(a) any defect or disturbance in the normal structure or functioning of a person's body;
(b) any defect or disturbance in the normal structure or functioning of a person's brain or
(c) any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or which results in disturbed behaviour,
whether arising from a condition subsisting at birth or from an illness or injury and includes an impairment which presently exists or existed in the past but has now ceased to exist.": s 4(1).

9.16 A committee chaired by Mr Justice Nicholson, on which the Authority for Intellectually Handicapped Persons is represented, is drawing up guidelines for courts and court officials on the handling of witnesses with an intellectual handicap. A similar committee is examining guidelines for police handling of such witnesses.

9.17 It is now generally accepted that witnesses who are intellectually handicapped may need special assistance to enable them to give evidence effectively or at all. The Commission considers that such persons should be included in the category of "special witnesses". However, in the Commission's view "intellectual handicap" may not be the only mental condition which should be given special treatment. There may be persons with a psychological disturbance (for example, a phobia) which, while not interfering with the ordinary reliability of their powers of observation and recall, nevertheless makes a court appearance unduly stressful, if not impossible. The Commission considers, therefore, that the category of "special witnesses" ought to be wide enough to include people with a mental or psychological disorder. It should, in the Commission's view, be a matter of judicial discretion whether to permit an otherwise competent witness with a mental or psychological disorder or intellectual handicap to give evidence by alternative means.

9.18 The proposal in the Commission's Discussion Paper would allow a court to declare a person a "special witness" on this ground, but only if the person would in the court's opinion be likely to suffer unusual emotional trauma from giving evidence in the normal manner or to be so intimidated or stressed as to be unable to give effective evidence. The other jurisdictions which make, or which propose to make, special provision for this category of witnesses do not impose such a requirement. Queensland, for example, while imposing such requirements for other "special witnesses", merely requires that persons suffering from intellectual impairment should be treated as "special witnesses" if "disadvantaged" as a witness.[18] The Commission has concluded that it should make a similar recommendation in the case of persons suffering from an intellectual handicap or other mental or psychological disorder.

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18 *Evidence Act 1977* (Qld) s 21A(1)(b).

(ii) Persons suffering from physical handicaps

9.19 The Commission has also considered the situation of people who suffer from physical handicaps, such as the deaf, the blind, the disabled and those with speech impediments, who are therefore unable to give evidence in the normal manner. The proposal in the Discussion Paper suggested that such persons might be treated as "special witnesses" on the ground of their physical condition. The extension of the *Equal Opportunity Act* to cover discrimination on the ground of impairment includes both the mentally and the physically impaired.[19]

9.20 Responses to the Discussion Paper drew attention to the need for courts to facilitate the giving of evidence by physically handicapped witnesses. One submission[20] drew attention to the special difficulties that may be experienced by disabled children. It was suggested that specialist interpreters may be needed, and that such witnesses may require preparation for giving evidence and support while in court. It was suggested that witnesses with speech impediments may need to give evidence in the form of written statements.

9.21 Although in many cases witnesses with physical handicaps may be sympathetically treated by the courts, such witnesses should be included in the category of "special witnesses". As in the case of witnesses suffering from an intellectual handicap or other mental condition, it is inappropriate to require that they should be likely to suffer unusual emotional trauma or to be intimated by giving evidence in the normal manner before qualifying to be treated as "special witnesses".

(iii) Recommendation

9.22 The Commission therefore recommends that -

> **A court should be able to declare a witness a "special witness" if the witness, by reason of intellectual handicap or other mental or psychological disorder, or physical handicap, is likely[21] to be unable to give evidence if required to give evidence in accordance with the traditional rules and practice of the court**.

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19 See para 9.15 above.

20 Children's Interests Bureau of South Australia.

21 The Queensland legislation uses a test of likelihood: see para 9.6 above. The Commission considers that this connotes a more stringent test than the ordinary civil standard of proof: see *Briginshaw v Briginshaw* (1938) 60 CLR 336.

(b) Other cases

9.23 The Commission's proposal referred to several other factors which might qualify a person for special consideration in the giving of evidence.

(i) Age

9.24 Elderly people are identified by both the Scottish Law Commission[22] and the Pigot Report[23] as potentially vulnerable witnesses who should in appropriate cases be able to give evidence on terms similar to those proposed for child witnesses. This Commission considers that age alone is unlikely to lead a court to declare a particular witness to be a "special witness". However, in combination with other factors such as physical or mental condition or the nature of the offence, it may be relevant to the court's decision to make such a declaration.

9.25 The same may apply to young witnesses over the age of 16. This is the age limit which applies to the special procedures, such as the use of closed-circuit television, which the Commission has recommended should be available for child witnesses.[24] Several responses to the Commission's Discussion Paper urged that these reforms should apply to all children under 18, but the Commission has concluded that routine inclusion of older teenagers is not appropriate. However, it should be possible for children aged 16 or 17 to be declared "special witnesses" if their age, in combination with other factors, makes this appropriate.

(ii) Cultural background

9.26 Among the difficulties experienced by witnesses from particular cultural backgrounds, the most obvious is language. One respondent suggested that migrants are terrified by difficulties with language. To some extent language difficulties may be overcome by skilled interpreters. However, witnesses who feel that an interpreter is not communicating accurately what they wish to say can experience frustration. This dependency on an interpreter is likely to be a disempowering experience, and courts need to be sensitive to the witness's predicament.

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22 Scottish Report para 5.16.
23 Para 3.14.
24 See chs 4 and 5.

9.27 Witnesses from other cultural backgrounds may also be ignorant of the Australian legal system and suffer consequent fear or bewilderment. Many such persons may have little or no understanding of the adversarial legal process, and their natural nervousness may be heightened by fear of the unknown element in the experience of giving evidence. It has been suggested to the Commission that sympathetic preparation for court and support on the day of an appearance would alleviate these problems to a significant extent.

9.28 Women from certain cultural backgrounds may experience particular difficulties. For women from some Middle Eastern cultures, for instance, a public appearance in court may be a source of shame and humiliation and something to be concealed as far as possible from friends, neighbours and family members. Great encouragement may be needed to get such women to appear in court. It is clearly desirable that they should be provided with preparation and support by someone who understands their feelings. The giving of evidence by closed-circuit television may overcome some of these problems.

9.29 As far as Aboriginal witnesses are concerned, the legal process may conflict with traditional Aboriginal culture.[25] If so, this would undermine their ability to give effective evidence.[26] For instance, for Aborigines silence and eye-contact have meanings different from those in non-aboriginal society. Agreement to whatever is being asked may be culturally appropriate. These differences may lead the court and the jury to undervalue the evidence of Aboriginal witnesses, or to misinterpret their demeanour.

9.30 Dr Diana Eades suggested the following protections for Aboriginals who are assessed by an independent adviser to be "not bi-culturally competent":

* informed control of questioning and cross-examination techniques;

* videotaping of police interviews;

* use of closed-circuit television for such witnesses;

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25 See generally Australian Law Reform Commission *The Recognition of Aboriginal Customary Laws* (Report no 31 1986) chs 17-23.

26 Dr D Eades, University of New England, NSW, who is compiling a handbook on *Aboriginal English and the Law* for the Queensland Law Society.

* access to a trained interpreter with cross-cultural understanding;

* greater use of an open-ended interviewing style with Aboriginal witnesses and the greater use of narratives, or "free reports" in the courtroom;[27] and

* wherever possible, requiring that Aboriginal witnesses be interviewed by police officers or lawyers of the same sex (especially where sexual health or other personal matters are concerned).

9.31 The Commission has concluded that "cultural background" may constitute a disadvantage to a witness and may be a relevant factor is assessing whether such a person should be declared a "special witness". Among the special measures which the Commission considers most likely to be helpful here are proper preparation for court, presence of a support person during the giving of evidence, and, in an exceptional case, the use of closed-circuit television.

(iii) Relationship to any other party to the proceedings

9.32 The special provisions recommended for cases involving sexual offences against or intra-familial assault on or abuse of a child under 16 do not cover other young children who are not themselves victims of the alleged crime. However, there could be situations in which children are called upon to give evidence in circumstances which are stressful because of the child's relationship to a party to the proceedings. This factor might make it appropriate for the child to be declared a "special witness".

9.33 One such situation is where there is some relationship between the child and the accused. For example, children may have to give evidence of sexual or other abusive acts which they have observed being committed upon someone else by an adult who is in a position of trust or authority over them, such as a parent or other close family member, a teacher, youth worker or babysitter. It was to deal with such cases that the Scottish Law Commission recommended that the relationship, if any, between the witness and the accused should be a factor for consideration.[28] Alternatively, there could be cases in which the child witness has some

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27 A recommendation in respect of all witnesses made by the Australian Law Reform Commission in its Report on *Evidence* (LRC No 38 1987) ch 7

28 Scottish Report para 5.21.

relationship with the victim, for example where called upon to testify in the case of an alleged murder or attempted murder of a family member.

9.34 The experience of giving evidence in such a case would in all likelihood be unusually stressful for the witness and justify the court in declaring the witness a "special witness". In cases where the court thought it appropriate, this would allow the witness the opportunity to be appropriately prepared for court, to have a support person close by while giving evidence, and, in some instances, to give evidence by videotape or over closed-circuit television.

9.35 The examples discussed all involve criminal cases, but there could also be civil cases in which children have to give evidence in circumstances which are stressful because of their relationship to one of the parties. In such cases, if the court thought it appropriate to do so, it could declare the child a "special witness".

9.36 The Commission considers that the relationship of a witness to any other party to the proceedings would rarely on its own result in the witness being declared a "special witness". However, it would be a factor which, together with other factors, such as the age of the witness and the nature of the proceedings, might influence the court to exercise its discretion that way.

(iv) Nature of the offence

9.37 Another factor which may influence a court to declare a witness a "special witness" is the nature of the proceedings. This would apply particularly in prosecutions for sexual assault, where the victim of the assault has to give evidence.[29] The Scottish Law Commission recommends that "the nature of the offence" should be one of the factors which could be taken into consideration in a decision to recommend the use of special procedures for taking evidence, and mentions in particular "alleged victims of serious sexual offences such as rape".[30] In England, the Pigot Report recommends a rebuttable presumption that victims of serious sexual offences should be regarded as vulnerable witnesses.[31]

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29 See also J McEwan *Documentary Hearsay Evidence - Refuge for the Vulnerable Witness?* [1989] Crim L R 629. She identifies "women who have been sexually attacked" as witnesses most obviously in the category of adult vulnerable witness.

30 Scottish Report para 5.16.

31 Recommendation 10.

9.38 Individual reactions to sexual assault vary a great deal. Some victims of serious sexual crimes experience complete breakdown. In such cases prosecutions may be impossible. On the other hand, some victims are assisted in their recovery by the experience of confronting their alleged assailant in court. In between are those victims for whom the prospect and experience of giving evidence in court, while not impossible, will produce "an unusual and unreasonable degree of mental stress".[32] For such witnesses the assistance of a support person in court, adequate preparation for being a witness and giving evidence over closed circuit television, or in advance of the trial in a special videotaped hearing, may make the difference between agreeing to testify and refusing to do so.

9.39 The reactions described in the previous paragraph are not confined to sexual crimes, but would extend to other crimes of violence, and perhaps some other offences. Hence the Commission considers that the nature and seriousness of the offence should be a relevant factor in determining whether to grant an application to declare any person a "special witness".

(v) The general criteria

9.40 The proposal in the Discussion Paper suggested that, although it was possible to identify categories of persons who were likely to be vulnerable witnesses, a court should not be able to declare any person to be a "special witness" unless it was satisfied that the person would be likely to suffer unusual emotional trauma, or to be so intimidated or stressed as to be unable to give evidence in the traditional way. These criteria were modelled on similar criteria found in the Queensland legislation.[33] In the case of witnesses suffering from physical or intellectual handicaps or other mental or psychological disorders, the Commission has already concluded that these criteria are not appropriate.[34] In the Commission's view, however, they are appropriate for all other cases. The categories discussed above are merely factors which, alone or in combination, together with any other relevant factor (including physical or intellectual handicap or other mental or psychological disorder), may lead a court to declare a person a "special witness", if satisfied that the witness is likely to suffer severe emotional trauma, or to be so intimidated or stressed as to be unable to give evidence in the traditional manner.

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32 Pigot Report para 3.5.
33 *Evidence Act 1977* (Qld) s 21A.
34 See para 9.21 above.

(vi) Recommendation

9.41 The Commission therefore recommends that -

A court should be able to declare any witness a "special witness" if, taking into account -

(1) a person's age, cultural background, or relationship to any party to the proceedings,

(2) in a criminal case, the nature of the offence, or

(3) any other relevant factor,

the court is satisfied that the person

(a) would be likely to suffer severe emotional trauma, or

(b) would be likely to be so intimidated or stressed as to be unable to give evidence,

if required to give evidence in accordance with the traditional rules and practice of the court.

5. FACILITIES AVAILABLE TO SPECIAL WITNESSES

9.42 In the Commission's view, no attempt should be made to prescribe the rules that should apply to each class of "special witness". The court should have a discretion to order any one or more of a number of special procedures, depending on what is appropriate in the circumstances of each particular case.

9.43 In the opinion of the Commission, the procedures which should be available for special witnesses, if the court so orders, are:

(1) appropriate preparation for court;

(2) the presence in the courtroom of a support person;

(3) in a criminal trial, allowing the special witness to give evidence by closed-circuit television from a room outside the courtroom, or to give evidence in court while the accused observes proceedings via closed-circuit television (or allowing the use of screens where closed-circuit television is unavailable);

(4) in a criminal trial, in an exceptional case, allowing the special witness to give evidence in advance of the trial at a special videotaped hearing, in the same way as recommended above[35] for children under 16.

9.44 The Commission has deliberately excluded from this list several procedures which it recommends for child witnesses - in particular, the admission of out-of-court statements and the use of videotapes at committal proceedings, or at trial in place of examination in chief. In its view, the most important need special witnesses have is the provision of preparation and support to assist them in giving evidence in court. In criminal cases, if the need to confront the accused is likely to result in the witness being unable to give evidence, the court may allow the witness to give evidence by CCTV or, in an exceptional case, at a special videotaped hearing in advance of the trial.

9.45 The Commission therefore recommends that :

A court should be empowered in respect of any person declared by the court to be a "special witness" to order any one or more of the following:

(a) that appropriate arrangements be made for the witness to be prepared for the giving of evidence;

(b) that a support person, approved by the court, be permitted to be present and seated near to the witness while the witness is giving evidence;

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35 Para 4.40.

(c) that in a criminal trial

(i) the "special witness" should give evidence over closed-circuit television from a room outside the courtroom; or

(ii) while the "special witness" gives evidence in court, the accused, in a room outside the courtroom, should see and hear the "special witness" giving evidence by closed-circuit television; or

(iii) where closed-circuit television is not available, a screen should be used instead;

(d) that in an appropriate case, in a criminal trial the "special witness" should give evidence in advance of the trial at an informal hearing of the kind recommended above[36] for child witnesses.

6. PROCEDURAL MATTERS

9.46 The Commission would expect that a prosecutor or the police, or in civil proceedings a legal practitioner responsible for calling a particular witness, would, in assessing any witness's evidence, form a view as to the ability of the witness to give effective testimony in the traditional way. Where the person calling the witness became aware of any special difficulties, that person would determine whether the witness would be assisted or the witness's testimony facilitated by one or other of the special procedures available to "special witnesses". It would then be necessary to demonstrate to the court that the witness satisfies the criteria for being declared a "special witness", as recommended above. The Commission would expect that in the ordinary way the court would be satisfied by evidence on affidavit or by representations from prosecution or defence counsel and that it would not be necessary to call the prospective witness.

9.47 These matters ought as far as possible to be decided, along with other procedural matters, in advance of the trial at a special pre-trial hearing.[37] In some cases the only assistance sought

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36 Ibid.

for the "special witness" would be preparation for court and the presence of a support person at the trial. However, declaring the witness to be a "special witness" would emphasize the need for sensitivity and care in the treatment of the witness in the witness box. It would also alert the judicial officer to the possibility that the witness may have difficulty in understanding questions, and so encourage a more thoughtful control of the proceedings.

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37 See ch 10 below.

Chapter 10
PRE-TRIAL HEARINGS

10.1 As foreshadowed in Chapter 1,[1] the Commission has concluded that all matters relevant to procedure in cases involving children and other vulnerable witnesses (whether at committal proceedings, at trial on indictment, or summary trial) should be settled at a pre-trial hearing. A pre-trial hearing should be held on application being made to the court by either party.

10.2 Matters which should, if possible, be settled at a pre-trial hearing include:

* an application to declare a witness a "special witness";[2]

* arrangements to be made for preparation and support of a child witness or "special witness";[3]

* whether a "child interpreter" or other specialist interpreter is to be used, and if so, who the interpreter is to be;[4]

* whether a prior statement of a child witness under 16 is sought to be admitted at committal proceedings or trial;[5]

* in a case where the evidence of a child under 16 is to be offered in the form of a videotape,

    (i) whether the child is to appear at committal proceedings or trial to be cross-examined, or

    (ii) whether an informal hearing in advance of the trial will take place;[6]

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1 Paras 1.22-1.23 above.
2 See ch 9.
3 See chs 6 and 9.
4 See paras 6.40-6.47 and 9.20 above.
5 See paras 3.33, 3.38 and 4.29 above.
6 See para 4.40 above.

* if the evidence of a child under 16 is to be offered at a trial in the form of a videotape, the videotape should be viewed by (or arrangements made for the viewing of the tape by) the accused and defence counsel and a decision made by the presiding judicial officer as to whether any parts of the tape require to be excised for the purposes of the trial on the ground that they offend against the rules of evidence other than the hearsay rule;[7]

* whether, in the case of a "special witness", an informal hearing in advance of the trial is to be held.[8]

* if the prosecution seeks to have a witness give evidence with the assistance of closed-circuit television or of a screen, then any necessary application to do so should be made and a decision given at this stage.[9]

10.3 Pre-trial proceedings of this kind are widely used in civil cases. Pre-trial conferences are a regular feature of proceedings in the District Court and the Family Court of Western Australia. In criminal cases, a system of pre-arraignment or pre-trial hearings has been introduced for the Perth sittings of the Supreme Court,[10] and also in the District Court. A pre-trial hearing could also be incorporated into the present procedure for committal proceedings.[11] The Commission has recommended that provision be made for the holding of pre-trial hearings in Courts of Petty Sessions in the exercise of their summary jurisdiction.[12]

10.3 The Commission recommends that:

(a) in a case where a child under 16 at the time proceedings are initiated is to be a witness in court proceedings; or

(b) in a case where a person whom it is sought to have declared a "special witness" is to be a witness in court proceedings,

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7 See paras 4.45-4.47 above.

8 See para 9.45 above.

9 See paras 5.22, 5.45 and 9.45 above.

10 (1991) 65 ALJ 191, reporting the address of the Chief Justice at the closing of the legal year on 21 December 1990.

11 The changes to procedure at committal proceedings recommended by the Commission in its Report on Courts of Petty Sessions (Project No 55 Part II 1986) paras 8.8-8.23 are consistent with the recommendation made in the text.

12 Id paras 5.1-5.5.

it should be possible to make an application for a pre-trial hearing to be held under the supervision of the trial judge or magistrate at which the following issues should be settled:

(1) an application to declare any witness a "special witness";

(2) the identity of a suitable support person for a child witness under 16 or a "special witness";

(3) arrangements for preparation for court of a child witness under 16 or a "special witness";

(4) the identity of any child interpreter or other specialist interpreter;

(5) whether a prior statement of a child witness under 16 is to be admitted;

(6) whether, in a case where the evidence of a child under 16 is to be offered in the form of a videotape:

(a) the child is to appear at committal proceedings or trial to be cross-examined; or

(b) whether an informal hearing in advance of the trial is to be held;

(7) if the evidence of a child under 16 is to be offered in the form of a videotape, the videotape should be viewed (or arrangements made for the viewing of the tape) by the trial judge, the accused and defence counsel, and a decision should be made by the judge as to whether any part of the tape requires to be excised for the purposes of the trial on the ground that it offends against the rules of evidence other than the hearsay rule;

(8) whether, in the case of a "special witness", an informal hearing in advance of the trial is to be held;

(9) whether a child under 16 or a "special witness" is to give evidence with the assistance of closed-circuit television or a screen;

(10) if closed-circuit television is to be used to facilitate the giving of evidence by a child under 16 or a "special witness", whether the witness should give evidence over closed-circuit television while the accused remains in the courtroom, or whether the witness should give evidence in the courtroom while the accused observes proceedings by closed-circuit television.

Chapter 11

LEGAL EDUCATION

1. INTRODUCTION

11.1 This Report refers to a number of problems which arise when participants in the legal process are not familiar with issues relating children and to other vulnerable witnesses which are relevant to the ability of such people to give evidence.

11.2 In Western Australia child development study and the psychology of child abuse have not been an aspect of formal legal education. However in 1990 WACOSS[1] and Childright Inc in conjunction with the Law Society of Western Australia conducted seminars devoted to legal issues affecting children and one seminar on communication with children.

11.3 The Child Sexual Abuse Task Force[2] also recommended additional training in children's issues for legal personnel and staff from other disciplines. An Education and Training Co-ordinating Committee on Child Protection, operating under the auspices of the Advisory and Co-ordinating Committee on Child Abuse, was established in October 1990. It is overseeing the development of child protection training across the state and is developing a training proposal on legal issues.[3] As recommended by the Child Sexual Abuse Task Force, this committee is contemplating the development of a core curriculum in child sexual abuse, for use in tertiary institutions.

11.4 The Discussion Paper invited comment on a proposal that :

(1) a written guide for legal personnel in dealing with child witnesses be developed; and

(2) guidelines be issued to judges, magistrates, and other court officials concerning appropriate procedures and terminology for dealing with child witnesses.

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1 Western Australian Council of Social Services Inc.

2 Child Sexual Abuse Task Force *A Report to the Government of Western Australia* (1987) 133-139.

3 His Honour Judge H H Jackson, President of the Children's Court, is a member of the Committee.

11.5 The aim of the proposal was to assist judges, lawyers and other court personnel to ensure that child witnesses are treated in such a manner as to reduce their stress and to enable them to give evidence. Public response to the proposal was very supportive, and also indicated that the proposal should be extended to include "special witnesses".

2. POSSIBLE APPROACHES

11.6 There are a number of possible ways in which participants in the legal process can be educated about issues relating to children and other vulnerable witnesses.

(a) University courses

11.7 Sydney University and the University of New South Wales offer undergraduate courses relevant to child witnesses. Neither course is compulsory. The Commission recommends that consideration should be given to the introduction of similar courses in Western Australian Law Schools. However, it recognizes that this would not be a complete answer to the problem.

(b) Continuing legal education

11.8 The 1990 seminar series referred to above[4] provided a useful start for legal education in relation to child witnesses. The Commission considers it desirable that similar courses be offered at regular intervals, not only in relation to child witnesses, but also in relation to other vulnerable witnesses and the use of alternative means of presenting evidence. It recommends that consideration be given to the provision of such courses.

11.9 Doctors, psychologists and social workers, as well as legal professionals, are likely to have significant contact with child witnesses. Specialized training for legal professionals with staff from other disciplines will prove mutually beneficial.

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4 Para 11.2.

(c) Seminars for judges and magistrates

11.10 Judges and magistrates may also find assistance in seminars and materials similar to those which the Commission considers should be provided to the legal profession, to familiarize them with changes in the law and practice as they affect children and other vulnerable witnesses. The Commission recommends that consideration should be given to the provision of such seminars.

(d) A written guide for legal personnel

11.11 The Law Society is in the process of commissioning a written guide for legal practitioners. The Commission supports the efforts of the Law Society. It suggests that the guide also include appropriate references to vulnerable witnesses other than children.

(e) Guidelines for judicial personnel

11.12 It may be useful for magistrates and judges to have guidelines to assist them in dealing with children and other vulnerable witnesses. Those guidelines might include matters relating to: the law as to competence; directions as to appropriate questioning of children; the conduct of a voir dire examination; and suggestions in relation to discretionary matters such as the presence of support persons, arrangements within the courtroom and other special adjustments to procedure that may be necessary when children and other vulnerable witnesses testify.[5] The Commission recommends that such guidelines should be made available.

3. RECOMMENDATION

11.13 The Commission recommends that:

(1) Consideration should be given to the introduction at undergraduate level of interdisciplinary courses in matters relevant to children and other vulnerable witnesses.

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5 A set of such guidelines exist in New South Wales - The Local Court Bench Book.

(2) Considera tion should be given to the provision, at regular intervals, of courses for lawyers on dealing with children and other vulnerable witnesses.

(3) Consideration should be given to the provision of seminars for judicial officers similar to the courses referred to in (2), to familiarize them with changes in the law and practice as they affect children and other vulnerable witnesses.

(4) Guidelines should be available to judicial officers to assist them in dealing with children and other vulnerable witnesses.

Chapter 12

SUMMARY OF RECOMMENDATIONS

CHAPTER 2 - COMPETENCY AND CORROBORATION

Competency - evidence on oath

1. The distinction between sworn and unsworn evidence should be retained.

(Paragraph 2.10)

2. A child of any age should be able to take the oath where the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath, over and above the ordinary duty to tell the truth.

(Paragraph 2.15)

Competency - unsworn evidence

3. A test as to the competency of children under 12 to give unsworn evidence should be retained.

(Paragraph 2.31)

4. A child under 12 who is not competent to swear an oath or affirm should be able to give unsworn evidence if the child is able to give an intelligible account of events which he or she has observed or experienced.

(Paragraph 2.35)

5. Section 101(3) of the *Evidence Act 1906*, under which a child under 12 who gives unsworn evidence is liable to be charged with perjury as if the evidence had been given on oath, should be retained.

(Paragraph 2.37)

Competency - affirmation

6. A child of any age who is competent to do so but does not wish to take the oath should be entitled to make an affirmation in place of swearing an oath.

(Paragraph 2.39)

Corroboration

7. Section 101(2) of the *Evidence Act 1906*, which requires corroboration of the unsworn evidence of a child under 12, should be repealed.

(Paragraph 2.52)

8. A judge should be prohibited from issuing a corroboration warning to a jury on the basis that the witness is a child and therefore belongs to a class of witness which is less trustworthy.

(Paragraph 2.64)

CHAPTER 3 - ADMISSION OF OUT-OF-COURT STATEMENTS

Out-of-court statements generally

9. In a case of an alleged sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated, the court should be empowered to do any one or more of the following (as appropriate):

(a) to admit in evidence any prior statement, whether oral, written or electronically recorded, made by the complainant to another person provided that:

(i) the complainant is called or available to be called as a witness; and

(ii) a notice is served in advance on the accused of the proponent's intention to offer the statement and of the particulars of the statement so that the accused has a sufficient opportunity to prepare to meet the statement;

(Paragraph 3.33)

(b) to allow the child's evidence at committal proceedings to be given in the form of a previously made written statement, audiotape or videotape; and where such a statement is admitted, the child complainant should not be called or summoned to appear unless the magistrate is satisfied that because of the special circumstances of the case, there is good cause for oral examination of the complainant.

(Paragraph 3.38)

CHAPTER 4 - VIDEOTAPE EVIDENCE

10. In a case of an alleged sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated, the court should have power to direct that:

(a) the prosecution be permitted to present the child's evidence at trial in video-recorded form, in lieu of evidence-in-chief. The child would be available for cross-examination and re-examination by counsel. Such examination would take place under conditions laid down by the judge.

(Paragraph 4.29)

(b) a child be permitted to give evidence in advance of the trial at an informal hearing conducted according to the usual rules of evidence, with only the judge, counsel for both sides and the witness (together with any approved support person[1]) present, the accused observing proceedings over closed-circuit television from another room. The child could be examined, cross-examined and re-examined by counsel, subject to control by the judge.

(Paragraph 4.40)

11. In a case where the child is permitted to give evidence at an informal hearing in advance of the trial:

(a) the hearing would be videotaped;

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1 See recommendation 19 below.

(b) where a videotaped statement has already been admitted (in whole or in part) at a pre-trial hearing,[2] the prosecution may invite the child to confirm or expand upon the statement, and defence counsel would have the opportunity to cross-examine;

(c) at the trial, the videotape of the hearing referred to in (a) above and any videotaped statement referred to in (b) above would be presented in lieu of the child's evidence-in-chief, and the child would not be required to appear at the trial unless he or she wishes to do so;

(d) where it is necessary to recall a child who has been cross-examined at the hearing in advance of the trial a further informal hearing should be convened.

(Paragraph 4.40)

Protection of the right of the accused to a fair trial

12. A Code of Practice for the use of videotapes in judicial proceedings and for interviewing child witnesses should be developed by an inter-agency committee on which the Police Department, the Department for Community Services and the Child Abuse Unit are represented.

(Paragraph 4.44)

13. In any case where a videotaped statement is sought to be introduced at trial as part or all of the evidence of a child witness, an edited or altered version of the statement should be admitted only if such editing or altering was directed by the presiding judicial officer at a pre-trial hearing.[3]

(Paragraph 4.47)

CHAPTER 5 - CLOSED-CIRCUIT TELEVISION AND SCREENS

Closed-circuit television

14. In all cases involving sexual offences against or intra-familial assaults on or abuse of children under 16 at the time the proceedings are initiated:

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2 See recommendation 27 below.

3 See ch 10 below.

(a) the court should have power to order that closed-circuit television be used to facilitate the giving of the child's evidence;

(b) a Code of Practice should be developed for the use of closed-circuit television, which should, inter alia, ensure that a jury would be presented with more then one view or type of shot of a witness giving evidence over closed-circuit television;

(Paragraph 5.22)

(c) the use of closed-circuit television should be routine, and should be departed from only if the court is satisfied that the child is able, and wishes, to give evidence in the presence of the accused;

(d) whenever closed-circuit television is used in a trial on indictment, the judge should be required to instruct the jury that the procedure is routine and that no inference as to the accused's guilt should be drawn from its use.

(Paragraph 5.33)

15. Where closed-circuit television is used in accordance with the previous recommendation, the court should have power to:

(a) permit the child to give evidence over closed-circuit television from a room outside the courtroom from which all persons other than those specified by the court are excluded; or

(b) permit the child to give evidence in court and make provision for the accused, in a room outside the courtroom, to see and hear the child giving evidence by closed-circuit television.

(Paragraph 5.38)

Screens

16. (a) Legislation should authorise the use of screens in cases where closed-circuit television would otherwise be used but such facilities are unavailable, provided that the screen is so constructed as not to obstruct the accused's view of the witness while the witness is giving evidence.

(b) The type of screens to be used and procedures to be used in any particular case should be set out in Practice Directions developed by the courts.

(Paragraph 5.45)

Identification

17. In cases where it has been determined that the child will be able to present evidence out of the presence of the accused, and identification of the accused is an issue:

(a) where the accused is a member of the child's family, the identification should, if possible, be undertaken by another family member or familiar adult;

(b) where in the circumstances of the particular case it is necessary for the child to identify the accused at the trial, the child should be able to identify the accused by way of closed-circuit television;

(c) if the use of closed-circuit television for identification of the accused by the child witness is considered by the presiding judicial officer to be inappropriate in the circumstances of the particular case, the child witness should be in the presence of the accused solely for the purpose of identification and only after the child's examination-in-chief, cross examination and re-examination are complete.

(Paragraph 5.54)

CHAPTER 6 - PREPARATION AND SUPPORT

Preparation

18. (a) The Attorney General, in consultation with interested persons and organizations (such as the Crown Law Department, the Department for Community Services, the Law Society, the Crime Victims Support Unit, the Honorary Court Welfare Service Inc and the Child Abuse Unit), and taking into account the Child Abuse Unit's proposal for a Victim Witness Support Unit, should establish a programme for the preparation of children under 16 who have to give evidence in court proceedings.

(b) Under the programme persons with appropriate training and experience in child communication and court processes should be appointed to prepare child witnesses for the giving of evidence, and to be available to assist them whenever appropriate before, during and immediately after the trial process.

(c) Written publications and videos should be produced and should be readily available to child witnesses and other interested persons.

(Paragraph 6.23)

Support

19. Legislation should permit a child witness under 16 to have a support person, approved by the court, present and seated near to the child while the child is giving evidence. The support person should not be a person to be called as a witness in the same proceedings.

(Paragraph 6.35)

Questioning of children

20. The court should have power to appoint "child interpreters" to facilitate the giving of evidence by children under 16, where the court is satisfied that the child is unable to understand questions put by counsel.

(Paragraph 6.43)

21. An unrepresented accused person should not be permitted to cross-examine a child witness under 16. In such cases the court must appoint an intermediary to facilitate cross-examination.

(Paragraph 6.47)

CHAPTER 7 - COURTROOM PROCEDURES FOR CHILD WITNESSES

Excluding the public from hearings

22. There should be no change to the present law in Western Australia regarding the closing of courts to the public in cases where children are required to give evidence in court.

(Paragraph 7.15)

Informal court dress

23. There should be no change to the present practice concerning formal court dress in cases where children are required to give evidence in court.

(Paragraph 7.21)

CHAPTER 8 - DRAFTING INDICTMENTS IN CHILD SEX ABUSE CASES

24. (a) Legislation should be enacted to address the difficulties associated with prosecuting offences of child sexual abuse arising from *S v R.*

(b) The matters raised in chapter 8 should be taken into account in the drafting of such legislation.

(Paragraph 8.26)

CHAPTER 9 - OTHER VULNERABLE WITNESSES

25. A court should be able to declare a witness a "special witness" if:

(a) the witness, by reason of intellectual handicap or other mental or psychological disorder, or physical handicap, is likely to be unable to give evidence if required

to give evidence in accordance with the traditional rules and practice of the court; or

(Paragraph 9.22)

(b) taking into account

(1) a person's age, cultural background, or relationship to any party to the proceedings,

(2) in a criminal case, the nature of the offence, or

(3) any other relevant factor,

the court is satisfied that the person

(a) would be likely to suffer severe emotional trauma, or

(b) would be likely to be so intimidated or stressed as to be unable to give evidence,

if required to give evidence in accordance with the traditional rules and practice of the court.

(Paragraph 9.41)

26. A court should be empowered in respect of any person declared by the court to be a "special witness" to order any one or more of the following:

(a) that appropriate arrangements be made for the witness to be prepared for the giving of evidence;

(b) that a support person, approved by the court, be permitted to be present and seated near to the witness while the witness is giving evidence;

(c) that in a criminal trial:

(i) the "special witness" should give evidence over closed-circuit television from a room outside the courtroom; or

(ii) while the "special witness" gives evidence in court, the accused, in a room outside the courtroom, should see and hear the "special witness" giving evidence by closed-circuit television; or

(iii) where closed-circuit television facilities are not available, a screen should be used instead;

(d) that in an appropriate case, in a criminal trial the "special witness" should give evidence in advance of the trial at an informal hearing of the kind recommended above[4] for child witnesses.

(Paragraph 9.45)

CHAPTER 10 - PRE-TRIAL HEARINGS

27. (a) in a case where a child under 16 at the time proceedings are initiated is to be a witness in court proceedings; or

(b) in a case where a person is to be a witness in court proceedings whom it is sought to have declared a "special witness",

it should be possible to make an application for a pre-trial hearing to be held under the supervision of the trial judge or magistrate at which the following issues should be settled:

(1) an application to declare any witness a "special witness";

(2) the identity of a suitable support person for a child witness under 16 or "special witness";

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4 Recommendation 10(b)

(3) arrangements for preparation for court of a child witness under 16 or "special witness";

(4) the identity of any child interpreter or other specialist interpreter;

(5) whether a prior statement of a child witness under 16 is to be admitted;

(6) whether, in a case where the evidence of a child under 16 is to be offered in the form of a videotape:

(a) the child is to appear at committal proceedings or trial to be cross-examined; or

(b) whether an informal hearing in advance of the trial is to be held;

(7) if the evidence of a child under 16 is to be offered in the form of a videotape, the videotape should be viewed (or arrangements made for the viewing of the tape) by the trial judge, the accused and defence counsel, and a decision should be made by the judge as to whether any part of the tape requires to be excised for the purposes of the trial on the ground it offends against the rules of evidence other than the hearsay rule;

(8) whether, in the case of a "special witness", an informal hearing in advance of the trial is to be held;

(9) whether a child under 16 or a "special witness" is to give evidence with the assistance of closed-circuit television or a screen;

(10) if closed-circuit television is to be used to facilitate the giving of evidence by a child under 16 or a "special witness", whether the witness should give evidence over closed-circuit television while the accused remains in the courtroom, or whether the witness should give evidence in the courtroom while the accused observes proceedings by closed-circuit television.

(Paragraph 10.4)

CHAPTER 11 - LEGAL EDUCATION

28. (a) Consideration should be given to the introduction at undergraduate level of interdisciplinary courses in matters relevant to children and other vulnerable witnesses.

(b) Consideration should be given to the provision, at regular intervals, of courses for lawyers on dealing with children and other vulnerable witnesses.

(c) Consideration should be given to the provision of seminars for judicial officers similar to the courses referred to in (b), to familiarize them with changes in the law and practice as they affect children and other vulnerable witnesses.

(d) Guidelines should be available to judicial officers to assist them in dealing with children and other vulnerable witnesses.

(Paragraph 11.13)

J A THOMSON,
Chairman

R L LE MIERE

M D PENDLETON

12 April 1991

Appendix I

LIST OF PERSONS RESPONDING TO DISCUSSION PAPER

Advisory and Co-ordinating Committee on Child Abuse
Australian Association of Social Workers Ltd
Australian Nursing Federation (WA Branch)
Authority for Intellectually Handicapped Persons
Belton H & M
Brennan Mr M (Centre for Teaching & Research in Literacy, Charles Sturt University Riverina)
Cashmore Dr J (School of Behavioural Sciences, Macquarie University)
Child Abuse Unit
Children's Interests Bureau (SA)
College of General Practitioners
Council for Civil Liberties in WA
Country Women's Association of WA (Inc)
Criminal Law Association
Department for Community Services (Director-General's Office)
Department for Community Services (Southern Metropolitan Region)
Department for Community Services (Northern Metropolitan Region)
Eades Dr D (Linguistics Department, University of New England)
Edwards Mr B
Family Court of Western Australia
Hannah Mrs E
Health Department of Western Australia (Community and Child Health Services Unit)
Henderson Ms L (Senior Social Worker, Department for Community Services)
Holland Mr J
Krans Mrs L
Law Society of Western Australia
Leeman C T
McCreddin Mrs P
Men's Confraternity Inc (WA Branch)
Mother United Self Help Group
National Association for the Prevention of Child Abuse and Neglect Inc (NAPCAN)
Office of Women's Interests
Passmore Ms A & do Rozario Ms L (School of Occupational Therapy, Curtin University of Technology)
People Against Child Sexual Abuse
Perry Mr P
Peterson Associate Professor C (School of Social Sciences, Murdoch University)
Princess Margaret Hospital
Princess Margaret Hospital (Child Sexual Abuse Unit)
Roberts L
Royal Australian and New Zealand College of Psychiatrists (WA Branch)
Sexual Assault Referral Centre
Stonehouse Mr
Tennant Mr B G JP
WA Association for Mental Health (Inc)

Warwick Child & Adolescent Clinic
West-Dantin P & M
Wiggins Mrs
Women's Health Care House
Youth Legal Service