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Standing Committee on Law and Justice

Report on Child Sexual Assault Prosecutions

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Terms of Reference

The Standing Committee on Law and Justice is to inquire into and report on:

The circumstances surrounding the prosecution of child sexual assault matters, including:

(1) communication between the police and the complainant, and the complainant and the prosecution concerning the consequences of pursuing a prosecution for child sexual assault;
(2) the role of sexual assault counsellors in the complaint process;
(3) the impact of the application of the rules of evidence, other legislative provisions and court practices in prosecutions for child sexual assault offences;
(4) alternative procedures for the prosecution of child sexual assault matters including alternative models for the punishment of offenders;
(5) possible civil responses to perpetrators and victims of child sexual assault;
(6) appropriate methods of sustaining ongoing dialogue between the community, government and non-government agencies about issues of common concern with respect to child sexual assault; and
(7) any related matter concerning approaches to child sexual assault in the justice system.

These terms of reference were referred to the Committee by the Attorney General, the Hon R J Debus MP, on 11 December 2001.

Committee Membership

The Hon Ron Dyer MLC Australian Labor Party *Committee Chair*

The Hon John Ryan MLC Liberal Party *Deputy Chair*

The Hon Peter Breen MLC Reform the Legal System

The Hon John Hatzistergos MLC Australian Labor Party

The Hon Peter Primrose MLC Australian Labor Party [1]

[1] The Hon P Primrose MlC replaced the Hon J Saffin MLC on 28 August 2002 (NSW Legislative Council Minutes No.27).

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Figures, Tables and Charts

Chair's Foreword

In July this year, as the Committee approached the end of its hearing program for this Inquiry into Child Sexual Assault Prosecutions, a report was published by Dr Eastwood and Professor Patton of the Queensland University of Technology. The report detailed the authors' findings about the experiences of child sexual assault complainants in the criminal justice system, based on surveys of the victims and their carers. Notably, when asked whether they would report sexual assault again if it were repeated in the future, **more than half** (56 per cent) of the children in New South Wales said they **would not**. This means that victims of child sexual assault in this state find the experience of prosecuting the offender to be so stressful, and so traumatic, that the majority would not report any future sexual assault perpetrated on them. The children's dissatisfaction with the criminal justice system did not necessarily decrease if the defendant was convicted: in the three jurisdictions studied, some two-thirds of children who had obtained convictions said they would not report future abuse if it occurred again.

The challenges faced by child sexual assault complainants include lengthy court delays, harsh and unfair cross-examination techniques, the prospect of coming into contact with the perpetrator, long waits in inhospitable witness waiting areas, and language and court processes that are often incomprehensible to them. Given these difficulties, it is not surprising that participation in prosecutions is tremendously distressing for child complainants.

Statistics reveal that child sexual assault offences are particularly difficult to prosecute successfully. The conviction rate for child sexual assault trials in 1999-2000, for example, was 20.13 per cent, and this was a **decrease** on previous years, when the prosecution success rate at trial was approximately 33 per cent. Moreover, only a minority of child sexual assaults ever make it to the prosecution stage. The results of two studies referred to the Committee revealed that only between 23 and 25 per cent of substantiated child sexual assault cases result in charges. A great many more child sexual assaults – possibly as high as 90 per cent – are never reported to authorities.

This ongoing failure to convict, punish and treat child sex offenders has significant implications in relation to child protection policy. Moreover, the secondary trauma caused to children who participate in the criminal justice system as complainants and witnesses is manifestly unacceptable. There can be no doubt that there is a need for reform.

The Committee has evaluated the options for change, and has developed a multifaceted reform model that involves trialling a specialist court, introducing a new special measure and reforming the rules of evidence. I am confident that the implementation of these measures can be achieved without undermining defendants' fundamental right to a fair trial.

I would like to sincerely thank the many people who contributed to this Inquiry: my colleagues on the Committee, authors of submissions and the witnesses at hearings. I also thank the child sexual assault survivors who shared their experiences with the Committee through submissions or by giving evidence – their insights were of particular assistance in allowing the Committee to gain an understanding of the issues under inquiry.

The Hon Ron Dyer MLC
Committee Chair

Executive Summary

Overview of Key Committee Recommendations

The Committee's report has identified the principal problems brought to the Committee's attention about the current system for prosecuting child sexual assault offences. These focused on both matters that reduce the conviction rate for prosecutions and increase the distress experienced by child complainants. The key recommendations that seek to address these problems involve the establishment of a pilot project to trial a specialist jurisdiction and the introduction of pre-trial recording and admission of children's entire testimony. Other important recommendations suggest modification of rules of evidence relating to the admission of tendency evidence, relationship evidence, hearsay evidence of complaint, and expert evidence, as well as changes to rules relating to joint trials and judicial warnings. Chapter 10 provides an overview of these recommendations and the problems they seek to address.

Introduction and Background (Chapter 1)

The focus of the terms of reference for this Inquiry is the **prosecution** of child sexual assault rather than its investigation or child protection in general. The inquiry took place between December 2001 and October 2002, and included 88 submissions and ten public hearings.

Victims responses to child sexual assault

Children who are victims of sexual assault generally react in ways that are contrary to how most adults might expect a child to react. For example, most do not immediately disclose that the assault happened, but keep it a secret as a result of shame, fear of not being believed or of being punished. It is common that children do not complain about sexual assault until months or years after the assault, with up to a third never disclosing the abuse to anyone. When they do disclose the abuse, the disclosure tends to be tentative and uncertain as the child overcomes fear and embarrassment, with retractions of the complaint followed by a re-confirmation of the allegation being common.

Prosecutions for child sexual assault offences

Prosecution statistics reveal that the number of prosecutions for child sexual assault have risen dramatically in the past two decades. In 1999 there were 177 contested trials for child sexual assault, compared to 34 in 1982. Despite this rise in prosecutions, studies reveal that the overwhelming majority of child sexual assaults are never prosecuted.

The success rate for prosecutions of child sexual assault remains lower than that of criminal prosecutions generally. Conviction rates for child sexual assault (including where the accused pleads guilty) stand at approximately 70 per cent, compared to 80 per cent for all other offences. Where the accused pleads not guilty, the conviction rate decreases to approximately 20 per cent.

A number of reasons for the low success rate for prosecutions of child sexual assault have been suggested. The nature of the crime is one obstacle to conviction, as child sexual assault is usually perpetrated in secret, without witnesses and with manipulation of the victim by the perpetrator to intimidate or otherwise prevent disclosure of the abuse. Another barrier is the high level of trauma to the complainant associated with the criminal justice process. Anxiety and distress is created by confusion and intimidation as a result of the cross-examination process, the prospect of seeing the defendant, the stressful wait of up to two years before the trial commences, and the formality and

unfamiliarity of the court environment. In addition, underestimation of the reliability and accuracy of children's evidence undermines the value placed on the complainant's testimony. Finally, the application of the rules of evidence restrict what information can be placed before the jury and so impact on the outcome of the trial. The rules of evidence can be seen to impact unfairly on child sexual assault complainants because they relate to many of the common features of child sexual assault.

Need for reform

While a number of reforms to the way in which child sexual assault offences are dealt with have taken place in recent years, most participants considered that further reform was essential to minimise trauma to complainants and improve conviction rates. In considering the proposals for reform, the Committee maintained the view that any changes to the rules of evidence or court procedures should not undermine the legitimate rights of the accused to a fair trial.

The Complaint Process (Chapter 2)

Communication between the complainant and the police and prosecution

The communication between the complainant and the authorities about the likely consequences of pursuing a criminal prosecution can have an impact on the complainant's decision to proceed with a complaint of child sexual assault. The impression gained by sexual assault counsellors and community legal centres is that the information given to complainants by police officers and prosecutors is often unduly pessimistic, focusing on the probability of distress and the unlikelihood of conviction. This generally reflects the views of police officers and prosecutors about the hardships associated with pursuing a complaint. The Committee heard that, as a result, some complainants and their carers are discouraged from pursuing a prosecution. The Committee has recommended reminding police and prosecutors of the importance of providing impartial information to complainants.

Other issues raised about communication with complainants generally focused on the additional hardships caused by insensitive communication styles and by a failure to keep the complainant up to date with the progress of the investigation or prosecution. The Committee identified a need for a review of the adequacy of training of Joint Investigative Response Team (JIRT) members in these respects.

The Committee heard that there is an important role for witness assistance officers in preparing child complainants for court. The Witness Assistance Service (WAS) supports witnesses for the prosecution, with special care taken to prepare child witnesses both practically and emotionally for the trial. This includes ensuring the child has access to appropriate counselling, as well explaining to the child witness what can be expected from the court process and environment, and the roles of various people in the court. A visit to the court room prior to the trial is often involved. The Committee received a great deal of positive feedback about the WAS and its value in reducing the distress and fear felt by child witnesses. The Committee suggested that funding be provided to the WAS to update its court preparation resources. The Committee also considered that the Attorney General should review all existing witness preparation services with a view to identifying any duplication of services and ensuring any funding needs are identified and addressed.

The role of counsellors in the complaint process

Child sexual assault counsellors are involved in assisting the victim to cope with the effects of abuse, including listening to the child's disclosure about the abuse, assisting victims to understand that they are not responsible for the assault, and helping them to develop an understanding about how the 'grooming' process works. Support is also given during the prosecution process, particularly through the provision of information.

The counsellor's role generally begins **after** the first forensic interview of the child complainant is completed. This is to prevent any contamination, or perception of contamination, of the child's evidence. However, the Committee heard that the length of delay between the complaint about sexual abuse and the initial interview can sometimes be weeks or months, in which case a child complainant could be significantly harmed by the delay in commencement of counselling. The Committee suggests that the evidentiary needs of the prosecution should not be given priority over the therapeutic needs of the child victim, and that where the interests of the child require it, a child victim should have access to counselling prior to the investigative interview.

Giving Evidence (Chapter 3)

Cross-examination is the principal means by which the defence can test the prosecution's case and challenge the testimony of the complainant. It is therefore essential to a fair trial.

However, many aspects of cross-examination are unfair to child complainants of sexual assault. The Committee has heard that some defence counsel regularly use intimidation as a tactic to undermine the confidence and coherence of child witnesses, which not only adds to the trauma of the prosecution process for children, it also diminishes their capability to give evidence. Intimidatory behaviour reported to the Committee includes shouting, suggesting that the child was a willing participant of the abuse, repetitive questioning and bullying. Defence counsel can also create confusion in child witnesses through the use of complex language and sentence structures such as double negatives, repeatedly interrupting answers, asking irrelevant questions and asking questions that the child does not understand. These strategies can make the complainant's testimony appear unreliable and diminishes the complainants credibility. Misrepresentation of the typical reactions to child sexual assault (such as delaying a complaint, maintaining a relationship with the offender, and failing to scream or cry out during the abuse) is also used to create doubt about the credibility of the complainant.

Mechanisms currently exist in the *Evidence Act 1995* that enable judicial officers to intervene in unfair, intimidating or misleading cross-examinations. Despite this, the Committee heard that judges and magistrates appear disinclined to curtail harsh or confusing cross-examination of children. Some participants suggested that training of judicial officers and court officials to increase their understanding of children's development, language and memory could assist professionals to be aware of the need to intervene in the cross-examination process. The Committee advocates inserting a new provision into the *Evidence Act* that makes clear the role of judicial officers in controlling inappropriate questioning of children.

Rules of Evidence (Chapter 4)

Tendency evidence and relationship evidence

Rules of evidence determine what information or evidence can be considered in cases, how the evidence is presented and how it is assessed. A number of specific rules of evidence are particularly

relevant to child sexual assault trials in their influence on the outcomes of trials and their impact on the experience of complainants. The rules restricting the admission of tendency and coincidence evidence are one example. The tendency and coincidence rules exclude evidence of character, reputation or conduct that seeks to prove that a person has a tendency to act or think in a particular way, unless the evidence has significant probative value. This includes evidence about assaults by the defendant allegedly committed against other children as well as uncharged assaults on the same complainant.

In practice, tendency evidence is often ruled inadmissible in child sexual assault trials because it is either deemed insufficiently probative (especially if the evidence involves witnesses who are known to each other and may therefore have jointly concocted the allegations) or excessively prejudicial. This has resulted in potentially relevant information being excluded from some trials, preventing the jury from considering the charges in context and creating additional difficulties for the complainant giving evidence.

Given the common patterns of conduct of child sex offenders – including targeting multiple children in a particular locations such as a child care centre or school or repeatedly assaulting a single child over weeks, months or years – the inadmissibility of a great deal of tendency evidence is, in the Committee's opinion, unjust. The Committee has recommended that the provisions relating to the admission of tendency evidence in child sexual assault proceedings be modified, to make such evidence prima facie admissible if it is relevant to a fact in issue. It is important to note that the general exclusionary rules of section 135 and 137 of the *Evidence Act*, which require a trial judge to exclude evidence that is unfairly prejudicial, would be retained. However, guidelines should be inserted into the Act to provide that, when considering the exclusion of tendency evidence under sections 135 and 137, the court must take into account matters beyond the risk of unfair prejudice to the accused, such as the public interest in admitting all relevant evidence. A similar approach is recommended to clarify that relationship evidence (that is, evidence establishing relevant background information) is admissible in child sexual assault trials and to define the types of acts that could constitute relationship evidence in such proceedings.

Multiple proceedings

The issue of trials involving multiple complainants against one accused raises problems comparable to those associated with tendency evidence. In cases where an accused is charged with child sex offences against more than one child it is common for the offences against each child to be tried separately (pursuant to section 64 of the *Criminal Procedure Act 1986*) on the grounds that a joint trial may create unfair prejudice against the accused. The practice of separating trials for multiple charges against a defendant can result in the jury being unaware of the full range of allegations against the accused, and could be a factor contributing to the low conviction rates for child sexual assault. The Committee considers that there should be an amendment to the *Criminal Procedure Act* to create a presumption that, in child sexual assault prosecutions, multiple counts of an indictment will be tried together.

Evidence of complaint

Evidence of a victim's first complaint to another person about having been sexually assaulted is information that, if corroborated, can support the complainant's version of events. Complaint evidence is a type of hearsay evidence. An exception to the general prohibition on the admission of hearsay evidence is provided by section 66 of the *Evidence Act 1995*. Section 66 has the effect of allowing the admission of hearsay evidence of a complaint of sexual assault if the complaint was made while the assault was 'fresh in the memory' of the complainant, as long as the complainant is available to give evidence. In practice, many child victims' first complaint of sexual assault (which studies have shown frequently are made months or years after the assault) have been held inadmissible, because the courts have ruled that a complaint made more than hours or days after the alleged assault is not 'fresh in the

memory' of the complainant, and therefore falls outside the exception provided by section 66. The Committee can see no logic in distinguishing between evidence of **recent** complaint and evidence of **delayed** complaint when determining the admissibility of complaint evidence in a child sexual assault trial. The fact that a complaint was made after a delay ordinarily bears no relation on the credibility of the complaint and in fact is a typical feature of child sexual assault. The Committee proposes an amendment to allow the admission of such evidence.

Expert evidence

Expert evidence is seldom admitted into child sexual assault trials in New South Wales, due to restrictions under the *Evidence Act 1995*. The Committee heard that expert evidence, if admitted, could be useful to overcome common misconceptions held by jurors about child sexual assault and victims' responses to it. Myths about child sexual assault that have been shown to be frequently believed by jurors include assumptions that children often make false accusations about sexual assault, that there should be physical evidence of the assault, and that most victims would attempt to resist the assault, cry for help, and immediately report the offence. Studies have shown these beliefs to be false.

A lack of knowledge about the dynamics of child sexual assault and the typical responses of victims can impact on a jury's verdict by creating an inaccurate view about the credibility of the complainant. The Committee considers that it would be valuable to provide the jury with the necessary knowledge to make an accurate assessment of the credibility of the complainant that is not confounded by misconceptions. Admission of evidence from a child development expert would be an appropriate mechanism for providing this information to jurors.

Judicial warnings

In the course of a criminal trial before a jury, the trial judge may give warnings to a jury as to the weight to be given to certain evidence or inferences that may or may not be drawn, and whether these are to affect the jury's deliberations. Several specific jury warnings are particularly relevant in child sexual assault trials and have been the subject of criticism during the Inquiry.

The *Crofts* warning, relating to the credibility of delayed complaints about sexual assault, is one such warning. It is criticised on the grounds that it runs counter to research about the reasons for complainants delaying their disclosure about sexual assault. The Committee recommends that the *Crofts* warning be prohibited in child sexual assault trials. The *Longman* warning focuses on the difficulties for the accused in defending him or herself in cases of a delayed and uncorroborated complaint. In such cases, the defendant often loses opportunities to obtain evidence to use in his defence, such as alibis or witnesses. However, it is not always the case that such exculpatory evidence ever in fact existed. Indeed, where the defendant did actually commit the offence, it could be seen to be misleading to advise the jury that the **delay** caused the defendant to be unable to obtain such evidence. For this reason, the Committee recommends that the *Longman* warning be given in child sexual assault trials only where there is good reason to suppose that the accused has been prejudiced by the delay.

The *Murray* warning, which directs that a jury must scrutinise with great care the complainant's uncorroborated evidence, was also criticised in evidence. The key cause of concern was that this warning could cause the jury to unfairly doubt the credibility of a complainant merely because of the lack of corroboration, when in reality the vast majority of child sexual assaults are uncorroborated. The Committee favours reformulating the warning so that, in addition to a reminder to scrutinise the evidence with great care, the jury is advised that the evidence of one person, if believed, is sufficient for a conviction. The final warning considered in detail by the Committee is the warning provided for in section 165B(2)(a) of the *Evidence Act 1995*. This allows a judge to warn a jury that a particular child's

evidence may be unreliable because of the child's age. This warning disregards available scientific knowledge about the high standard of accuracy and reliability of children's evidence, and should be abolished in favour of a provision that allows for a warning about a **particular** child's evidence if it can be shown that there is objective evidence that the child's evidence may be unreliable that is not based on the mere fact that the witness is a child.

The important protection provided by section 165, allowing the court to warn the jury about any evidence that may be unreliable, should be retained. The Committee does not seek to prevent judicial officers from giving directions to juries in relation to evidence given in a particular case that may be unreliable. In the Committee's view, however, any such warning must be based on current scientific knowledge about common reactions to child sexual assault and the reliability and credibility of child witnesses, rather than the misconceptions that have formed the basis of existing and past judicial warnings.

Court Practices and Procedures (Chapter 5)

Court practices are often a source of distress to child sexual assault complainants. One key stressor is the lengthy delay between the making of a complaint of sexual assault and the trial of the alleged offender. Children often find this delay, which can be up to two years, to be enormously stressful, as anxiety builds up in anticipation of the trial. It is difficult for complainants to put their assault behind them until the trial is completed. The long delays, in addition to being detrimental to child witnesses' well-being, can also result in the diminishing of the complainant's memory of the details of the offence, thus reducing the effectiveness of the child's testimony.

The court environment is an additional cause of anxiety to child complainants. When waiting to give evidence during the trial, a witness can sometimes be required to wait hours or days in a waiting area outside of the courtroom. In many instances, the waiting area is entirely inappropriate for children and has been identified as a source of additional stress. In particular, children become especially fearful and anxious when required to wait in view of the accused or the accused's family. Inappropriately sized courtroom furniture and the wigs and gowns worn by judges and counsel create additional stress because of their unfamiliarity and formality.

Special Measures (Chapter 6)

Special measures are mechanisms that are used in court to reduce the stresses and fears of child witnesses. Several special measures currently exist, such as the provision for an electronically recorded interview to be admitted into trial as the child's evidence-in-chief, and the ability for a child to give evidence via closed-circuit television. The Committee heard that, despite their value in reducing the anxiety of child witnesses, special measures have not been universally used in courts in New South Wales.

There are a number of reasons for the failure to use special measures. In some instances, technical failures have hindered use of the equipment, or court staff have been unable to operate the facilities. In other cases, judicial officers have been unaware of the special measures provisions, or have ordered that the special measures not be used because they consider it would be contrary to the interests of justice. The poor standard of some equipment can also lead to a reluctance of prosecutors to have Crown witnesses use special measures, fearing that the child will make less of an impact on the jury if evidence is given electronically.

The Committee considers that special measures provisions should be used as a matter of course in child sexual assault trials and has suggested means of increasing their use. The Committee's recommendations focus on improving the standard of the equipment, the training of court staff in the use of the equipment, and the education of judicial officers about the special measures provisions and the importance of their use. The Committee's recommended specialist jurisdiction (in Chapter 7) should also contribute to an improved rate of utilisation of special measures.

The Committee has also recommended the introduction of provisions to allow a child's entire testimony (evidence-in-chief, cross-examination, re-examination) to be electronically recorded prior to the trial and admitted into evidence. This addresses a number of difficulties faced by child witnesses, such as the fear created by the possibility of seeing the accused, the need for the child to give evidence on more than one occasion and the long delays between making a complaint and giving evidence (and the resultant loss of memory of details of the assault). The need for the child to spend hours or days waiting outside the courtroom before appearing would also be overcome.

Proposed Specialist Court (Chapter 8)

The Director of Public Prosecutions proposed the establishment of a pilot project to trial a specialist court for matters involving children who are victims of physical or sexual assault. The aim of the specialist court is to overcome many of the identified problems experienced by child witnesses in the criminal justice system through the specialisation of the judicial and court officers and the development of child-focused procedures and environment. The DPP's proposal received a high level of support by stakeholders, although some particular aspects were the subject of criticism. After considering the DPP's proposal and the views of inquiry participants, the Committee recommended trialling a specialist court for child sexual assault prosecutions.

The Committee's proposed pilot project is based on the DPP's proposal (although there are some differences, including the retention of trial-by-jury). The key features of the proposed trial specialist court are as follows. Cases would be heard by designated judicial officers specially trained in child development and the dynamics of child sexual assault. Prosecutors and court staff would also receive special training. There would be a presumption in favour of the use of special measures, including pre-trial recording of evidence and electronic equipment would be of the highest standard. The court environment, including the room used for pre-trial recording of evidence, would be appropriately child-friendly and informal. The pilot project should be the subject of comprehensive evaluation after a trial period to assess its success in alleviating the distress of children without unfairly disadvantaging the accused.

Alternative Methods of Prosecuting and Punishing Child Sexual Assault Offences

Alternative approaches to prosecuting child sexual assault are usually raised because of the difficulties in obtaining a conviction for child sexual assault offences. Some have suggested reducing the standard of proof for child sexual assault trials, while others favour an inquisitorial approach to replace the adversarial system. While understanding the perceived attractions of such models, the Committee is unable to support them due to the practical and philosophical difficulties that would arise.

Civil responses to child sexual assault

A number of civil remedies are available to victims of child sexual assault that can be pursued in addition to criminal prosecution. These often appear to be an attractive option because the standard of proof is lower than that of criminal trials, so there is a greater chance of a finding in favour of the

complainant. However, it is undesirable for civil responses to form the principal response to child sexual assault as it would effectively decriminalise child sexual assault and would place the responsibility for pursuing the offender onto the complainant.

Civil litigation against the offender for damages or compensation is one civil remedy available to victims of child sexual assault. However, the cost involved in taking civil action is a serious obstacle to commencing civil action, as is the lack of assets usually owned by the offender. Compensation can also be sought from the Government by applying to the Victims Compensation Tribunal. Finally, where an alleged offender is employed in the public sector, disciplinary action can be taken against him or her.

Alternative Models for Punishment and Treatment of Offenders

The conventional penalty for child sexual assault is a prison term, which reflects the community's view of the seriousness of the crime. The vast majority of convicted child sex offenders are released into the community at the end of their sentence. Many are never convicted or even charged. The community's interest in offenders receiving treatment to reduce (or eliminate) their re-offending is therefore clear.

The Committee reviewed the existing government-provided non-custodial treatment programs for child sex offenders – the Pre-Trial Diversion of Offenders Program at Cedar House and the New Street Adolescent Program. The Departments of Juvenile Justice and Correctional Services also offer custodial programs.

The information received by the Committee points to a clear need for an increase in treatment places for child sex offenders. This is particularly the case for adolescent offender programs, which offer the most hope for prevention of child sexual assault, yet face chronic shortages in availability. The Committee recommends that the relevant departments jointly review their child sex offender treatment services with a view to ensuring the full range of treatment programs are available.

Community Consultation (Chapter 9)

Communication between the community, government and non-government service providers can play an important role in refining the criminal justice system's approach to child sexual assault. This requires a two-way flow of information. While a number of forums currently exist which allow interagency consultation, the Committee found that mechanisms could be enhanced by greater encouragement of input from victims of child sexual assault and their representatives. Expanding the functions of the Child Protection Chief Executive Officers Group is recommended as an appropriate means of achieving this.

Summary of Recommendations

Recommendation 1 page 3

The Committee's principal recommendation is that the Attorney General establish a pilot project to trial a specialist court for child sexual assault prosecutions. The details of the Committee's proposal are described in Recommendation 43.

Recommendation 2 page 29

The Committee recommends that the Director of Public Prosecutions and the Commissioner of Police use appropriate internal communication methods to remind staff of the Office of the Director of Public Prosecutions and police officers (respectively) of the necessity of impartially presenting information to complainants and their carers about the consequences of pursuing a prosecution for a child sexual assault.

Recommendation 3 page 35

The Committee recommends that Joint Investigative Response Teams (JIRT) management assess its officers' provision of information to complainants, and the reasons for shortcomings in communicating the progress of a complaint. An evaluation of the need for a designated case manager to be appointed from within the Joint Investigative Response Teams could be undertaken in this context.

Recommendation 4 page 36

The Committee recommends that the Director of Public Prosecutions and the Commissioner of Police use appropriate internal communication methods to remind staff of the Office of the Director of Public Prosecutions and police officers (respectively) of the necessity of informing complainants about the progress of their complaint.

Recommendation 5 page 36

The Committee recommends that the Charter of Victims Rights be amended so that communication of information about the progress of a complaint is required to be initiated by the Police and the Prosecution, rather than at the instigation of the victim.

Recommendation 6 page 40

The Committee recommends that the Joint Investigative Response Teams (JIRT) management assess the adequacy of training of its officers in the areas of interview techniques, practical interview experience, child development and refresher courses, with a view to ensuring all Joint Investigative Response Team officers have the necessary expertise to interview children in an effective, sensitive and child-friendly manner.

Recommendation 7 page 41

The Committee recommends that the New South Wales Police Service review its practices for interviewing adult complainants of child sexual assault, with a view to ensuring optimum levels of privacy, sensitivity and support.

Recommendation 8 page 45

The Committee recommends that New South Wales Treasury provide funding to the Witness Assistance Service to oversee the development of updated court preparation resources.

Recommendation 9 page 46

The Committee recommends that the Attorney General review the available witness preparation services, with a view to identifying and rationalising any duplication of services, as well as determining and funding future resource needs.

Recommendation 10 page 54

The Committee recommends that the Commission for Children and Young People amend the *Interagency Guidelines for Child Protection Intervention 2000* to require that decisions about whether to delay counselling until after the investigative interview should be made on a case-by-case basis, and that the best interests of the child should be given priority in the decision making about the timing of a referral for counselling.

Recommendation 11 page 58

The Committee recommends that the Minister for Health examine:

- the incidence of 'repressed memories' of child sexual assault
- whether the level of regulation of therapists and counsellors is adequate, and
- the training of counsellors, in particular the possible perpetuation of techniques that may give rise to 'false memories'.

Recommendation 12 page 79

The Committee recommends that the *Evidence Act 1995* be amended to insert a section as follows:

With a witness under the age of 18, the court shall take special care to protect him or her from harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to ensure that questions are stated in a form which is appropriate to the age of the witness. The court may in the interests of justice forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness.

Recommendation 13 page 98

The Committee recommends that the Director of Public Prosecutions review the use of section 66EA of the *Crimes Act* 1900 after it has been operational for five years, with a view to determining whether it could or should be more frequently used.

Recommendation 14 page 99

The Committee recommends that the Attorney General amend the *Evidence Act 1995* to provide that:

(1) In relation to the prosecution of a child sexual assault offence, and subject to (2) and (3), tendency evidence relevant to the facts in issue is admissible and is not affected by the operation of ss 97, 98 and 101.

(2) In relation to evidence admitted under (1) a court must, in applying the balancing test under s 137, take into account the following in addition to the matters set out in s 192:

- the nature of the other evidence in the proceeding
- the public interest in admitting all relevant evidence
- the likelihood of any harm that may be caused by excluding the evidence.

(3) In relation to evidence admitted under (1) a court must not, in applying the balancing test under s 137, take into account the prior relationship between the complainant and other witnesses.

Recommendation 15 page 102

The Committee recommends that the Attorney General amend the *Evidence Act 1995* to provide that, in proceedings for child sexual assault offences, relationship evidence relevant to the facts in issue is admissible and is not subject to sections 97 and 101.

Recommendation 16 page 102

The Committee further recommends that the Attorney General amend the *Evidence Act 1995* to provide that, in relation to the admission of relationship evidence in a child sexual assault trial, a court must, in applying the balancing test under section 137, take into account the following in addition to the matters set out in section 192:

- the nature of the other evidence in the proceeding
- the public interest in admitting all relevant evidence
- the likelihood of any harm that may be caused by excluding the evidence.

Recommendation 17 page 102

The Committee further recommends that the Attorney General amend the *Evidence Act 1995* to define the types of related acts that are defined as relationship evidence in the child sexual abuse context and are therefore admissible pursuant to Recommendation 16.

Recommendation 18 page 107

The Committee recommends that the Attorney General amend the *Criminal Procedure Act 1986* to create a presumption that, in child sexual assault prosecutions, multiple counts of an indictment will be tried together.

Recommendation 19 page 108

The Committee further recommends that the Attorney General amend the *Criminal Procedure Act 1986*, to ensure that, when considering the severance of trials, the court:

- is not permitted to take into account the prior relationship or acquaintance of the complainants, and
- must ensure that the interests of justice are at all times paramount.

Recommendation 20 page 112

The Committee recommends that the Attorney General amend section 66 of the *Evidence Act 1995* to insert a provision defining 'fresh in the memory' in child sexual assault trials as being the quality of the memory (not having deteriorated or changed by lapse of time) of the asserted fact irrespective of the time that has elapsed between the making of the assertion and the occurrence of the asserted fact.

Recommendation 21 page 125

The Committee recommends that the Attorney General amend the *Evidence Act 1995* to permit in child sexual assault proceedings the admission of expert evidence relating to child development (including memory development), and the behaviour of child victims of sexual assault along the lines of section 79A of the *Evidence Act 2001* (Tas).

Recommendation 22 page 130

The Committee recommends that the Attorney General amend the *Criminal Procedure Act 1986* to expressly prohibit judicial officers from giving jury directions stating or suggesting that the credibility of a complainant is affected by a failure to report, or delay in reporting, a child sexual assault.

Recommendation 23 page 132

The Committee recommends that the Attorney General amend the *Criminal Procedure Act* 1986 to prohibit the issuing of the *Longman* judicial warning where there is no evidence or good reason to suppose that the accused was prejudiced by the delay in complaint.

Recommendation 24 page 134

The Committee recommends that the Attorney General amend the *Criminal Procedure Act 1986* to provide for a judicial warning on the uncorroborated evidence of a child sexual assault complainant. The Committee recommends that this judicial warning should advise the jury that, while they are required to scrutinise the evidence before the court with great care, the evidence of one witness, if believed, is sufficient to prove a fact in issue in the trial.

Recommendation 25 page 135

The Committee further recommends that the amendment proposed in Recommendation 24 make clear that the existing *Murray* warning about uncorroborated evidence of a complainant is no longer to be given in child sexual assault proceedings.

Recommendation 26 page 137

The Committee recommends that the Attorney General amend section 165B of the *Evidence Act 1995* to ensure that warnings about the reliability of a child's evidence are given only when (1) a party requests the warning and (2) that party can show that there are exceptional circumstances warranting the warning. Exceptional circumstances should not depend on the mere fact that the witness is a child, but on objective evidence that the particular child's evidence may be unreliable.

Recommendation 27 page 137

The Committee further recommends that the amendment suggested in Recommendation 26 should require that any warning given relating to the reliability of a child's evidence should follow the *Murray* formula that requires the jury to consider the evidence "with great care" before reaching a verdict.

Recommendation 28 page 138

The Committee recommends that the Judicial Commission provide training courses to judicial officers regarding child development and the reliability of child witnesses.

Recommendation 29 page 173

The Committee recommends that the Judicial Commission provide training courses to judicial officers regarding the special measures provisions in the *Evidence (Children) Act 1997*.

Recommendation 30 page 178

The Committee recommends that the Attorney General's Department conduct an audit of the numbers, locations and technological standards of existing electronic equipment in New South Wales courts.

Recommendation 31 page 179

The Committee recommends that the Treasurer provide funding to address the upgrading needs identified by the audit of electronic equipment suggested in recommendation 30, with a view to ensuring that all courts have access to high standard, well maintained, appropriate electronic facilities. Where it is not feasible for remote or rural courtrooms to be equipped with CCTV and video equipment, access to mobile electronic evidence rooms should be ensured.

Recommendation 32 page 179

The Committee recommends that the Attorney General's Department assess the adequacy of the training of court staff in the use of electronic equipment, with a view to ensuring that all relevant staff are able to operate the equipment.

Recommendation 33 page 180

The Committee recommends that the Attorney General amend the *Evidence (Children) Act 1997* to require that all child witnesses give evidence by closed-circuit television, except where the defence is able to prove that exceptional circumstances exist that render the use of CCTV against the interests of justice.

The Committee further recommends that the amendment make clear that a general possibility of prejudice to the accused caused by the use of CCTV is not to be considered an exceptional circumstance for the purpose of determining whether to make an order that CCTV not be used, and that the interests of the child must be paramount. The right for a child to choose not to use CCTV should be retained.

Recommendation 34 page 189

The Committee recommends that the Attorney General amend the *Evidence (Children) Act 1997* to provide for child witnesses' evidence to be recorded in full prior to the trial and to enable the electronic-recording to be admitted into evidence at trial to replace the child's evidence-in-chief, cross-examination and any re-examination.

Recommendation 35 page 189

The Committee also recommends that the Attorney General amend the *Evidence (Children) Act 1997* to enable the video-recording of a child's evidence to be admitted into evidence at any committal proceedings, re-trials or appeals.

Recommendation 36 page 189

The Committee recommends that the Attorney General ensure that pre-trial recording provisions allow for the court to order the editing of the video recording in order to omit irrelevant or prejudicial material prior to the trial.

Recommendation 37 page 190

The Committee recommends that the pre-trial recording provisions proposed in recommendations 34 and 35 include provision for the creation of guidelines for pre-recording evidence. The guidelines should that ensure that children's evidence is recorded from a remote CCTV room, in a child-friendly and non-intimidatory environment, with access to a support person. The guidelines should also ensure that the child complainant does not come into contact or view of the accused.

Recommendation 38 page 191

The Committee recommends that the legislative amendments to provide for pre-trial recording suggested in Recommendations 34 and 35 should **create a presumption** that a child witness will have his or her entire evidence pre-recorded and admitted into trial.

Recommendation 39 page 192

The Committee further recommends that the provisions for pre-trial recording suggested in Recommendations 34 and 35 should enable courts to order that a child's evidence not be pre-

recorded or admitted into trial if, in the specific circumstances of the trial, it is not in the child's best interests, or the child prefers not to have the evidence pre-recorded or admitted electronically, or particular circumstances render it contrary to the interests of justice for the evidence to be pre-recorded or admitted electronically. The possibility of generalised prejudice should not be considered sufficient for an order against pre-recording to be made.

Recommendation 40 page 192

The Committee recommends that the provisions for pre-trial recording suggested in Recommendations 34 and 35 should specify that a child witness is not required to attend the trial for further examination, unless further examination is required in circumstances that make an additional pre-trial recording unfeasible.

Recommendation 41 page 193

The Committee recommends that the Attorney General establish mobile witness rooms, to be used by child witnesses in rural and remote areas that lack the necessary facilities for pre-trial recording of evidence.

Recommendation 42 page 206

The Committee recommends that the Attorney General convene an appropriate forum, such as a Working Group, to assess the merits of the proposal for the pilot project to incorporate a provision for judge-alone trials.

Recommendation 43 page 208

The Committee recommends that a pilot project be established to trial a specialist child assault jurisdiction with the following characteristics:

- retention of existing criminal standard of proof and application of the *Evidence Act 1995*
- trial by jury, unless both parties agree to trial by judge alone
- selection of interested judicial officers, prosecutors and court staff, with relevant specialised training in child development and child sexual assault issues
- pre-trial hearings between judges and counsel to determine the special needs of the child and readiness to proceed
- presumption in favour of using special measures, including admission of pre-recorded evidence and support persons
- the equipping of the court/s with high standard electronic facilities for the use of special measures and proper training of staff in the use of the equipment
- mobile units to ensure that rural and remote child witnesses have access to electronic facilities
- specially trained prosecutors with a focus on continuity of representation and early contact with the complainant
- presumption that children will not be required to give evidence at committal hearings
- appropriate, child-friendly facilities, furnishings and schedules, including disrobing of judicial officers and counsel
- to guard against burn-out of judicial officers and staff, a rotation system could be employed, or specialist judges and officers could serve part-time in the specialist court, and part-time in general duties, following their training and induction. For example, they could sit for several weeks or months in the specialist court, followed by a similar period outside it.

Recommendation 44 page 209

The Committee recommends that an extensive evaluation be conducted, after an appropriate trial period, of the success of the pilot project to inform the decision about whether to establish the specialist court on a permanent basis.

Recommendation 45 page 210

The Committee recommends that the pilot specialist court deal with all child sexual assault cases involving witnesses who are under the age of 16, plus child witnesses between the ages of 16 years and 18 years if the offence to which the evidence relates was committed before the child reached 16 years.

Recommendation 46 page 219

The Committee recommends that the Premier consider the recommendation of the Ombudsman that the *Public Sector Management Act 1988* be amended to enable the public sector to incorporate a risk management approach to disciplinary proceedings.

Recommendation 47 page 234

The Committee recommends that the Department of Juvenile Justice, the Department of Health, the Department of Corrective Services, and the Department of Community Services jointly review their child sex offender treatment services, with a view to ensuring that the full range of treatment services are available. These should include programs for adults and adolescents, in custodial and non-custodial settings, residential and non-residential settings, in metropolitan and rural areas, whether court mandated or voluntary.

Recommendation 48 page 241

The Committee recommends that the functions of the Child Protection Chief Executive Officers Group be expanded to allow for meetings with non-government associations, community groups and victims of child sexual assault to discuss issues of concern as they arise.

Glossary and Abbreviations

ALRC	Australian Law Reform Commission
CASAC	Child and Adolescent Sexual Assault Counsellors Network
CCTV	Closed Circuit Television
Child Abuse Accommodation Syndrome	This describes the coping behaviours typical of child sexual abuse victims. The syndrome features a pattern of response of: secrecy and helplessness; entrapment and accommodation; delayed, conflicted and unconvincing disclosure; retraction. This is usually followed by a reconfirmation of the disclosure by the victim. Also known as Child Sexual Assault Accommodation Syndrome.
DoCS	Department of Community Services
DPP	Director of Public Prosecutions
Grooming	Grooming refers to the tactics commonly used by child sexual assault offenders to create a relationship with a child that will enable the perpetrator to obtain and maintain sexual access to the child. This includes measures such as developing trust in the child by providing gifts or taking the child on special outings, establishing a relationship with the family to ensure ongoing contact with the child, psychologically isolating the child from his or her mother or other sources of support and gradual blurring of physical boundaries through increasingly inappropriate touching.
HREOC	Human Rights and Equal Opportunity Commission
JIRT (or JIT)	Joint Investigative Response Team (Joint Investigation Team) – Established in 1997 to conduct joint investigations of child abuse, 'Joint Investigative Response Teams' consist of officers from the Police Service and the Department of Community Services, with support by the Department of Health where appropriate
ODPP	Office of the Director of Public Prosecutions
QLRC	Queensland Law Reform Commission
Relationship evidence	Relationship evidence is evidence that establishes background information to explain the context in which the criminal act occurred. It does not relate only to conduct that is criminal in nature, but can include non-criminal acts. In relation to child sexual assault prosecutions, relationship evidence can include evidence of previous sexual misconduct or physical violence, or related acts such as 'grooming'

Tendency evidence	Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, that seeks to prove that a person has or had a tendency to act in a particular way, or to have a particular state of mind.
Uncharged acts	The term 'uncharged acts' refers to criminal conduct by the accused for which he or she has not been charged. In the child sexual assault context, uncharged acts are typically sexual assaults by the accused on the complainant that are not the subject of charges, usually due to insufficient evidence or lack of specificity in the details of the allegation.
WAS	Witness Assistance Service, established by the Office of the Director of Public Prosecutions

Chapter 1 Introduction

Reference to the Committee

The Inquiry into Child Sexual Assault Matters was referred to the Committee by the Attorney General in correspondence dated 11 December 2001, with terms of reference as follows:

The Standing Committee on Law and Justice is to inquire into and report on the circumstances surrounding the prosecution of child sexual assault matters, including:

a) *communication between the police and the complainant, and the complainant and the prosecution concerning the consequences of pursuing a prosecution for child sexual assault;*

b) *the role of sexual assault counsellors in the complaint process*

c) *the impact of the application of the rules of evidence, other legislative provisions and court practices on prosecutions for child sexual assault offences*

d) *alternative procedures for the prosecution of child sexual assault matters including alternative models for the punishment of offenders*

e) *possible civil responses to perpetrators and victims of child sexual assault*

f) *appropriate methods of sustaining ongoing dialogue between the community, government, and non-government agencies about issues of common concern with respect to child sexual assault and*

g) *any related matter concerning approaches to child sexual assault in the justice system.*

The Committee notes that the terms of reference principally relate to the prosecution of child sexual assault, rather than its investigation. The adequacy of the child protection system more generally is currently the subject of an inquiry by the Standing Committee on Social Issues.

Conduct of this Inquiry

The Committee's advertisements inviting submissions from the public appeared in newspapers on 22 December 2001. In addition, in January 2002, the Committee Chair wrote to a number of stakeholder groups to advise them of the Inquiry, and to invite them to make a submission. This included legal associations, sexual assault victims' support groups, sexual assault service providers, relevant ministers and departments, and legal academics. Although the closing date for submissions was 15 February 2002, the Committee acknowledged the difficulty in preparing submissions during the Christmas period, and accepted all submissions received after the due date.

The Committee is grateful for the 88 submissions that were received. As a result of the sensitive nature of the submissions from victims of child sexual assault and their carers, many of the authors requested that their names be suppressed, or that their submission be entirely confidential. In each case, the Committee acceded to the request. The list of submissions, which appears at Appendix 1, does not include the names of those who requested confidentiality or name suppression.

The Committee held ten hearings between March and July to gather oral evidence, with a total of 33 witnesses. Of these, four witnesses requested that their evidence and names remain confidential. Appendix 2 lists the hearing dates and witnesses, again, without the names of those who requested confidentiality.

Preparation of the Chair's draft report occurred between July and October 2002, with the draft circulated to Committee Members in October 2002. The Committee met to consider and adopt the draft report on 7 November 2002. The minutes of that meeting appear at Appendix 3.

Structure of this Report

The remainder of this chapter provides relevant background information and context. It sets out the current legislation relating to child sexual assault offences, and briefly examines child sexual assault prosecution statistics and conviction rates, and the common reactions of children to sexual assault. The obstacles to conviction and the impact of the prosecution process on child sexual assault complainants are also explored. Finally, the broader criminal justice system and the importance of the right to a fair trial for the accused are considered.

Chapter Two focuses on the complaint process. The communication between the various parties in the complaint process is examined, with a particular examination of the police and the prosecutors' representations to the complainant about the likely impact and consequences of prosecuting a child sexual assault complaint. The role of sexual assault counsellors in this process is also reviewed.

Chapter Three centres on issues surrounding the cross-examination of child witnesses in child sexual assault trials, both in terms of the effects on the well-being of the child complainant and the broader question of the fairness of the cross-examination process.

The impact of rules of evidence on the prosecution of child sexual assault are reviewed in **Chapter Four**. The chapter examines rules of evidence such as admission of tendency evidence, hearsay evidence and expert evidence, and the issuing of judicial warnings. It also assesses how such rules affect the success of the prosecution and child complainants' experiences in court.

Chapter Five explores court practices and procedures, and how these contribute to the difficulties faced by child witnesses and the outcomes of trials. Court delays and adjournments and the environment of the court room are matters of particular focus.

In **Chapter Six**, the Committee examines 'special measures' – that is, the mechanisms used or proposed to reduce the distress caused to child witness when giving evidence. These include admission of electronically recorded evidence, the use of closed-circuit television and the involvement of support persons.

Chapter Seven reviews the DPP's proposal for a trial of a specialist court for child sexual assault prosecutions, including the views of inquiry participants about the proposal.

Chapter Eight deals with alternative methods of prosecuting child sexual assault cases and assesses the utility of civil responses to child sexual assault, such as civil litigation and victims compensation. Proposals to reduce the standard of proof, and establish an inquisitorial approach are examined. The chapter also reviews treatment programs for child sexual assault offenders.

Chapter Nine examines the mechanisms for ongoing dialogue between the community, government and non-government child sexual assault service providers and policy makers.

Chapter Ten is an overview of the Committee's key recommendations.

Principal Committee Recommendation

1.1 The Committee's main recommendation arising from this report is the establishment of a pilot project to trial a specialist court for child sexual assault prosecutions. Throughout this report, the Committee identifies areas in which it considers that the law, prosecution procedures or other practices have intensified the distress felt by child complainants of sexual assault who enter the criminal justice system, and/or have created unfair obstacles to successful prosecutions of offenders.

1.2 The Committee considers that a specialist court would provide a comprehensive approach to overcoming the barriers for child sexual assault complainants. Several of the Committee's recommendations for reform would be superfluous in the event of the specialist jurisdiction being established statewide. These are recommendations 29, 30 and 31. In the interim, however, the recommendations remain necessary.

1.3 The Committee stresses that the pilot project recommendation offers improvements that go beyond resolution of the problems that recommendations 29 – 31 seek to address. The Committee also emphasises that the proposed pilot project would need to be implemented *in addition to* the majority of the recommendations contained in this report.

Recommendation 1

The Committee's principal recommendation is that the Attorney General establish a pilot project to trial a specialist court for child sexual assault prosecutions. The details of the Committee's proposal are described in Recommendation 43.

Child Sexual Assault Offences and Prosecutions

Offences relating to child sexual assault

1.4 There is no single offence of child sexual assault: instead, the *Crimes Act 1900* provides for a number of different child sexual assault offences, as tabulated below. The offences are distinguished variously by the age of the child, the sex of the child, the nature of the act committed on the child, the relationship between the perpetrator and the child, the sex of the perpetrator and whether there are any aggravating circumstances.

Section	Offence	Maximum penalty
61M(1)	Aggravated indecent assault (including if victim is under 16 years)	7 years imprisonment
61M(2)	Aggravated indecent assault of a child under 10 years	10 years
61N(1)	Act of indecency with a person under 16 years, or inciting a person under 16 years to commit an act of indecency	2 years
610(1)	Aggravated act of indecency on a person under 16 years or inciting a person under 16 years to commit an aggravated act of indecency (including if victim is under the authority of alleged offender).	5 years
61(0)(2)	Aggravated act of indecency on a person under 10 years or inciting a person under 10 years to commit an act of indecency.	7 years
66A	Act of sexual intercourse with a child under 10 years.	20 years
66B	Act of attempting to have sexual intercourse with a child under 10 years (including assaulting any such person with intent to have sexual intercourse).	20 years
66C(1)	Act of sexual intercourse with a child between 10 and 16 years.	8 years
66C(2)	Act of sexual intercourse with a child between 10 and 16 years by a person in authority.	10 years
66D	Act of attempting to commit an offence against section 66C or assaulting such a person with intent to have sexual intercourse.	8 years (s66C(1)) or 10 years (s66C(2))
66EA	Act of persistent sexual abuse of a child.	25 years
73	Act of carnal knowledge by a teacher or a father or step-father of a girl between 10 and 16 years of age.	8 years
74	Act of attempting to have carnal knowledge by a teacher or father or step-father of a girl between 16 and 17 years of age.	8 years
78H	Act of homosexual intercourse with a male under 10 years of age.	25 years
78I	Act of attempting to have homosexual intercourse with a male under 10 years of age (including assaulting such a person with intent to have homosexual intercourse).	14 years
78K	Act of homosexual intercourse with a male between 10 and 18 years of age.	10 years
78L	Act of attempting to have homosexual intercourse with a male between 10 and 18 years of age (including assaulting such a person with intent to have homosexual intercourse).	5 years
78N	Act of homosexual intercourse with a male between 10 and 18 years of age by a teacher or father or step-father.	14 years
78O	Act of attempting to have homosexual intercourse with a male between 10 and 18 years by a teacher or father or step-father.	7 Years

Section	Offence	Maximum penalty
78Q(1)	Act of committing a gross act of indecency towards a male under 18 years.	2 years
78Q(2)	Act of inciting a male under 18 years to commit a gross act of indecency.	2 years

Table 1: Child sexual assault offences under the Crimes Act 1900

1.5 A prosecution for a criminal offence can sometimes be a lengthy process. Following the completion of the police investigation, the suspect is arrested and charged. A committal hearing is held to determine whether there is sufficient evidence for trial. If the evidence is insufficient, the charges are dismissed (or withdrawn by the Crown). If there is enough evidence to support a prosecution, the defendant is committed to trial at a higher court. At that stage, the accused can plead guilty or not guilty. If a not guilty plea is entered, the case proceeds to trial, to be decided by a jury.

1.6 Over the past few decades, studies have begun to reveal the scope of child sexual abuse and patterns of offending. The studies reveal that the overwhelming majority of perpetrators are male (over 95 per cent), usually the perpetrator is acquainted with or related to the child (approximately 80 per cent), and one-third of offenders are adolescents.[2] The offender is typically a serial offender, with one study estimating that the average male offender commits approximately 558 offences before being arrested at the age of 38 years.[3]

Prosecution statistics

1.7 Many witnesses pointed to the dramatic increase in the number of prosecutions for child sexual assault in recent years. Dr Cashmore, for example, gave evidence that:

> … I think it is well recognised now that there has been a marked increase in the number of cases of child sexual assault that are both investigated and come before the courts. For example, in 1982 the number of contested trials in higher courts was 34, in 1992 it was 143 and it reached a high of 177 in 1999… While there is no clear explanation for that, it seems that the major factors are an increase in recognition of child sexual abuse in the community; legal and procedural changes to the investigatory process, which means that their evidence is more likely to be heard; and an easing of restrictions about the admissibility of their evidence.[4]

2 Eastwood and Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, Queensland University of Technology, 2002, p 6.

3 Cited in Submission 2, p 5.

4 Cashmore, Evidence, 19 April 2002, p 1.

1.8 This was confirmed by the Director of Public Prosecutions, Mr Nick Cowdery (DPP):

> The phenomenon of the prosecution of child sexual assault is comparatively recent. In this State the flood really began, I suppose, about 10 or 12 years ago and it has been building ever since… My own view is that this does not necessarily reflect an increasing incidence of this offending; it reflects an increasing amount of reporting of it.[5]

1.9 The information provided to the Committee overwhelmingly suggests that, despite recent increases in prosecutions, the vast majority of child sexual assaults are never prosecuted. As noted further below, an initial obstacle to prosecution is a reluctance to disclose the abuse, with a significant minority of victims never telling anyone that the abuse has occurred.

1.10 Where a complaint is made, a variety of factors lead to cases dropping out of the system. Professor Parkinson provided details of his joint study on the process of attrition in child sexual assault cases. Examining the outcome of 183 cases of sexually abused children who presented to two Sydney child protection units, the study found that there were 117 cases where the name of the offender was known. Of these, only 45 cases reached trial, and 32 cases resulted in convictions. This reflects the findings of another study undertaken in the early 1990s in New South Wales, where 36 of the 155 substantiated cases of child sexual abuse resulted in the offender being charged.[6]

1.11 Indeed, common perceptions amongst professionals who work with child sexual assault victims are that the abuse is only rarely prosecuted. For example, the Coffs Harbour Child and Adolescent Sexual Assault Service submitted:

> Feedback from parents of children referred to our Service suggests that sexual assault matters are perceived as 'not worthwhile' prosecuting. Possibly this is a) because the rate of guilty verdicts is low, or b) because younger children may not be perceived as credible witnesses in court. Our Service statistics indicate that in 2001, we received 83 new referrals, but were only required to support 2 children in court.[7]

1.12 The Child and Adolescent Sexual Assault Counsellors network submitted that prosecutions for offences against very young children were rare:

> This message was also conveyed at the JIRT [Joint Investigation Response Team] forum where matters of competency and reliability were discussed and it was indicated that children under five would not be adequate witnesses. If this is a consequence of current legal practice it effectively means there is no legal consequence for any offender who chooses to assault children under five. This is obviously unacceptable.[8]

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5 Cowdery, Evidence, 26 March 2002, p 5.

6 Submission 23, pp 1 - 2.

7 Submission 33, p 1.

8 Submission 47, p 1.

1.13 Similarly, the Women's Legal Resource Centre (WLRC) advised:

> WLRC often hears from mothers that JIT [Joint Investigative Team] 'automatically' excludes preschool aged children from being interviewed, on the grounds that there are difficult evidentiary issues in relation to disclosures from young children.[9]

1.14 Of the child sexual assaults that do go to trial, only a minority result in conviction, and this figure is declining. Dr Cossins told the Committee:

> In recent years, increasing numbers of cases have been going to trial, whilst, at the same time, conviction rates have been found to be steadily decreasing compared to the category of all *other* criminal offences combined. Based on the data from the studies of Cashmore (1995) and Cossins (2001), it can be predicted that there is just slightly more than a one third chance of obtaining a conviction in NSW higher courts where the accused pleads not guilty, although the NSW Director of Public Prosecutions recently reported that the conviction rate at trial in NSW for 1999-2000 was lower still at 20.13%.[10]

1.15 Dr Cossins' research indicates that the overall conviction rate (that is, including guilty pleas) for child sexual assault offences hovered around 70 per cent in the years between 1992 and 1996. The comparative figure for all other offences was approximately 80 per cent.[11]

1.16 The DPP advised the Committee that child sexual assault offences are particularly difficult to prosecute for a variety of reasons, including:

- the secrecy of the crime
- the perpetrator's manipulation of the child resulting in fear or reluctance to disclose the offence
- the absence of corroborating evidence
- the absence of eyewitnesses, and
- the young age of the key witness, and the resultant difficulties in obtaining evidence of sufficient particularity due to children's language and memory development.[12]

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9 Submission 67, p 5.

10 Submission 69, p 2, footnotes omitted.

11 "Answers to Proposed Questions", document tendered by Dr Cossins, 23 April 2002, p 12.

12 Submission 27, p 2.

'Typical' responses by victims of child sexual assault

1.17 It is useful at the outset to gain an understanding of how children commonly respond to sexual assault. A number of studies referred to the Committee reveal that their responses frequently are contrary to how an adult might expect a child to react. This becomes significant in the context of how the reactions are viewed by the criminal justice system.

1.18 A delayed complaint or failure to disclose that sexual assault occurred is a common feature of victims' reaction to sexual assault as a child. Dr Cossins' submission to the Committee cited a 1997 study of Australian women, which found that almost half of women sexually abused as children (44.4 per cent) had not disclosed their abuse. Approximately 16 per cent of the sample disclosed the abuse at the time of the assault, five per cent within one year and almost ten per cent disclosed between one and ten years after the assault. One-quarter of the women did not disclose the abuse until more than ten years after the first incident. And, in only ten per cent of cases was the abuse reported to the authorities or a sexual assault worker.[13]

1.19 These findings are reflected elsewhere, including a New Zealand study which found that 37 per cent of victims disclosed within one year of the abuse, while 24 per cent disclosed more than ten years after the abuse, and 28 per cent had never disclosed.[14]

1.20 Dr Cossins summarised the findings of the various studies as follows:

> All in all, the … studies provide evidence of six main consistent features of children's reactions to sexual abuse:
>
> i. a *majority* of sexually abused children do not report the abuse at the time it occurs;
>
> ii. a majority of children either only disclose the abuse some years after it occurred or never disclose at all
>
> iii. the younger the child, the less likely she or he will report the abuse;
>
> iv. embarrassment, shame, fear of punishment and feeling responsible for the abuse are key factors that prevent children from reporting;
>
> v. a significant minority of children will experience repeated abuse over an extended period of time;
>
> vi. repeated abuse appears more likely to occur if the abuser is a relative and the intrafamilial relationship means a child is less likely to disclose.[15]

13 Submission 69, pp 39 - 40.

14 ibid.

15 Submission 69, p 43.

1.21 The submission from Professor Parkinson also reported findings from studies about children's disclosure of child abuse and subsequent retractions:

> Children sometimes retract statements concerning sexual abuse. This is demonstrated by one American study of 116 cases in which sexual abuse was subsequently confirmed… The researchers found that in 78% of cases, the child's initial acknowledgment of the abuse was tentative and vacillating rather than detailed and coherent, and in 22% of the cases, the child recanted the allegation before subsequently confirming it again. While there were a number of causes for recantation, pressure from the perpetrator and from the family were the first two causes listed. However, it should be noted that a study conducted in Texas has cast some doubt upon the frequency with which children recant.[16]

1.22 The pattern of victim responses to child sexual abuse has been described as 'child abuse accommodation syndrome', and according to Dr Cossins, the coping behaviours typical of the syndrome help to explain the failure to disclose child sexual abuse. The syndrome features the following pattern: secrecy; helplessness; entrapment and accommodation; delayed, conflicted and unconvincing disclosure; and retraction.[17] A similar theory arose from a more recent study, with the pattern described as: denial, tentative disclosure, active disclosure, recant and reaffirm.[18] Dr Cossins comments:

> Although Bradley and Wood (1996) consider there is little empirical support for the phenomenon of retraction by sexually abused children, what Summit and Sorensen and Snow describe correlates with offenders' accounts of how they maintain their victims' silence and indicates that, rather than disclosure being a spontaneous event, it is a slow, difficult process for the sexually abused child.[19]

1.23 The importance of these findings in the outcome of prosecutions for child sexual assault relate particularly to cross-examination and perceptions about the integrity of the complainant. Defence counsel commonly highlight reactions such as delayed complaint, the ongoing relationship with the defendant and retracted disclosures, using them to cast doubt on the truthfulness of the allegation and the credibility of the complainant. The Committee examines this issue further in Chapters Three and Four.

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16 Submission 23, p 6.

17 Summit (1983), cited in Submission 69, p 49.

18 Sorensen and Snow (1991), cited in Submission 69, p 49.

19 Submission 69, pp 49 – 50.

Obstacles to Successful Prosecution of Child Sexual Assault

Nature of the crime

1.24 To a large extent, the difficulties in prosecuting child sexual assault offences arise from particular aspects of the crime: the fact that it occurs in secret, in the absence of witnesses, and with manipulation of the victim by the perpetrator to prevent disclosure.

1.25 The DPP noted the following traits as features particular to child sexual assault:

> Child sexual assault is a unique crime insofar as:
> - the child is often targeted and groomed well before the crime is committed
> - there is a process whereby secrecy and silence around the crime is established and maintained over a period of time
> - the child is subtly invited to take responsibility for the crime, and for other people including the offender
> - the victim often has mixed emotions and maintains some loyalties towards the offender
> - the victim may still love or like the offender, while not wanting the abuse to happen or continue
> - the victim's emotions and realities are often confused by the tactics the offender uses
> - the victim may want to protect the offender and other family or friends from negative things happening especially as a result of the disclosure.[20]

1.26 He further noted some of the obstacles to disclosure of child sexual assault:

> … children often struggle with self-doubt, self-blame, shame and embarrassment. These feelings, along with the fear of family break-down and separation, or fear of getting the offender or themselves into trouble, will often mean that disclosure is delayed and/or staggered as the child will often test out the safety and timing of disclosure.[21]

1.27 The absence of evidence supporting allegations of child sexual assault are an obvious impediment to the successful prosecution of the crime. In this respect, Professor Parkinson advised:

> … there is an understandable reluctance to prosecute if the case rests solely on the evidence of a child. The problem of finding corroborative evidence is a major one. In the majority of cases, clinical evidence is not available to confirm the abuse. Most sexual abuse does not involve acts of penetration or violation sufficient to cause physical damage to the body of the child…[22]

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20 Submission 27, pp 1 – 2.

21 ibid.

22 Submission 23, p 4.

> Even if there is penetration, there may be no signs of this. Medical evidence such as the presence of semen or pubic hairs is likely to be obtained only if the child is medically examined relatively soon after the abuse occurs. This assumes immediate disclosure. With sexual abuse there are usually strong disincentives to disclosure. There are the inhibitors of threats, or fears of what might happen if the abuse is disclosed. There is also the powerful inhibitor of shame.[23]

1.28 This is confirmed by the DPP:

> In no other type of case must a prosecutor put forward a child as the most important and, frequently, the only witness… Unlike non-sexual physical abuse, sexual assault will often leave no medical sign and the case will simply be the child's word against that of the accused.[24]

Trauma of the complaint process

1.29 Another impediment to successful prosecution of child sex offenders is the distress caused to the child complainant by the trial itself. This not only serves as a disincentive for complainants to participate in a prosecution, but it can also reduce the effectiveness and reliability of their evidence.

1.30 The 1995 study by the Judicial Commission of NSW, *The Evidence of Children* by Cashmore and Bussey, included an examination of the experiences of children (and their parents) who had been involved in child sexual assault prosecutions.[25] Although this study was completed before the implementation of the reforms of the *Crimes Amendment (Children's Evidence) Act 1996*, it is useful in identifying the main stressors for children giving evidence. These were:

- facing the defendant
- cross-examination
- difficulty of the language used in court and
- procedural and administrative concerns such as
  - closed court
  - absence of support persons
  - delays, adjournments and
  - intimidating courtroom environment.[26]

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23 Submission 23, p 5.

24 Submission 27, p 2.

25 Cashmore and Bussey, "The Evidence of Children", *Judicial Commission Monograph Series No 11*, June 1995.

26 Cashmore and Bussey, p 29.

1.31 A study recently published by the NSW Police Service included a survey of child sexual assault counsellors and witness support officers, who commented on the ongoing difficulties faced by child complainants of sexual assault. Their views on the causes of distress are tabulated below:

Challenge	**WAS Officers & CSA counsellors** (n=27)	
	%[a]	***No.***
Cross examination; behaviour of defence	59	16
Adult system; lack of understanding of child development	59	16
Adversarial system; its impact on children	44	12
Language used at court	26	8
Confronting the accused and facing strangers	22	6
Physical environment of court & CCTV rooms	19	5
Length of time matters take to reach court; adjournments	19	5

Table 2: Challenges most frequently faced by child witnesses at court

a. As more than one challenge was identified by most respondents, the sum of the percentages is more than 100%

1.32 Another recent study was completed by Dr Eastwood and Professor Patton from the Queensland University of Technology.[27] The study involved interviews with children from Queensland, New South Wales and Western Australia who had been complainants in sexual assault trials. Notably, when asked whether they would report sexual abuse again if it were repeated, more than half (56%) of the children in New South Wales said they *would not* report the abuse, 33 per cent said they *would* report the abuse, and 11 per cent were unsure.[28] The reluctance to report was not necessarily connected to the verdict at trial: two-thirds of children who had obtained convictions said they *would not* report abuse again.[29] One of the children in the Eastwood and Patton study wrote:

> … it makes it very hard when police, legal system and judges send messages throughout the world telling us to report crimes like sex offences, and then when we do we get no good outcomes and our lives just get heaps more pressure put on us. All for nothing! It's a waste of time and it hurts a lot. If they keep telling us to report it then they should do something about it when we do.[30]

27 Eastwood and Patton, "The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System", Queensland University of Technology, July 2002.

28 Eastwood and Patton, p 1.

29 ibid, p 1. This figure relates to children across the three jurisdictions in the study.

30 ibid, p 44.

1.33 The Judicial Commission study by Cashmore and Bussey revealed that approximately half of the children who testified in child sexual assault cases considered the court case to have been in every respect a negative experience. Of those who did perceive some benefits, the reasons included: a feeling of vindication (usually where a guilty verdict was handed down); a sense of satisfaction in being heard; and a cathartic effect.[31]

1.34 The Committee received submissions from child sexual assault complainants and their parents, many of whom wished to remain anonymous. Overwhelmingly, their experiences in the courts were distressing, and included:

- ridiculing of child witness by defence counsel
- insinuations and accusations by defence counsel that victim is lying
- victim feeling "taunted and harangued" by the defence counsel[32]
- victim feeling unsupported by the crown prosecutor
- "inhospitable" court rooms
- relentless repetition of questions
- aggressive questioning
- inability of victims to tell the full story of the abuse due to requirement to exclude evidence about incidences not charged
- misrepresentation of children's responses to abuse (such as delayed complaint) to imply the victim is lying.[33]

1.35 The difficulties faced by child witnesses were noted by Professor Briggs, who submitted that:

> To survive the trial, children must be able to tolerate insults and accusations that they are lying, or worse, that they seduced their abuser. They must be able to cope with the tricks that lawyers play to confuse them, bearing in mind that the aim of the defence is to discredit victims.[34]

31 Cashmore and Bussey, p 40.

32 Submission 12, p 2.

33 Various confidential submissions.

34 Submission 2, p 2.

1.36 Commander Heslop, of the Police Service's Child Protection Enforcement Agency concurred:

> I think courts are intimidating places for anybody, including police. I think that if a person is a six or seven year old and goes into a court, it is fairly awful. If that person then has to go on and relate in probably the most intimate detail what a person has done to them sexually in front of everybody and if we are looking at the abuse of children, then if that is not a systems abuse or secondary abuse, I do not know what is.[35]

1.37 A joint report by the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Law Reform Commission (ALRC) concluded that the experience of children as witnesses generally precludes them from telling their stories:

> Evidence to the Inquiry indicated that, whatever the jurisdiction, the structures, procedures and attitudes to child witnesses within all these legal process frequently discount, inhibit and silence children as witnesses. In cases where the child is very young or has or had a close relationship with one of the parties or where the subject of the evidence is particularly sensitive, children often become so intimidated or distressed by the process that they are unable to give evidence satisfactorily or at all.[36]

1.38 Studies have supported the assertion that children find the court process to be an upsetting experience. For example, Professor Oates et al conducted a study on the impact of the criminal justice system on the sexually abused child. The results of the study suggested that children found the experience of testifying to be upsetting, although the distress was not necessarily long-term. The authors noted, however, that the transient nature of the distress does not reduce the need for reform:

> However, because children who testify in court "get over it" is no reason not to make the experience less intimidating. The stress of giving evidence should be reduced.[37]

1.39 The authors also reported that the level of stress experienced by some children at committal resulted in parents refusing to allow the child to give evidence at trial.[38] Parental reluctance to involve their children in a prosecution was also identified in submissions. For example the mother of one child stated:

> I feel very strongly that we all have a duty to make sure that perpetrators of child sexual abuse are prosecuted and pay the price for these vile crimes. But even stronger are my feelings of protection and concern for the recovery of my

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35 Heslop, Evidence, 3 May 2002, p 7.

36 Human Rights and Equal Opportunity Commission and Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84, 1997, p 297.

37 Oates et al, "The Criminal Justice System and the Sexually Abused Child: Help or Hindrance?", *The Medical Journal of Australia*, Vol 162, 6 February 1996, p 129, attached to submission 4.

38 ibid.

> daughter. I fear that the further trauma of a court case hanging over her would be detrimental to my daughter's already fragile health.[39]

Perceptions of children's reliability and accuracy

1.40 A further difficulty for prosecutors arises from misconceptions about the credibility of child witnesses. Given the central role usually played by the child complainant, community (and jury) beliefs about children's credibility – both in terms of accuracy of recall and truthfulness – can impact on the trial outcome.

1.41 As Dr Cashmore notes, the lack of confidence in children's reliability and accuracy can undermine acceptance of their evidence:

> A child may be able to provide a reliable account of events but that evidence may be given little weight if the professions involved and the fact-finder in court believe that children are inherently unreliable and/or dishonest. Of particular importance are the perceptions of the trier of fact, and the competence of both lawyers and judges in eliciting information from children. These people may hold various attitudes and beliefs about children that may affect the way they respond to children and treat them both in and out of court. Prosecutors, for example, who doubt the veracity of children and the likelihood of a jury convicting on the basis of a child's testimony may be reluctant to proceed with cases that rely heavily on the evidence of a young child. Similarly, judges may give strong warnings to the jury if they believe that children are unable to provide reliable evidence.[40]

1.42 The Committee learnt that the credibility of children's evidence is often underestimated by juries and the community more generally. In this regard, the NSW Rape Crisis Centre submitted:

> Children are considered by many people to be unable to distinguish lies from the truth, and even though the veracity of children's evidence has been upheld in many studies, community attitudes in this regard persist.[41]

1.43 A more realistic picture of children's capabilities has been established through studies of children's memory development. For example, Professor Kim Oates, Chief Executive of the Children's Hospital at Westmead, submitted:

> It seems that children's ability to recount events can be very accurate, particularly if free recall and simple direct questions are used. Using these techniques, the accuracy of recall of children six years of age and over, based on experimental studies, is as good as that of adults, with some children under six also being quite accurate.[42]

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39 Submission 53, p 2.

40 ibid, p 14.

41 Submission 30, p 4.

42 Oates, "Children as Witnesses", *Australian Law Journal*, Vol 64, March 1990, p 132, attached to submission 4.

1.44 Similarly, the Professor of Child Development at the University of South Australia, Professor Briggs, advised:

> Children are quite capable of recalling specific information but they have a different process and professionals need specialist training to assist children to explain those details. Because they are experts in law, not childhood, judges and lawyers do not usually have that expertise.[43]

1.45 The HREOC and ALRC report examined studies about children's reliability and accuracy as witnesses, and concluded that they revealed a high standard of evidence from children as long as delays are avoided:

> Children, including very young children, are able to remember and retrieve from memory large amounts of information, especially when the events are personally experienced and highly meaningful. However, children, and adults to a lesser degree, have significant memory loss after long delays. They recall less correct information over time while maintaining as a constant the inaccurate information…In addition there is no psychological evidence that children are in the habit of fantasising about the kinds of incidents that might result in court proceedings or that children are more likely to lie than adults. Indeed, research suggests that children may be actually more truthful than adults. Certainly, the research on children's beliefs about court proceedings implies that children may be more cautious about lying in the witness box than adult witnesses.[44]

1.46 Dr Judy Cashmore has written a number of papers about the reliability of children as witnesses, and notes:

> The importance of this issue arises from a general concern and traditional belief in the law that children are not truthful. But we need to ask why children are seen as less truthful than adults? Often, this view is based on anecdotal evidence of catching children out in lies. The fact that children are caught out more often, however, does not necessarily mean that children lie more often than adults. It is more likely to reflect their lack of skill.[45]

1.47 According to Dr Cashmore, studies have suggested a high standard of accuracy of children's evidence:

> The results of these studies indicate that, although children may be suggestible on peripheral information, they tend to be very accurate and resistant to misleading suggestions for central abuse-related information…
>
> … The main problem with children's reports lies in the omission of information rather than the commission of false information. When children are simply asked to report events without prompting (eg "Tell me what happened"), they provide less information than adults. What they do provide in free recall, however, is

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43 Submission 2, p 3.

44 HREOC and ALRC, pp 305 – 307.

45 Cashmore, "The Reliability and Credibility of Children's Evidence", Paper presented to Seminar "The Child as a Witness", Dubbo, June 1991, Attached as appendix to submission 70, p 2.

> generally quite accurate, and any errors tend to be errors of omission rather than errors of commission.[46]

1.48 Studies have also been conducted specifically to examine the truthfulness of children's allegations of child sexual assault. Professor Oates told the Committee:

> We published an extensive study out of a large sample of children in Denver looking at false allegations by children of sexual abuse because this question often comes up. That study showed that the level of false allegations of children was 1.2 per cent, so there are occasions of false allegations by children, but they are not very common…
>
> The movement that was around a while ago saying "children never lie" was an error because we all know that children lie, or they can be loose with the truth at times but they are not very good at it. One can often tell when a child is making a false allegation whereas adults, particularly offenders, are brilliant liars and manipulators. The various studies that have been done about false allegations from children fall into two groups. The most recent one was the one that we published and there are several others but all show that very low percentage when they are carefully looked at, of false allegations by children. Another group of a small number of studies are quite small samples that have got false allegations up around 20 or 30 per cent of children and all of the ones in that latter group are custody cases where the child is being coached.
>
> A skilled interviewer can usually tell the difference because children who are sexually abused are intimidated and they are told not to tell anybody. When they eventually pluck up the courage and tell somebody they tell it partially and haltingly and in fear and need a lot of reassurance whereas children who have been bribed or coached to tell a story of sexual abuse tell it the way they tell a speech they have learnt for school speech day. It is quite a different process.[47]

Rules of evidence

1.49 The rules of evidence govern which facts and other information are permitted to be taken into account by a court, and how that information is presented and assessed. The *Evidence Act 1995* establishes the rules of evidence in New South Wales. It covers admissibility requirements relating to relevance, and exclusionary rules such as hearsay, tendency, coincidence and credibility. Judicial discretion to exclude admissible evidence (such as evidence that is excessively prejudicial) also falls within the ambit of the *Evidence Act*.

1.50 According to Dr Cossins, the rules of evidence themselves create impediments to successful prosecution of child sexual assault charges:

> Because the prosecution of CSA is hampered by rules of evidence and methods of cross-examination that are based on discriminatory beliefs about the propensity of female children to lie about being sexually assaulted, it can be argued that it is the

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46 ibid, p 11.

47 Oates, Evidence, 17 May 2002, p 21.

> way the CSA trial is conducted that makes the offence harder to prosecute, rather than the fact that the prosecution's chief witness is a child.[48]

1.51 Dr Cossins is critical of arguments that rely on the point that the rules of evidence seek to ensure a just outcome of the trial in the child sexual assault context:

> The accepted wisdom about the rules of evidence that apply in the criminal trial is that they "ensure that the trial process is fair for [both] parties" to the proceedings. Generally speaking, however, these rules have the potential to prevent a child complainant from fully explaining their evidence and to prevent their evidence from being assessed in the actual context in which the assault is alleged to have occurred due to a general reluctance to admit 'similar fact' evidence and the general trend in Australia to hold separate trials where the accused has allegedly sexually assaulted more than one child.[49]
>
> If, as clinical and prevalence studies have found, lack of corroboration is a *typical*, not aberrant, characteristic of the crime of child sexual assault then it is incumbent upon reformers to address this and other distinctive features of the crime, such as the reasons for delay in complaint, repeated abuse over months or years, 'grooming' and manipulation of the child which may be accompanied by covert and overt threats, and the long-term psychological effects of sexual abuse. In particular, reforms to the child sexual assault trial need to consider the public policy objective of protecting children from sexual exploitation.[50]

1.52 Professor Parkinson also commented on the impact that the rules of evidence have on the success of prosecutions:

> In a criminal trial, the evidence which is allowed to be heard by a jury is often very narrow. Any evidence which is more prejudicial to the defendant than probative of the offence is excluded, and in this way the incident may be shorn of some of its context.[51]

1.53 The Committee notes that the rules of evidence affect the outcome of trials because they determine what evidence the jury is provided with in determining the guilt or innocence of the defendant. The details of the relevant rules of evidence, their interpretation by the courts, and their impact on child sexual assault trials are a key focus of this report, and are examined in depth in Chapter Four.

The Need for Reform

1.54 It is clear to the Committee from the information in the preceding sections, that significant public policy issues are raised by this Inquiry. Child sexual assault offenders have a known propensity to recidivism. Detection, conviction and treatment of perpetrators of child

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48 Submission 69, p 5, footnotes omitted.

49 ibid, p 7, footnotes omitted.

50 ibid, p 32.

51 Submission 23, p 7.

sexual assault are essential to the prevention of child abuse, particularly since many child protection mechanisms are activated only following a conviction.

1.55 If prosecutions of perpetrators of child sexual assault are unsuccessful merely as a result of failures in the prosecutory system, or because the traumatising effect of the court process inhibits complainants from participating in the prosecution or undermines the acceptance of their evidence, this has clearly unacceptable consequences for individual children and dangers for society at large. It is equally important that complainants who do testify do not do so at the cost of their emotional well-being.

1.56 Dr Cossins' submission drew the Committee's attention to the broader implications of the failure rate for prosecutions of child sexual assault:

> The difficulty in gaining convictions poses problems for the Department of Community Services, the police, and the DPP, in terms of dealing with children who are at risk, repeat offending by perpetrators, improving investigation methods and identifying those cases at which resources should be aimed.[52]

1.57 Previous reports have examined the problem of prosecuting offences against children, including the Royal Commission into the NSW Police Service, *The Paedophile Inquiry* in (August 1997), the HREOC and ALRC, *Seen and Heard: Priority for Children in the Legal Process*, (1997) and the Attorney General's Children's Evidence Taskforce, *Taking Evidence in Court* from 1994 and *Audio and Videotaping of Children's Out of Court Statements* in 1997. The findings of those reports have focused on the means of minimising the stress on the child witness through evidentiary reforms and technological solutions. Appendix 4 contains the recommendations of these recent reports, and the status of the implementation of recommendations.

1.58 The Committee acknowledges that some significant changes to the rules of evidence and court procedures have occurred in the past two decades, many arising out of the previously mentioned reports. However, the Committee has noted with some frustration that while many systemic problems were identified by previous inquiries, a significant proportion of the recommendations contained in the reports have not been implemented by the relevant governments.

1.59 This was also adverted to in evidence by the DPP:

> I mentioned the Wood Royal Commission. It is perhaps appropriate to mention the final report, Volume 5, of the Paedophile Inquiry issued in August 1997 [and] the nine recommendations made by the Royal Commission in this area. By my count one half of one of those nine recommendations has been implemented, and the other 8½ have not… The simple fact of the matter is that a lot of very useful recommendations were made by both the Australian Law Reform Commission and by the Wood Royal Commission. The vast majority of the recommendations have not been acted upon.[53]

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52 Submission 69, pp 2 - 3.

53 Cowdery, Evidence, 26 March 2002, p 14.

1.60 Reforms to the rules of evidence relating to children that have been adopted since 1985 include:

- *Crimes (Child Assault) Amendment Act 1985*, which removed the requirement for children's unsworn evidence to be corroborated, extended statutory warnings against inferences about delayed complaints, and allowed support persons to accompany child witnesses.

- *Oaths (Children) Amendment Act 1985*, which allowed a child to give unsworn evidence if the court is satisfied that the child understands the duty to tell the truth.

- *Evidence (Children) Amendment Act 1985*, which abolished the warning about the danger of convicting on a child's unsworn, uncorroborated evidence.

- *Justices (Paper Committals) Amendment Act 1987*, which excused complainants of sexual offences from giving evidence at committal hearings unless special reasons exist.

- *Evidence Act 1995*, that allowed complaint evidence if the fact is 'fresh in the memory' of the complainant, and made it unnecessary for the court to warn the jury about acting on uncorroborated evidence, and

- *Crimes Amendment (Children's Evidence) Act 1996*, which gave a general right for children to have support persons present in any matter, allowed evidence to be given by alternative means, including screens and CCTV.

1.61 Despite these legislative amendments, a number of witnesses suggested that there is ongoing need for reform. For example, the Department of Community Services submitted:

> In recent years, reforms to the rules of evidence and court practices have been introduced, to address the particular needs of child victims who are witnesses… It is now timely to further refine our approach to child witnesses, enhance their ability to give evidence, and ensure that court practitioners and members of the judiciary are better equipped to receive and understand the evidence of children.[54]
>
> Fear or lack of faith in the prosecution process *itself* should not be the reason why children do not report or participate as witnesses in the criminal process.[55]

1.62 On this matter, Professor Briggs submitted:

> It was then [in the mid-1980s] a concern that the adversarial Australian justice system not only failed to provide protection for child victims of sexual abuse, it added to the trauma and psychological abuse already inflicted on children by sex offenders. Little has happened to remedy this and concerned parents are now

54 DoCS, Submission 70, p 7.

55 ibid, p 8.

> refusing to allow their child victims to participate in prosecution because of the effects on children.[56]

1.63 Similarly, Dr Cashmore gave evidence that:

> While there have been a number of substantial changes, in many ways these changes have been necessary but not sufficient…My argument would be that we have only gone part way, that we have allowed more children into the system but we still have not necessarily allowed their voices to be heard when they are there. Under the United Nations Convention on the Rights of the Child articles 12 and 13, Australia has a duty not only to hear from child witnesses but also to free them from constraints, anxiety and distress which might inhibit their evidence. So, while technological and procedural fixes have helped the process in terms of getting children in, I think we still have some way to go in making sure that there is a level playing field for children as witnesses in what is inherently an unequal contest at this stage.[57]

1.64 Commander Heslop of the Child Protection Enforcement Agency agreed that more reform is necessary:

> I do not think that in general terms we have gone far enough in our positive treatment of children in the court system as victims. They are vulnerable persons and I think that we need to make some inroads into how we treat them in our court system, over and above what we have now.[58]

1.65 The Committee notes, however, that the view regarding the need for further reform was not universal among participants in this Inquiry. For example, the Legal Aid Commission of New South Wales submitted that:

> This Commission is of the view that the current state of law and procedure are such that all that can reasonably be done has been done to ensure that victims of child sexual assault will be willing to report their allegations to the police, and co-operate in the investigation and prosecution of these matters.[59]

1.66 The Committee considers particular proposals for reform in the body of this report.

Right to a Fair Trial

1.67 The Committee is conscious that its examination of the need for changes to the prosecution of child sexual assault must be conducted with an awareness of the principles that underpin the criminal justice system in New South Wales. At the centre of this system is the fundamental right of people accused of a crime to know the case against them, to be

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56 Submission 2, p 2.

57 Cashmore, Evidence, 19 April 2002, p 1.

58 Heslop, Evidence, 3 May 2002, p 7.

59 Submission 57, p 2.

presumed innocent until proven guilty, and to test the Crown's case against them. These points are known collectively as the right to a fair trial.

1.68 The Director of Public Prosecutions acknowledged the central role of a fair trial:

> The background to all of this is that we operate an adversarial system of criminal justice… It is adversarial in the sense that one case is battling against another case. It is not a search for the truth; it is putting a Crown case against a defence case, and the jury being asked whether or not they are satisfied beyond reasonable doubt that the Crown case has been made out.[60]

1.69 Similarly, Professor Parkinson gave evidence that:

> The consequences of conviction are very serious. The defence is entitled to present its case with appropriate vigour, and the presumption of innocence is the foundational principle of the criminal justice system.[61]

1.70 The argument for the rights of the accused were strongly put by the Legal Aid Commission:

> This Commission is concerned that there needs to be a balance in the prosecution of child sexual assault matters between the rights of the accused and the interests of the child complainant. In recent years the emphasis has been on the difficulties experienced by child complainants, and legislation has been enacted to make the process of making statements and giving evidence less stressful. We are concerned to ensure that the interests of the accused are not overlooked in this process.
>
> The Commission is of the view that legislative change in all jurisdictions is eroding the rights of the accused.[62]
>
> The accused is entitled to the presumption of innocence and all the protections which exist to ensure a fair trial. In any discussion of the prosecution of child sexual assault matters, the protection of the rights of the accused should be given paramount consideration.[63]

1.71 In evidence, representatives from the Legal Aid Commission further emphasised the importance of the rights of the accused:

> I think it is important, at the end of the day, that we do not lose sight of the fact that the sole purpose of the criminal justice system is to determine the guilt beyond reasonable doubt or otherwise of the accused in circumstances where there is a presumption of innocence.[64]

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60 Cowdery, Evidence, 26 March 2002, p 5.

61 Submission 23, p 11.

62 Submission 57, p 4.

63 Submission 57, p 8.

64 Humphreys, Evidence, 3 April 2002, p 2.

> I would like to … emphasise that the aim of the process of a criminal trial is to ensure a fair trial. By that I mean a fair trial to the accused and a fair trial to the Crown. The object of the exercise is not to secure a conviction. One must bear in mind where the onus of proof lies and what is termed the presumption of innocence… It would be my submission that the accused person has the right to know what case he has to meet and indeed the right to test that case.[65]

1.72 As the Public Defenders noted, the scarcity of evidence in child sexual assault crimes should not reduce the rights of defendants to a fair trial:

> The protections that are allowed to the accused in other very serious crimes cannot be diminished … because of some of the difficulties of proof.[66]

1.73 The Judicial Commission monograph on Child Sexual Assault also observed the central importance of the rights of the accused:

> … the purpose of a criminal trial is to determine whether the accused person is guilty of the offence charged. It follows that the court's major focus (unlike the focus in family law or child care proceedings) is the position of the accused, requiring proof of guilt beyond reasonable doubt.[67]

1.74 The Committee agrees with the view that rights of the accused to a fair trial cannot be compromised or undermined in any attempt to improve the success of prosecutions for child sexual assault and to lessen the burden created for child witnesses who testify in court. Any attempt to make the criminal justice system more child-friendly must occur without undermining the legitimate rights of defendants.

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65 Fraser, Evidence, 3 April 2002, p 2.

66 Winch, Evidence, 9 July 2002.

67 Judicial Commission of New South Wales, "Child Sexual Assault", Monograph Series 15/1997, p 73.

Chapter 2 The Complaint Process

This chapter examines the first two terms of reference for the Inquiry: communication between the complainant and the authorities concerning the consequences of pursuing a prosecution for child sexual assault; and the role of sexual assault counsellors in the complaint process. The Committee has found that many submissions and witnesses identified concerns with authorities' communication with child sexual assault complainants generally, and not just in relation to the consequences of commencing a prosecution. The Committee believes this broader issue to be worthy of consideration, and has incorporated it into its examination of the first term of reference.

There are several key agencies involved in communicating with children and their parents in a child sexual assault matter: the Police Service, the Department of Community Services (DoCS) and the Office of the Director of Public Prosecutions (ODPP). Since 1997, investigations of child abuse have been conducted by 'Joint Investigative Response Teams' (JIRTs) consisting of officers from the Police Service and DoCS, who are supported by the Department of Health where appropriate.[68] Contact between the complainant and the JIRTs would typically relate to forensic interviews and the progress of the investigation. Once the investigation is complete, if there is sufficient evidence for a prosecution, the information brief is provided to the ODPP. The complainant's contact with the ODPP would usually be associated with the progress of the prosecution, hearing dates for committals or trials, witness preparation services, and trial outcomes. In addition, the Department of Health's child sexual assault services would provide medical and psychological care.

Communication with the Complainant about the Consequences of Prosecution

2.1 In deciding whether to participate in a prosecution for child sexual assault, complainants and/or their caregivers have a number of issues to consider – the interests of the child, the potential emotional cost, the effect (particularly in intra-familial assault) of a conviction, and the impact on the child if there is an acquittal. Complainants and their families will be in need of information about the process, their role as complainant, the likely court experience and the possible impact on recovery and emotional well-being. In this, they are largely dependent on the information they obtain from police and prosecutors, and the decision made by complainants or parents can be affected by the nature of the information provided by those officers.

2.2 The difficulties and stresses of the prosecution process for child complainants, as described in the previous chapter, are well known to police officers and to prosecutors. Indeed, many professionals involved in the criminal justice system have indicated that they would not allow their own child to be involved in a child sexual assault prosecution because of the additional trauma it is likely to cause.[69] A common concern expressed to the Committee in the course of this inquiry was that these negative views held by police officers and

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68 Joint Investigative Response Teams 2001 Policy and Procedure Manual, Tendered by Ms Gray, 3 May 2002, p 1.

69 Eastwood and Patton's study reported that only 33% of legal professionals in NSW would want their child in the justice system if that child was a victim of serious sexual assault (p 2).

prosecutors may be communicated to parents and complainants, thus discouraging them from pursuing a complaint, and resulting in charges against alleged perpetrators being dropped.

2.3 The DPP submitted that, ideally, a balanced view of the consequences should be given to complainants and parents:

> Communication concerning the consequences of pursuing a prosecution for child sexual assault needs to be an objective presentation of the prosecution process, the likelihood of conviction and the impact of the legal process upon victims and their families. It is important that first the police, and then the prosecution, do not present an overly negative picture of pursuing a prosecution. The reactions and feelings of a child who has just given evidence or heard that the verdict is not guilty are not necessarily those that will stay with them over time.
>
> Police and prosecutors need to be wary of expressing a personal view of the process and the impact of that process; for instance, saying that they would not let their own children give evidence and be subject to cross-examination. This sort of comment can have a very powerful impact upon victims and their parents.
>
> Equally, people should not be presented with an overly optimistic view of the case; eg being told that it is a strong case, that the person will be convicted or that the person will go to gaol. This may not be the case even when an accused has made admissions to the police – at the trial it may be argued successfully by the defence that the interview is inadmissible, questions of fitness may be raised and so on.[70]

2.4 This was also the opinion of the Salvation Army:

> Participants in the case need to be given good, reasonably comprehensive information concerning… a fair and realistic appraisal of likely outcomes of the case, including both negative and positive possibilities, as well as any assessment of likely further trauma being caused to the victim.[71]

2.5 A number of submissions considered that the information given to complainants is unduly pessimistic, focusing on the unlikelihood of success and the probability of distress, while omitting or de-emphasising any possible benefits of the prosecution. For example, the author of submission 19, a child sexual assault complainant, wrote:

> Quickly and coldly you are advised on the difficulties of obtaining a successful judgement in a sexual abuse case at any time, near impossible when the victim allows years to elapse before reporting the crime. There is no consideration given to the reasons why it has taken years for the victim to gain the courage to face the battering that comes with revealing the sexual abuse and exposing the abuser… The victim is told how fortunate they are to have obtained even those charges against their abuser.[72]

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70 Submission 27, p 5.

71 Submission 42, p 3.

72 Submission 19, p 2.

2.6 The submission from the Catholic community service organisation Centacare expressed concern that:

> … in discharging their role to inform children and parents of the nature of the court process and the personal cost to victims, officers inadvertently dissuade victims from continuing to seek justice.[73]

2.7 Similarly, the Salvation Army noted:

> Information given to complainants needs to be factual, however, we express concern at anecdotal evidence which suggests that complainants are discouraged from pursing a prosecution because of fear that court processes will add extra trauma to the child.[74]

2.8 There was also some suggestion from child sexual assault counsellors that parents and complainants are being discouraged from making a complaint:

> Counsellors within the CASAC network have expressed concern that JIRT are speaking with families about the negative aspects of proceeding to court which appears to be serving to discourage families to follow through with legal action. It is suggested that a more balanced view of the negatives and positives of taking legal action would be more helpful and appropriate.[75]

2.9 This problem was also encountered by the Women's Legal Resource Centre:

> Our clients have reported JIT officers painting bleak pictures of the court process and highlighting the trauma for children of making a child sexual assault complaint in an effort to actively discourage parents from proceeding with an interview and complaint.[76]

2.10 The Commander of the Child Protection Enforcement Agency (CPEA) considers that it is essential that complainants and their families be informed, but that they should not be discouraged from participating in the prosecution:

> Certainly the police in their understanding and my officers in their understanding of the Charter of Victim's Rights, part of that is to inform parents, caregivers and the child… We owe that to them. I do not necessarily think it is a case of talking children and/or their parents or care givers out of proceeding, but it is to be upfront with them. It is to let them know what will happen from here on… Having said that, sometimes that can be the case why one case will be dropped out of the system, because parents and/or children say, "I do not want to do that. I do not want to have to get up in court and tell a whole room full of people in the court what he did to me. It is embarrassing…[77]

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73 Submission 32, p 2.

74 Submission 42, p 3.

75 Submission 47, p 1.

76 Submission 67, p 5.

77 Heslop, Evidence, 3 May 2002, p 6.

> I would like to think that my staff are not actively encouraging people *not* to pursue the matter. If I was aware that they are, that is something that I would need to address… The last thing as the police officer I want to do is have somebody get off and not be investigated or not have the matter pursued.[78]

2.11 The Committee was also advised that sometimes inadequate information was given about the consequences of making a complaint. For example, the Education Centre Against Violence advised:

> If information is insufficient or framed in negatively biased ways, this can discourage parents from granting permission for police to proceed with the child sexual assault investigation. Decisions about whether to become involved in the criminal prosecution process are big decisions made by parents and children for which they need information and support. Current systems are overloaded and carers report a lack of information and support in that decision making.[79]

2.12 A local child sexual assault service submitted that the stress of the system was impossible to portray adequately:

> Certainly the police and the prosecution have an important role in ensuring that the process is understood but to suggest that it is possible to communicate the consequences of pursuing a prosecution in any way that can be readily reasoned by victims and that would improve their experiencing of that system, is to deny the complexity of that process. Until there are significant changes to the way child sexual assault matters are prosecuted the process will continue to be very unsatisfactory and possibly detrimental to the victim.[80]

2.13 The Committee acknowledges that a decision about whether a child should participate in a prosecution is extremely difficult, and caregivers and complainants are entitled to be fully informed of the hardship that is likely to accompany the process. Clearly there will be cases where the interests of the child will not reflect the interests of the broader community in apprehending and convicting child sex offenders.

2.14 The Committee is conscious that communicating the consequences of a prosecution for the complainant presents a complex problem. As the previous chapter highlighted, participation in a child sexual assault prosecution is a distressing, anxious experience for the child complainant, and one that the majority of child witnesses say they would not repeat. The prospective complainant and his or her carers are entitled to know this when deciding on whether to proceed with a complaint.

2.15 However, the Committee is concerned that the police and prosecution may discourage complainants from proceeding with their complaint by focussing on the difficulties of the process. The evidence from Commander Heslop and the DPP demonstrates that at the highest levels of the Police Service and the Office of the DPP, it is considered important that information about the impact of pursuing a prosecution is presented to parents

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78 ibid, p 9.

79 Submission 40, p 8.

80 Submission 61, p 2.

impartially and without bias. The evidence provided by complainants, legal centres and child sexual assault counsellors, however, would suggest that police officers and prosecutors do, on occasion, allow their own negative perceptions of the prosecution process to discourage complainants from proceeding. As a first step, the Committee recommends that the importance of providing objective information be reiterated to police officers and prosecutors.

Recommendation 2

The Committee recommends that the Director of Public Prosecutions and the Commissioner of Police use appropriate internal communication methods to remind staff of the Office of the Director of Public Prosecutions and police officers (respectively) of the necessity of impartially presenting information to complainants and their carers about the consequences of pursuing a prosecution for a child sexual assault.

2.16 However, the Committee considers that ensuring that the complainant is provided with impartial information about the consequences of pursuing a prosecution is a superficial measure only. It would be more pertinent and productive to address the fundamental problem, which is that the process of prosecuting a child sexual assault complaint is extraordinarily distressing to the complainant. Eliminating the sources of stress would remove the motivation for police officers and prosecutors to discourage complainants from proceeding. This is the key focus of the remainder of this report.

Communication with the Complainant about Other Matters

2.17 Complainants have expressed concern about receiving inadequate information and feedback as they pass through the complaint process. The information to which victims of crime are entitled is established by the Charter of Victims Rights contained in the *Victims Rights Act 1996*. The Director of Victims Services, Ms Claire Vernon, advised the Committee that the standards for treatment of victims of crime include:

> **4. Information about investigation of the crime**
>
> A victim should, on request, be informed of the progress of the investigation of the crime, unless the disclosure might jeopardise the investigation. In that case, the victim should be informed accordingly.
>
> **5. Information about prosecution of accused**
>
> A victim should, on request, be informed of the following:
>
> (a) the charges laid against the accused or the reasons for not laying charges
>
> (b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including [plea bargaining]

> (c) the date and place of hearing of any charge laid against the accused,
>
> (d) the outcome of the criminal proceedings against the accused …
>
> **6. Information about trial process and role as witness**
>
> A victim who is a witness in the trial for the crime should be informed about the trial process and the role of the victim as a witness in the prosecution of the accused.[81]

2.18 The Police Service submission outlined the types of communication that typically takes place between the police and the complainant in a child sexual assault investigation, as detailed in the *NSW Interagency Guidelines for Child Protection Interventions (2000)*:

> During the progress of criminal proceedings issues will arise that need to be communicated to those working with the child or their family in cases of child sexual assault. The information communicated to complainants include:
>
> - dates of court listings, hearings, trial adjournments
> - dates for the hearing of evidence from a victim
> - bail applications, granting of bail and any conditions
> - breaches of bail conditions and progress of proceedings
> - charges withdrawn by the Crown (no bill applications)
> - findings or determinations of courts
> - sentencing decisions and appeals
> - any other matter that arises and is relevant to the safety or welfare of the child.[82]

2.19 The nature of communication between the complainant and the prosecution is set out in the DPP's submission:

> Communication between the prosecution and the complainant and family focuses on providing information as outlined under the **Charter of Victims Rights** in the **Victims Rights Act (1996)**… eg their roles as prosecution witnesses. Complainants and their families are informed of the progress of the matter if they request this information. [83]

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81 Submission 22, p 2.

82 Submission 82, p 4.

83 Submission 27, p 6.

2.20 According to the DPP, problems in communicating with complainants include:

- lack of contact details provided by the police when the matter is first referred to the ODPP
- the child and family being difficult to contact for a variety of reasons; eg. rural and remote locations, transient lifestyles or lack of communication facilities.[84]

2.21 The Committee notes that many submissions were highly complimentary of police officers and/or prosecutors. For example, the author of submission 10 wrote that she was:

> … always dealt with in a very professional manner. I cannot stress how highly I regard the integrity of that particular arm of the NSW Police Force… I became very close to two of the DPP ladies during the lapse in time between court hearings which helped me immensely mentally.[85]

2.22 In submission 12, the author noted:

> … I would like to note that the communication I experienced between the investigating officer in my case … and myself was excellent. Further, her commitment to her work and the professionalism with which she carried out what can only be described as an emotionally challenging job are to be commended.[86]

2.23 The Committee acknowledges that extraordinary demands must be involved in working in the child protection field, and commends the officers in the Police Service and the Office of the Director of Public Prosecutions for the professionalism and integrity of their work with victims of child sexual assault. However, a number of submissions identified areas of concern in relation to the communication between complainants and the police and prosecution, and these are reviewed below.

Provision of progress reports to complainants

2.24 One problem that was commonly cited by complainants was obtaining progress reports on the status of the investigation or prosecution of a complaint. For example, one complainant submitted:

> I was informed by the Detective that she would follow up with me in a couple of days, maybe a week, re any changes to my statement, contacting my parents and approaching [the alleged perpetrator] on the matter. No follow up was made by the Detective. I had to chase the officer for any information regarding my complaint and its status. Officer would not return any of my calls. No one else in the Station knew about my matter nor where it was up to…

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84 Submission 27, p 7.

85 Submission 10, pp 1 – 2.

86 Submission 12, p 2.

> I was … told by the supervisor that I should get on with my life, it was unrealistic to expect the case to go anywhere, I hadn't done anything for 13 years why bother now.[87]

2.25 The Education Centre Against Violence also commented on problems of lack of information about the status of an investigation:

> For matters taken up for investigation by JIRTS, many carers and children report difficulties in obtaining feedback about the progress of the investigation of their case.[88]
>
> Child witnesses and their carers need to be quite assertive and persistent in pursuing this information. Because of the numbers of people that can be involved in their case, it is not always clear to the carer who they can contact for this information. This can have serious consequences for the well being of the child witness and their family.[89]

2.26 Similarly, the network of Child and Adolescent Sexual Assault Counsellors (CASAC) submitted:

> CASAC workers statewide have reported difficulties with the communication between the Joint Investigation Response Team (JIRT) and the victims of sexual assault and their families. Counsellors have found that at times the police have not kept clients informed of what was happening with their case. This can prove to be distressing to the client, particularly when they have fears about what will happen when the offender finds out about the disclosure. They are left unable to take protective measures if they are not informed. On many occasions clients will have no idea of what is happening, understand very little about the system and have not heard from the JIRT team for some time.[90]

2.27 This was confirmed by the CASAC counsellors in evidence:

> We have had experiences with families that have not heard for weeks about what is happening. They do not get any information. They try to contact people and they cannot seem to get through. That seems to be a big problem…[91]
>
> I hear repeatedly from families that they do not even get their phone calls returned. I am not wanting to put down the joint investigation response teams [JIRTs] because I recognise how under-resourced and busy they are. However, yesterday a young woman told me that she made her statement [about her child's disclosure] 18 months ago and she has not received a single phone call. She has no

87 Submission 21, p 6.

88 Submission 40, p 7.

89 ibid, p 8.

90 Submission 47, p 1.

91 Peters, Evidence, 23 April 2002, p 17.

> idea where the matter is up to. She is wanting to proceed… She has made repeated phone calls to the office, but she has just not had them returned.[92]

2.28 The Combined Community Legal Centres noted:

> Community Legal Centre (CLC) solicitors find that the communication between complainants and the police, DPP and the Courts needs to be improved. On the whole, CLC solicitors feel that they still have to act as liaison officers on behalf of complainants, to ensure that complainants receive the correct information about procedures, and to ensure that complainants are kept up to date with the progress or otherwise of their case. The responsibility for informing clients about their case should lie with the police, DPP, DoCs, VCT and others involved in the justice system.[93]

2.29 Furthermore, Commissioner Calvert suggested that, rather than waiting for a complainant to seek information about the status of a prosecution, the ODPP should initiate the communication:

> … I think the Committee has probably heard from a number of people about the difficulty that kids and family have in understanding the process. It is a highly anxious time for them. They do want to know what is going on. I think from the point of view of putting the child's needs first, thinking about the impact on the child and just offering a decent customer service, that really the onus should be on the prosecution, the DPP, to be proactive in contacting the child or the child's family and keeping them up to date with where things are in the prosecution process.[94]

2.30 At present, a complainant is provided with the contact details of both the police officer and the DoCS worker, and may seek information from either of them. Commander Heslop told the Committee that the nature of the case will sometimes result in one of the JIRT members taking a more prominent role in communicating with the complainant:

> In the majority of cases there is the role for DOCS and for the police. If there is criminality involved that points us to the investigation process, the police officer will often be the point of contact because the case will head in that direction for us… If no criminality is involved, the police will go to a certain point and then DOCS will come in…
>
> From the outset, victims and families are given cards of both DOCS and police officers who are on their case…We encourage both police and DOCS officers to make contact and say, "if you need to know something or something is not clear, contact me". This doubles the chance of getting a person who knows about the case.[95]

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92 Wightman, Evidence, 23 April 2002, p 22.

93 Submission 64, p 8.

94 ibid, p 6.

95 Heslop, Evidence, 3 May 2002, p 4.

2.31 The Committee heard that the Police Service has sought to improve its provision of information in more recent years:

> In relation to communication, I would like to think that that is one thing that we have improved substantially over the years. Ongoing police training for JIRTs has focused attention on the provisions of the charter of victims rights. From a policing point of view, others in my command reinforced the need to keep victims and their families in the loop about where investigations are at.[96]

2.32 The Commissioner for Children and Young People, Ms Gillian Calvert, suggested in her submission to the Inquiry that difficulties in the provision of information could be minimised if a JIRTs case worker were to be designated for each case:

> With an emphasis on consistency, the Commission [for Children and Young People] recommends each JIRT should select a case manager from existing JIRT staff. The case manager would be specially trained and formally designated to serve as a communication focal point for each child and his or her family, from the investigative stage, through to and including the prosecution itself.
>
> The tasks of the case manager would include communicating with the child victim and his or her family and notifying them of significant events in the investigation. They could also liaise with a representative from the DPP Witness Assistance Programme, co-ordinating communication with the prosecution in that sense. This would enable the case manager, child complainant and family to form a relationship, centred on effective communication over an extended period of time. It would also provide a link between pre-trial investigative procedures, court proceedings and post court counselling if required.
>
> In proposing the means of ensuring effective communication, it is important to clarify that the provision of a designated case manager must not become a substitute for open access to information provided by other members of the JIRT team.[97]

2.33 Commissioner Calvert provided further information about her proposal during a hearing with the Committee:

> Disclosure and prosecution is a very anxious time for kids. Having easy access to a familiar face, someone who can keep them up to date, is one of the best ways that we can help kids and families manage that anxiety. Familiarity also helps kids to share their concerns and helps them tell aspects of their story that they may not have told up to that point.
>
> We thought that providing a case manager from within the existing JIRTs was one way that we could set up a familiar face. The case manager should be from the existing JIRT staff, but it should not be a permanent position. It would be as part of someone's everyday activities as a JIRT member to be allocated as a case manager to one of the existing kids that that worker was seeing. The worker would then be responsible for managing the case and being the familiar face for that child. I think it is something that can be done within existing resources

96 ibid, p 2.

97 Submission 80, p 3.

> because, in fact, the JIRTs should be doing that in any case. We are formalising … and making it very explicit for the child and for the worker what the responsibilities are and the relationships that they have to attend to.[98]

2.34 The Committee is aware that a review of the Joint Investigative Response Teams has, after some delay, been completed. The Evaluation acknowledges that a failure by JIRTs to provide feedback to the complainant has been a problem:

> Unfortunately, no data is available in this evaluation about the follow-up arrangements and continuing support for the child and the family. Complaints to CPEA about the way cases are dealt with indicate, however, that some families are unhappy about the level of feedback and support and the lack of information given to them about the progress of the case.[99]

2.35 The Committee notes Commander Heslop's intent is that all complainants are kept informed of the progress of the investigation into their complaint. However, it appears from information provided to the Committee that this policy is not being uniformly implemented: some complainants who seek progress reports are unable to obtain them, and this is undoubtedly an additional source of anxiety for complainants that could easily be overcome.

2.36 The Committee does not have sufficient information to be able to determine the likely causes of the failure to keep complainants informed, although stretched staffing resources could be a relevant factor. Unfortunately, the JIRTs evaluation did not collect data on this issue. The Committee suggests that it would be beneficial for JIRTs management to assess conformity with the feedback policy and the causes of any failures to provide feedback. An evaluation of the need for a designated case manager to be appointed from within the JIRTs (as proposed by Commissioner Calvert) could be undertaken in that context.

2.37 There would also be a benefit in reminding police officers and prosecutors generally of their responsibilities in relation to communicating progress to complainants.

Recommendation 3

The Committee recommends that Joint Investigative Response Teams (JIRT) management assess its officers' provision of information to complainants, and the reasons for shortcomings in communicating the progress of a complaint. An evaluation of the need for a designated case manager to be appointed from within the Joint Investigative Response Teams could be undertaken in this context.

98 Calvert, Evidence, 17 May 2002, p 2.

99 John Taplin and Vanessa Green, *Evaluation of the Joint Investigation Team (JIT)/Joint Investigation Response (JIR) Strategy*, June 2002, p 33.

Recommendation 4

The Committee recommends that the Director of Public Prosecutions and the Commissioner of Police use appropriate internal communication methods to remind staff of the Office of the Director of Public Prosecutions and police officers (respectively) of the necessity of informing complainants about the progress of their complaint.

2.38 In addition, the Committee proposes that the police and prosecution be more proactive in their provision of information to complainants. At present, the Charter of Victims' Rights establishes a right for victims to be advised of the progress of the investigation and prosecution of their complaint **when they request such information**. This places the responsibility for seeking information on the victim. The Committee agrees with the Commissioner for Children and Young People that it would be appropriate for communication to be instigated by the police and prosecuting authorities, so that the authorities take the initiative in contacting the complainant to advise them about any progress (or lack of progress) with their complaint.

2.39 Clearly this recommendation goes beyond the existing requirements of the Charter of Victims' Rights. However, the Committee considers it likely that many victims would be intimidated by the criminal justice system, confused about whom to contact, and distressed by their recent experiences, all of which would impact on their ability to seek information. Placing the responsibility for communicating with complainants on the police and prosecution would remove such difficulties.

Recommendation 5

The Committee recommends that the Charter of Victims Rights be amended so that communication of information about the progress of a complaint is required to be initiated by the Police and the Prosecution, rather than at the instigation of the victim.

Sensitivity and 'child-friendliness'

2.40 General comments received by the Committee regarding communication with child complainants included reference to the need for child-friendly language and approaches to be used by those who interact with child complainants during the investigation and prosecution process.

2.41 For example, the Commissioner for Children and Young People provided the following advice on the information needs of child sexual assault complainants at the complaint and investigation stages:

> Communication between the police and the child complainant should ideally achieve desired investigative results and take place in a co-ordinated, holistic, child focused way…
>
> Child complainants require age appropriate information in relation to the prosecution process from the initial investigative stage, including information about the general conduct of investigations and how they fit into the court based prosecution system. Ideally, a child complainant and his or her family will have one constant point of contact for such information and support.[100]

2.42 The Combined Community Legal Centres presented a case study of a mother of a child sexual assault complainant. The mother had approached a local community legal centre after being dissatisfied with the JIRTs response to her daughter's disclosures, and the legal centre advocated on her behalf. The CCLC submitted that the case study revealed a number of problems with the system, including:

- Lack of child focus in the way the complaint is handled
- The limited capacity of the investigation teams to deal with the evidence of children who are pre-verbal or who have limited verbal skills
- Lack of appropriate facilities for children and their parents
- Lack of respect for children and concerned parents in presenting their complaint
- Placing of responsibility to investigate on the complainant.[101]

2.43 The community group People with Disabilities considers that additional communication problems arise for child sexual assault victims who have disabilities:

> First, there are a number of assumptions about people with disabilities and children with disabilities that mean that the communication that occurs between say the police or prosecution authorities … may be inappropriate or they may already have preconceived ideas about the ability of a child with a disability to know the difference between truth and lie or they may use communication techniques which are inappropriate for the particular disability for the child to be able to provide accurate information.[102]

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100 Submission 80, p 2.

101 Submission 64, p 7.

102 Sands, Evidence, 9 July 2002, p 2.

2.44 According to the CASAC network, some prosecutors show insensitivity to the child witness:

> In the experience of counsellors the court process is very problematic for children who have been sexually abused and their families. Many families have reported feeling that they have been treated like a number by the Director of Public Prosecutions (DPP). Their child is reduced to being seen as a "witness" to a crime perpetrated on their child's genitalia.[103]

2.45 The Commissioner for Children and Young People suggested that specialised training for prosecutors would assist in improving their communication with young children:

> A key obstacle to effective communication between the prosecution and the child complainant is the language of the court process and particularly the language sometimes used by DPP solicitors…[104]
>
> The Commission recommends that whilst prosecution is a speciality in and of itself, all DPP solicitors involved in child sexual assault prosecutions must place emphasis on achieving mandatory specialist training in the effects of child sexual assault and the stress of a child sexual prosecution on children.
>
> On the understanding that the DPP currently offers training for DPP solicitors prosecuting child sexual assault and in light of the DPP *Child Sexual Assault Policy and Guidelines Manual* (DPP Guidelines), the Commission recommends such training particularly focus on the use of appropriate language when communicating with child sexual assault victims as well as techniques for interviewing children, particularly with regard to considerations of different backgrounds and culture.[105]

2.46 The Education Centre Against Violence also noted the varying communication skills of prosecutors and the need for additional training:

> A further issue relating to communication with child witnesses is the ability of Prosecutors to communicate with children at an age appropriate level, and there is great variation in skills amongst prosecutors in their understanding of developmental levels of children and to adjust their language accordingly so that children can participate more fully in the adult oriented system. Further training of prosecutors in this area would be of benefit to the child and the criminal justice system.[106]

2.47 The Committee has considered the issue of specialised training for prosecutors and court personnel further as part of the pilot project recommended in Chapter Seven.

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103 Submission 47, p 3.

104 Submission 80, p 4.

105 ibid, p 5.

106 Submission 40, p 8.

2.48 Criticisms expressed to the Committee also frequently referred to the physical environment in which the interview took place as being inappropriate for dealing with child sexual assault. One parent described her experience in this way:

> In September 1994, our daughter made her statement naming 2 relatives as her abusers (sexual assault). December 1994, 3 months later, I was called in to make my statement as a witness in our daughter's case. Nervous, confused, embarrassed at the lack of knowledge of the technicalities that surround a legal statement. The detective overwhelmed us with facts, figures, excuses as she led us to the Squad room. The computer was beside the open door, detectives moving in and out, phones ringing until answered by the detective taking my statement. No privacy, little understanding of the embarrassment of giving a statement in that situation.[107]

2.49 Another mother stated similar concerns:

> I felt the communication between the police, myself and my daughter was inadequate. There was no time, appropriate environment nor intention to build a rapport with my [3½ year old] daughter, in order for her to feel comfortable and speak more freely.[108]

2.50 A child sexual assault victim, now an adult, submitted:

> There was no private area in which I was able to give my statement to the Police officer. I had to sit in the open Detective area. During the 4 hours or so it took to give the statement, the detective was constantly interrupted by phone calls and uniform officers. Providing the statement was a very physically and emotionally tiring experience, yet I was not asked by the Detective as to whether I needed a break, and/or my counsellor present.[109]

2.51 The Committee understands that the creation of the JITs, or JIRTs, has helped to improve the sensitivity and child-focus of police interaction with child complainants. The JIRTs Policy and Procedures Manual identifies as one of its aims:

> To … conduct investigative interviews in an environment that is child or young person focused and promotes the participation of the child or young person.[110]

2.52 In relation to interview environments, Commander Heslop explained the JIRT's approach to the Committee:

> If you look at the context where child victims are interviewed by JIRT officers, of the nine co-located teams that we have, none is in a police station. They are all in private leased accommodation with little or no signage to indicate what the office does and what goes on there. Generally, they are not close to police stations and they have been designed and outfitted to be child friendly. We have rooms for

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107 Submission 19, p 1.

108 Submission 51

109 Submission 21, p 6.

110 JIRTs Policy and Procedure Manual 2001, p 3, tendered by Ms Gray, 3 May 2002.

> very young children where we can take recorded interviews now through the new method. They have lots of toys and mirrors on the wall. We have other rooms for older children and young persons. We acknowledged the pitfalls of interviewing child victims – indeed any victim – in a police station. It is very busy and it is very intimidating for anybody…[111]

2.53 The Committee notes that many of the criticisms that it was informed of relate to investigations that occurred before the establishment of JIRTs. However, there is some suggestion that the benefits of the JIRTs approach have not been universal. Unfortunately, the recently completed JIRT Evaluation did not assess the physical interview environment or 'child-friendliness' of officers, so the Committee is unable to establish whether the insensitivity described is a result of systemic problems, inadequate training, or the selection of unsuitable personnel. However, the Committee notes the Evaluation's finding that 65% of JIRT DoCS officers, and 48% of JIRT Police Officers would like additional training in interview techniques for children of different ages.[112] The provision of refresher courses, training in children's development, practical training, and assessments of interviews by supervisors were also requested.[113] An assessment of the adequacy of interview training and practical interview experience, including the availability of refresher courses and courses on child development, would be a good start.

Recommendation 6

The Committee recommends that the Joint Investigative Response Teams (JIRT) management assess the adequacy of training of its officers in the areas of interview techniques, practical interview experience, child development and refresher courses, with a view to ensuring all Joint Investigative Response Team officers have the necessary expertise to interview children in an effective, sensitive and child-friendly manner.

2.54 One further issue is that adult complainants of past child sexual assault currently must give their statements without the protective mechanisms provided by the JIRTs environment. While it would be inappropriate for historical cases of child sexual assault to be investigated by JIRTs, due to the absence of child protection issues for an adult complainant, the Committee considers that improved sensitivity to the difficulties of making a statement about past abuse would reduce the anxiety being experienced by adult complainants. This could be as simple as ensuring statements are taken in private, comfortable surroundings, with a support person available to the complainant.

111 Heslop, Evidence, 3 May 2002, p 2.

112 Taplin and Green, p 29.

113 ibid.

2.55 One complainant suggested the following procedures for taking statements from witnesses:

> Each time the complainant visits the officer in the Police station, they should be given a private audience with the Investigating officer. Option should be provided to the complainant as to where they wish or feel more comfortable with providing their statements. This may involve the investigating officer meeting with the complainant at their home, with the aid of a laptop computer for the purposes of taking their statement. Option should be given to the complainant to have whoever they wish to be present during the giving of their statement. This is a lengthy step within the investigation, and can be highly emotional as each incident of abuse is worked through in as much detail as possible for the Police.[114]

Recommendation 7

The Committee recommends that the New South Wales Police Service review its practices for interviewing adult complainants of child sexual assault, with a view to ensuring optimum levels of privacy, sensitivity and support.

Court preparation

2.56 Court preparation is an important aspect of the communication between complainants and authorities, with services provided by the Office of the Director of Public Prosecutions, sexual assault counsellors and the courts. The *NSW Interagency Guidelines for Child Protection Intervention 2000* noted the importance of child witnesses being supported and prepared for their role in the prosecution:

> A child or young person who is required to give evidence in criminal proceedings must be offered information to assist their understanding of court processes and procedures…It is the responsibility of the Office of the Director of Public Prosecutions to ensure that a child is appropriately prepared to appear as a witness.[115]

2.57 The DPP submitted details about the ODPP's Witness Assistance Service (WAS), which aims to liaise with and support complainants through the prosecution process:

> In my Office communication with complainants is also enhanced by the Witness Assistance Service (WAS). There are 14 WAS Officer positions and 1 WAS Officer (Indigenous identified) position across the State. The WAS aims to have contact with every child who is a sexual assault complainant where the matter is briefed to my office to prosecute… The aim of this contact is to case manage the witness support for the complainant while the matter is being prosecuted by the ODPP.

114 Submission 21, p 10

115 *NSW Interagency Guidelines for Child Protection Intervention 2000*, p 144.

> The WAS aims to ensure the child has access to appropriate counselling and support services and to court preparation and court support when the child has to give evidence at court.[116]

2.58 The Manager of the WAS described the function and features of court preparation:

> … children will generally feel more comfortable about giving evidence at court and make better witnesses when the fear of the unknown is reduced, and when they believe that as a result of their participation their circumstances will improve.[117]
>
> Court preparation involves a psycho-educational approach to assisting the child witness to learn about the courtroom environment, the court process, the roles of various people in court, and their role as a witness. Court preparation can also involve identifying emotional issues such as personal worries about going to court, and identifying strengths, coping strategies, stress reduction exercises and protective behaviours that can assist the child to survive their experience. The provision of accurate and objective information enables the child to make informed decisions about the use of special provisions such as Closed Circuit Television (CCTV) or screens.
>
> Court familiarisation is another part of the court preparation process and can include a visit to court before or on the day of hearing or trial. This enables the child to see the courtroom setting and the remote witness CCTV room, and to understand how they will be speaking to the court. Some children (especially those in rural and remote areas) do not always have the opportunity to visit a court until the actual day of proceedings. Court familiarisation can also be achieved through the use of videos, activity books or sheets, court maps or court models.
>
> Court preparation can be effective in reducing the stress of the court experience, both in the short and long-term, and in improving the court performance of child witnesses.[118]

2.59 The Committee heard a great deal of positive feedback from inquiry participants about the WAS. For example, Deputy Chief Magistrate Helen Syme noted:

> I have had experience with the Witness Assistance Scheme on a number of occasions, both the Witness Assistance Scheme provided by the DPP, which I must say is excellent, and also various witness assistance schemes provided either formally or informally by various courthouses that deal with various assault cases… In all cases, especially the Witness Assistance Scheme, the witnesses who have given evidence after they have had some introduction by that scheme have always been far more at ease in the giving of evidence and far more comfortable whether they are in the remote witness room or whether they are in court. So, it is

116 Submission 27, p 6.

117 Submission 29, p 4.

118 Submission 29, p 4.

> a scheme I think that has a great deal of merit and so far as I have seen it works very well.[119]

2.60 Commander Heslop from the Child Protection Enforcement Agency commented:

> I think it is an excellent scheme… The feedback to my office is that … the people are really good and know their craft in easing child victims into the process and explaining it to them. They have a number of resources which they make available to child victims. I think that is very good.[120]

2.61 Generally, any criticisms of the WAS focussed on problems arising from lack of resources. For example, the Education Centre Against Violence stated:

> The establishment of supports like the Witness Assistance Officers have contributed positively to the information complainants receive about the prosecution process, however high workloads, insufficient staffing and the range of witnesses that Witness Assistance Officers cover limit the communication that is able to be received.[121]

2.62 The Combined Community Legal Centres also found some gaps in the information given to complainants:

> Despite the welcome presence of witness assistance officers in certain matters, Community Legal Centre solicitors still have to explain police and court procedures to clients throughout the prosecution process. There is clearly a lack of personnel to properly brief complainants or inadequate procedural assistance and information provided.
>
> Complainants need to be fully advised of the steps involved in child sexual assault procedures, in simple and clear language. When decisions are taken complainants should be advised of the rationale underpinning the decision, and where appropriate have the opportunity to have any representations they or their advocates may wish to make about the matter taken into consideration.[122]

2.63 One participant to the Inquiry (an adult at the time of the complaint) felt unprepared on trial day as a result of lack of information:

> I was informed by the DPP that I would not be needed for the court appearance as my Uncle had pleaded guilty and it was very straight forward therefore…On the morning of the court date I was rung by the DPP and asked to attend the court, that now all of a sudden I may be called upon. There was no explanation of court room procedures, or how to handle myself if I was called to give evidence.[123]

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119 Syme, Evidence, 3 April 2002, p 27.

120 Heslop, Evidence, 3 May 2002, p 16.

121 Submission 40, p 8.

122 Submission 64, p 10.

123 Submission 21, pp 7-8.

2.64 In addition, there are access and equity issues for children from various backgrounds obtaining court preparation services. The Manager of the WAS told the Committee:

> Many children unfortunately face barriers to equal access to court preparation services because of the following factors:
>
> - Distances to travel in rural and isolated remote areas to access services
> - Lack of appropriate support services in rural and remote areas
> - Delay in referral of the child to counselling after the investigative interview
> - Waiting lists for counselling with sexual assault services
> - Financial disadvantage and poverty
> - Cultural and language diversity
> - Families who are transient and whose contact details are difficult to obtain or who are difficult to maintain contact with
> - Children who have limited social support networks
> - Families that are overwhelmed by the upheaval of disclosure and who have difficulty supporting their children in accessing the services they need
> - Children with disabilities have additional barriers to access the criminal justice system.[124]

2.65 The WAS has a number of resources available to it to assist with preparing and informing child witnesses and their families, including:

- 'Nothing But the Truth' Manual for adults, children and carers, prepared by the Education Centre Against Violence, and used for preparing children for court.
- 'Going to Court' video produced for the Attorney General's Courts Administration
- 'About Court' Activity Book for children produced by the Hunter Area Health Service
- 'Your Day in Court' video and booklet, for adults and adolescents, produced for the Victims of Crime Bureau.[125]

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124 Submission 29, p 6.

125 ibid, p 7.

2.66 The WAS has indicated to the Committee that, while these resources are very good, it would be timely for them to be reviewed as they need to incorporate information about reforms such as the use of video evidence, and CCTV:

> During 2001 the Sexual Assault Review Committee (SARC) chaired by the ODPP identified a need to review currently available court preparation resources after concerns had been raised about the currency of existing resources, and the lack of appropriate resources for some groups of children and young people.[126]

2.67 The NSW Police Service has also recommended revision of the available resources, recommending that:

> Resources for families about the investigation process, electronic recording of evidence and the prosecution process be reviewed and where necessary updated by relevant government agencies.[127]

Recommendation 8

The Committee recommends that New South Wales Treasury provide funding to the Witness Assistance Service to oversee the development of updated court preparation resources.

2.68 Other potential improvements to the way children are prepared for court suggested by the DPP included:

- Adequate staff levels
- Perhaps having accredited training which must be completed before undertaking court preparation
- Staff having time to be able to offer comprehensive court preparation program…
- Culturally sensitive programs and resources especially for Aboriginal children…
- Improved access to services and resources for children…[128]

126 ibid.

127 Submission 82, p 4.

128 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 16.

2.69 The Commissioner for Children and Young People suggests that a designated **child** witness service should be established through the courts, as is the case in Western Australia. She noted some of benefits of a court-based witness program:

> The first one was that the child witness service is separate from the DPP … which means that people other than the DPP can actually use it. So, for example, if the defence wanted a child to appear as a witness, it would be able to avail itself of the child witness service, which I think is better for children…
>
> The other thing is that we would want the child witness service located in the major court environments so that the child had a place in the court environment where they felt comfortable. You could in fact locate your CCTV room as part of your child witness area.[129]

2.70 The Committee has examined the views expressed to it about the WAS, including the areas of continuing need. The Committee has no doubt that court preparation is a valuable and essential service for child complainants, important in both reducing the anxiety of child witnesses and improving their ability to give evidence. It appears to the Committee that, whilst court preparation services are lacking in some areas, particularly for rural and remote witnesses and witnesses for the defence, in other cases there may be some avoidable duplication of service providers, such as where courts or sexual assault services are also involved in provision of court preparation.

2.71 The Committee recommends a review by the Attorney General of the full range of court preparation services provided by the Witness Assistance Service and the various court witness support schemes. The review should detect and rationalise any duplication of services for court preparation, and also address the identified resource and service needs that remain. It appears to the Committee that there is a case for improved funding so that the overall level of service for witnesses can be enhanced.

Recommendation 9

The Committee recommends that the Attorney General review the available witness preparation services, with a view to identifying and rationalising any duplication of services, as well as determining and funding future resource needs.

Familiarity with the Prosecutor

2.72 The *NSW Interagency Guidelines for Child Protection Intervention 2000* identified the importance for the child's preparedness that he or she has some familiarity with the prosecutor. This enables child witnesses to develop trust in the prosecutor and ensures that the prosecutor is aware of the child's needs:

> This should involve the prosecutor meeting with child or young person and caregivers well before the commencement of proceedings in order to assess the

[129] Calvert, Evidence, 17 May 2002, p 6.

needs of the child or young person as a witness. If a NSW Health Sexual Assault Service is involved, the prosecutor should liase with that service and the case manager to discuss the child's or the young person's specific needs with regard to court preparation and support.

The prosecutor should at this meeting:

- assess the child's or the young person's competence to give evidence
- decide whether the child or young person will give evidence in chief via a tape recording, if this has been made
- form an appreciation of the child's developmental level, including language and conceptual skills, their capacity to understand concepts of time and locality and their capacity to concentrate
- form an appreciation of the child's or the young person's level of anxiety in relation to the proceedings
- establish some trust and rapport with the child or young person
- refer to the Witness Assistance Service of the Office of the Director of Public Prosecutions…[130]

2.73 The importance of an early meeting between the child and the prosecutor was also identified by DoCS:

> The experience of DoCS fieldworkers suggests that workload pressures also exist for the DPP, which sometimes has difficulty meeting its responsibilities under the Guidelines including:
>
> - meeting with the child *well before* the commencement of the proceedings in order to assess the needs of the child as a witness
> - ensuring that a child is appropriately prepared to appear as a witness, and
> - attending case conferences.[131]

2.74 The Education Centre Against Violence submitted that a child's lack of familiarity with the prosecutor often creates problems:

> Access to the Prosecutor for pre-court conferencing and court preparation for the child witness is necessary to assist them with the very difficult task of being witnesses in an environment, which is intimidating even for adults. Extremely high workloads of Prosecutors frequently result in children receiving pre-court conferencing in time frames that do not allow them to establish rapport with the Prosecutor. At times, this occurs on the day prior to the trial or at worst, on the morning before the trial. This is a problem, particularly in rural areas. It is also not

130 *NSW Interagency Guidelines for Child Protection Intervention 2000*, p 145.

131 Submission 70, p 4.

> uncommon for Prosecutors to change at short notice and the child witness meets at the court a completely new Prosecutor.[132]

2.75 The CASAC network expressed a similar concern:

> Children and families are not given adequate time to talk with DPP solicitors and barristers. In one case a nine-year-old met the Barrister for less than five minutes in which he shared one sentence regarding his headdress. In order to promote trust in the process and confidence, the child needs time to build rapport with the prosecutor.
>
> It is not unusual for a child to meet the barrister on the day of the trial. This is inappropriate and unfair, particularly when the majority of barristers are male. This can be very threatening to a child who has been sexually abused.[133]

2.76 In an article for the Australian and New Zealand Journal of Criminology, Dr Judy Cashmore wrote of the importance of continuity of prosecutors:

> Continuity of involvement of the lawyer(s) involved in the case from committal to trial or finalisation has 'self-evident' benefits to child witnesses. It minimises the number of people that the child needs to get to know and to whom they have to repeat their 'story'. From the point of view of the prosecution, it also increases the chance that the child will be willing and able to 'come up to proof'. Unfortunately, however, continuity can be difficult to arrange in terms of prosecutors' workloads and some advocates are reluctant to instruct at trial.[134]

2.77 A recent study conducted by Eastwood and Patton reported on figures relating to child witnesses' contact with prosecutors prior to the committal. The report indicated that one-third of child complainants in the study did not meet with the prosecutor before the committal.[135]

2.78 The importance of maintaining continuity of representation by prosecutors and developing familiarity with the complainant appears to be well established among experts. Apart from the anecdotal evidence relayed above, the Committee has no information about the extent to which continuity of prosecutors is achieved, or early meetings with complainants are held. While the Committee acknowledges that there would be a number of competing priorities for the DPP when allocating prosecutors to cases, the Committee is of the view that emphasis should be placed on ensuring that, as far as possible, continuity of representation for child sexual assault cases is achieved.

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132 Submission 40, p 8.

133 Submission 47, p 3.

134 Dr Judy Cashmore, "Prosecution of Child Sexual Assault: A Survey of NSW DPP Solicitors", *The Australian and New Zealand Journal of Criminology*, Vol 28, No 2, June 1995, p 47 (footnotes omitted).

135 Eastwood and Patton, p 66.

2.79 The development of trust and understanding between the prosecutor and the complainant, including continuity of representation, is a key element of the Committee's later recommendation to trial a specialist jurisdiction. Relevant recommendations are contained in Chapter Seven.

The Role of Sexual Assault Counsellors in the Complaint Process

The purpose of counselling

2.80 The Committee heard that the role of counsellors generally begins after the first interview has been completed:

> In the initial stages of the complaint process, sexual assault counsellors have very little involvement. Until the child victim is interviewed by JIRTs, Sexual Assault Services will only provide support to non-offending parents/family members.[136]

2.81 The NSW Rape Crisis Centre submission detailed the important role played by child sexual assault counsellors in assisting the child to cope with the abuse:

> The effects of perpetrator 'grooming' tactics on the child are to exacerbate the child's isolation and silence about the abuse. Sexual assault counsellors have a significant role challenging the beliefs and responses of a child in order to facilitate the complaint process. Sexual assault counsellors can:
>
> - listen to a child's disclosure about the abuse and the impacts of this abuse
> - assist a child to identify how the 'grooming process' worked in her family or abusive situation
> - assist a child to begin to form a sense of self that includes a sense of right and wrong behaviours, clear understandings of their rights, both human and legal rights
> - assist a child to understand that the abuse was not their fault, nor their responsibility to stop. Any crime committed against a child by an adult must always be the responsibility of the adult
> - assist a child to recover from the impacts of abuse.[137]

2.82 Ms Wightman, a child sexual assault counsellor, described the role of counsellors at the prosecution and testimonial stages:

> The typical role with a child or young person that has a court process coming up would obviously be the counselling process but in addition to that there is court preparation and support. Sexual assault counsellors provide several weeks of court

136 Submission 60, p 4.

137 Submission 30, p 5.

> preparation, which is not about preparing the child in relation to the evidence, but emotional preparation as well as familiarity with the court process, given that it is such an alien experience for most children and young people who have never been in a courtroom, advocating between the DPP office and the child, letting them know about what is involved and what will be expected of them, and then very often being a support person…[138]
>
> In the court preparation process we try to address the outcome realistically and ensure that the healing of the child and the family does not depend on a guilty verdict. In eight years in this line of work I have been involved with more than 100 trials and had one guilty verdict. So it is a very unlikely possibility… Many children have said that a not guilty verdict does not mean that they would not have gone through the process, but it becomes a significant issue to address in ongoing counselling.[139]

2.83 The Northern Sydney Child Protection Service also noted the importance of counsellors in preparing a child for court, and submitted that it can raise conflicts in the allocation of resources:

> Sexual Assault Services are also involved in court support for the child during the trial. A difficulty in this area is that often sexual assault counsellors are required to spend a number of days with the child at court prior to the child giving evidence, impacting significantly on their other clients and responsibilities of their job. Whilst court preparation, particularly for children and their families, is considered a key role for Sexual Assault Services it must also be noted that Sexual Assault Services must prioritise crisis responses to those who have experienced recent assault. This can lead to a conflict in terms of priorities. In addition, a counsellor's schedule may be cleared to accompany the child in an upcoming AVO hearing or trial only to have a matter postponed.[140]

The timing of counselling

2.84 The submission from NSW Health advised that current guidelines for child sexual assault intervention require that any counselling is deferred until after the investigative interview, as directed by the *NSW Interagency Guidelines for Child Protection Intervention 2000*:

> Assessment and investigation should occur as quickly as possible to enable referral of the child or young person for counselling. Therapeutic intervention may be delayed until the child or young person has been interviewed.[141]

2.85 The purpose of this is to prevent the accidental contamination of the child's evidence, or the perception that it may be contaminated, and was recommended by the Wood Royal Commission.[142]

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138 Wightman, Evidence, 23 April 2002, p 18.

139 ibid, p 19.

140 Submission 60, p 4.

141 *NSW Interagency Guidelines for Child Protection Intervention 2000*, page 104.

2.86 The DPP explained that it is possible for a child to be counselled without evidence being contaminated, if the counselling occurs after the investigative interview:

> If the child has made a statement to the Police disclosing CSA then contamination of that evidence should not be a problem. Contamination more relates to deliberate attempts to elicit evidence from the child or to discuss modification of the evidence that is disclosed. Professional sexual assault workers should state at the beginning of the therapeutic relationship that they cannot discuss the evidence with the child. Counselling can be focussed on addressing current impact issues and if disclosure occurs it is important to respond appropriately but not elicit further information – rather use protective interrupting and focus on the emotional aspects for the child.[143]

2.87 A number of submissions and witnesses contend that deferring counselling for any length of time following a disclosure of child sexual assault is not in the best interests of the child. This particularly becomes a concern where therapy is postponed for weeks or months until the investigative interview has been undertaken. The DPP indicated that this can intensify the emotional difficulties faced by the child, and often deters the child's willingness to report the abuse.[144]

2.88 The Commissioner for Children and Young People argued that the needs of the prosecution should not take precedence over the therapeutic needs of the child, as is currently occurring:

> In line with the best interests approach adopted in relation to child sexual assault prosecutions generally, sexual assault counselling must be conducted separately from considerations of the prosecution of a child sexual assault offence. The decision of when and how to approach psychological counselling of a child should not be influenced by the occurrence of a prosecution. Rather, sexual assault counselling must be distinct from the prosecution of an offence if it is not to undermine the integrity and quality of the counsellor's opportunity for therapy with a child victim.[145]

2.89 The Northern Sydney Child Protection Service submitted that the delayed access to counselling can result in the complainant not receiving counselling at all:

> It is also of concern that, until the investigation is completed and abuse substantiated, children may not access sexual assault counselling services, as agreed within the *NSW Interagency Guidelines for Child Protection Intervention 2000* and the *Joint Investigation Response Teams Policy and Procedures 2001*. The importance of early intervention with child victims of sexual assault is well recognised and supported through research. Sexual Assault Services report that families are more likely to seek counselling of their child immediately after the disclosure of sexual

142 Recommendation 47, cited in Submission 81, p 3.

143 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 11.

144 ibid.

145 Submission 80, p 6.

> assault. Delays often result in families declining to accept counselling for their child due to a desire to protect the child from having to re-live the trauma, and a wish to put it all behind them.[146]

2.90 Several counsellors were of the view that counselling before the interview **would not** result in contamination of evidence because the objectives of counselling differ from those of investigations:

> **Ms Hinchcliffe:** The aim of counselling is not necessarily investigative. One of our aims is not to hear the details. In counselling we are about how it is affecting them and dealing with that, rather than what is happening.
>
> **Ms Wightman:** We are usually very cautious in our contact with families from which a child has made a disclosure but has not been interviewed by a JIT detective. We work with the non-offending family members to try to support that. We may work with the mother around advocacy issues and supporting her child. We do not aim to investigate, or try to take on the role of finding out what has happened to the child…[147]

2.91 Similarly, a local Sexual Assault Service submitted that crisis counselling does not result in contamination of evidence, even when undertaken before the investigative interview:

> Some of these changes appear to have been premised upon a myth about 'contamination'… Since the inception of the [Sexual Assault Service]there has never been an incident where it was considered that contamination had occurred and therapeutic intervention was never seen to interfere with the criminal justice process. SASs have an important role in helping children and families to negotiate the systems with which they will come in contact – so they can be active in the process and are not disempowered – and they also act as advocates so as to mediate against systems abuse.[148]

2.92 In fact, the Sexual Assault Service argued that it is important for counselling to be provided **before** the investigative interview:

> This enables the Service to address any concerns the parents or child may have and to assist parents to prepare the child. Often a child will disclose to a parent but the parent will feel that they cannot mention the abuse again before a police interview for fear that they will contaminate the child's evidence. The child immediately receives a message that they are not to talk about it. However, they are magically expected to disclose to a stranger a week later. A SAS counsellor can assist parents to understand ways and times to talk that will not lead to contamination but also address initial parental responses to the disclosure that might discourage the child to speak about it, eg if the parent displays rage toward the offender in front of the child with the child imagining that they will be in trouble too.[149]

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146 Submission 60, p 1.

147 Evidence, 23 April 2002, p 27.

148 Submission 61, p 5.

149 ibid, p 6.

2.93 The Child and Youth Health Network also considers the delay in crisis counselling to be unnecessary:

> Sexual Assault Services are not supposed to see children until a substantiated disclosure has been made. However in reality this means there could be quite some considerable time delay before the child can see the counsellor depending on the management of the DOCS/JIRT process.
>
> The role of "counselling" needs to be considered – in sexual assault matters, crisis counselling has been very helpful in assisting victims to deal with the emotional response to what has occurred. In counselling, the process looks at the impact of feelings the client is experiencing – it is not about investigating or asking questions or drawing out information, so it would not necessarily compromise the investigative process. In addition, most child sexual abuse cases do not get to the criminal court system, so the child misses out on the counselling experience at a critical time.[150]

2.94 The Committee is concerned at the obvious conflict between the need for sexually abused children to promptly access sexual assault counselling and the interests of the prosecution in preventing any potential contamination of the evidence. The information provided to the Committee suggests that the evidentiary requirements of the prosecution may at times be given priority over the therapeutic needs of the child victim. The Committee considers that the interests and needs of the child should at all times be paramount. Determining where the child's interest lies will sometimes be a matter of balance: a child may ultimately benefit from a successful prosecution even if it requires a short deferral in commencing counselling. However, the Committee can not envisage a situation where a delay of several months would be in the best interests of any child.

2.95 Clearly, the best solution would be to eliminate any delay between the disclosure and the investigative interview, enabling counselling to commence immediately. The Committee hopes that implementation of the package of recommendations made in this report will ultimately achieve this.

2.96 In the meantime, the Committee suggests that the *NSW Interagency Guidelines for Child Protection Intervention 2000* should be amended to require that decisions about the timing of referral to counselling should be made on a case-by-case basis, and that the best interests of the child be given priority in that decision making. Matters to be considered should include the anticipated timeframe for the investigative interview, the level of need for counselling for the child, and the likelihood that a prosecution will be undertaken.

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150 Submission 28, p 1.

Recommendation 10

The Committee recommends that the Commission for Children and Young People amend the *Interagency Guidelines for Child Protection Intervention 2000* to require that decisions about whether to delay counselling until after the investigative interview should be made on a case-by-case basis, and that the best interests of the child should be given priority in the decision making about the timing of a referral for counselling.

Counselling and the creation of false memories

2.97 The creation of 'false memories' of child sexual assault in adults undergoing therapy was referred to by a number of witnesses and submissions. The Committee emphasises that the following sections relate to **previously forgotten** memories of childhood abuse recalled by adults: it does not relate to disclosures by children or by adults whose memories of abuse had always been intact.

2.98 Dr Lucire, a forensic psychiatrist, described the danger of untrained counsellors creating false memories of child sexual assault in adult patients where in fact there had been no sexual assault:

> The major problem seems to be unquestioned acceptance…If people come in with fantasies or a notion they can be very much encouraged by this kind of attitude in the treater. The fact that the treater unquestionably believes, leads to a process which the American Psychiatric Association calls confabulation, which the lay term "recovered memory" or "false memory" covers. It can be induced by simply a credulous listener, by hypnosis, by relaxation therapies like EMDR, which is the eye wiggle movement therapy, by body work but basically by a subtle form of suggestion from the therapist to the client to the effect that she is being believed and will be believed. This is extremely important when this phenomenon escapes from the clinical situation and into the court room.[151]

2.99 The Committee notes the information provided by Dr Gelb, which quotes various professional associations' statements on the unreliability of recovered memories, including the following:

> The available scientific and clinical evidence does not allow accurate, inaccurate and fabricated memories to be distinguished in the absence of independent corroboration (Australian Psychological Society, Guidelines Relating to the Reporting of Recovered Memories, 1994)…
>
> At this point it is impossible, without other corroborative evidence, to distinguish a true memory from a false one (American Psychological Association, Questions and Answers about Memories of Childhood Abuse, 1995).[152]

151 Lucire, Evidence 10 May 2002, p 6.

152 Submission 83, p 2.

2.100 According to the Australian False Memory Association, false memories are created by certain therapeutic techniques:

> … It should be noted that some counsellors and therapists are declaring that they do not use recovered memory techniques but continue such practices under other nomenclature. Recovered memory practices which are used by many groups and individuals funded by the State Government include
>
> - Age regression
> - Hypnosis
> - Abreaction
> - Journalling
> - Guided Imagery
> - Drug-assisted recall…[153]
>
> Gullible and well-meaning counsellors are responsible for damage to individuals and families through implanting or encouraging the creation of false memories in their clients and the advice to separate from families and any person who questions the memories…
>
> The Australian False Memory Association believes that all counsellors should be licensed and fully trained by accredited institutions and that the industry should be properly regulated to discourage the excesses of the past and the present.[154]

2.101 The Committee also heard from some individuals who told of family members being victims of 'false memory'. For example, one mother wrote:

> While child sexual assault is a most abhorrent crime, to be condemned by all, I am concerned at some of the circumstances surrounding the prosecution of child sexual assault matters, in particular in reference to charges made many years after the alleged assaults, specifically in matters of "repressed" or "recovered" memories.
>
> There are many grieving, distressed families in New South Wales (particularly urban areas where "counsellors" are readily available) who have been falsely accused after so-called "victims" have made accusations of incest against other family members and friends.
>
> I personally know of marriage break-ups, illness and suicide attempts caused by the increasingly vehement accusations following this "memory recovery" therapy.[155]

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153 Submission 56, p 6.

154 Bradley, Evidence, 10 May 2002, p 4.

155 Submission 14, Covering letter, p 1.

2.102 The author of that submission described her own family's situation when one child's 'dream therapy' led to the child developing 'memories' of having been repeatedly sexually abused by her father, siblings and family friends:

> I was totally flabbergasted when [daughter] came into the house with her younger brother, and crying uncontrollably, said she had been a victim of child abuse. My immediate question was "why didn't you tell me?" and her reply was that she had only recently recalled the events. That immediately worried me, as I found it quite impossible to believe that … the happy, vivacious and intelligent child of former years, had been a victim of abuse…
>
> From the original accusation against her father … she now described his "brutality", and accused her brother of continual abuse, as well as her older brother, and two family friends (who would have been 11 and 13 at the time) as well as another friend…
>
> She implicated me, claiming I had known of the abuse, but covered up to preserve an outward semblance of a united family. She claims her sister knew of the abuse, and was present, and even could have undergone abuse as well, and is conspiring to hide it. (This is completely denied by her sister, who says nothing ever happened). [156]

2.103 Another submission tells a similar story:

> In November 1997, more than four years ago, I was accused by my then 27-year-old daughter of the most heinous crime – incest… She went into fine detail, claiming the first memories had come to her in a dream, then she had sought counselling and the counselling "helped" her to remember more…
>
> Since the accusations were made my wife and I have spent a lot of time finding out "why" and we have learnt a lot about repressed memory therapy. This therapy stole a daughter from our family.[157]

2.104 Concerns about false memories were also expressed by clinical psychologist, Ms Louise Samways:

> Memory is not a video of what happened. It is more like a self directed movie which changes over time and in the light of changing information or beliefs. Even if repressed memories do exist (and the body of research is overwhelmingly that they do not), they are still memories, and therefore unreliable unless supported by strong corroborative evidence. A person can genuinely believe their memories are factually and historically correct even when they are actually totally incorrect.
>
> Professionals treating people are often not sufficiently knowledgeable nor trained in the nature and limitations of memory to be able to properly help people who claim to have been sexually assaulted, eg anybody can call themselves a psychotherapist, psychoanalyst, life coach or counsellor. Many medicos,

156 Submission 14, pp 4 – 5.

157 Submission 25, pp 1 – 2.

> psychiatrists and even psychologists are ignorant of the nature and limitations of memory or how it can be deliberately or unwittingly manipulated.[158]

2.105 Dr Lucire considers that some training provided to counsellors in New South Wales is inappropriate:

> Indeed it seemed to me that dangerous techniques and evaluation procedures have been taught and that they are still being taught to counsellors of various types. The courses cite eminent American 'authorities' and these same authorities have been successfully litigated against for malpractice in therapy, counselling and social work in the United States…
>
> The unscientific assertions of these thoroughly discredited experts still underpin current official 'accreditation' teaching about sexual abuse and its effects.[159]

2.106 The Australian False Memory Association recommended that a body be established with a function of registering all counsellors and therapists, and establishing minimum training requirements for registration. AFMA proposes that the minimum training for a counsellor or therapist be a four year Bachelor's qualification with significant studies in memory.[160]

2.107 Dr Lucire agreed that regulation of therapists should be tightened:

> My concern is that people who are operating as sexual abuse counsellors are very well meaning, but they are inexperienced and untrained. They do not know what they are dealing with …
>
> "Counsellors" seems to be a very general term and involves people like six-month trained rehabilitation counsellors. There needs to be not only full professional training but, in order to counsel in a specific area such as this, also that people would be required to have knowledge and education in this area of the dangers and risks. They would certainly need to have experience working with mentally ill and mentally disordered persons, which many psychologists in New South Wales have not had.[161]

2.108 The Committee considers that it has insufficient evidence or knowledge to make recommendations about therapeutic techniques or appropriate regulation of therapists and counsellors. However, the Committee acknowledges that there is concern in the community and amongst some professionals about the incidence of 'false memories', the level of regulation of therapists and the possible perpetuation of inappropriate techniques through training of counsellors. The Committee recommends that the Minister for Health examine these matters further.

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158 Submission 84, p1.

159 Submission 24, p 2.

160 Submission 56, p 7.

161 Lucire, Evidence, 10 May 2002, p 5.

Recommendation 11

The Committee recommends that the Minister for Health examine:

- the incidence of 'repressed memories' of child sexual assault
- whether the level of regulation of therapists and counsellors is adequate, and
- the training of counsellors, in particular the possible perpetuation of techniques that may give rise to 'false memories'.

Chapter 3 Giving Evidence

This chapter focuses the experience of child witnesses when giving evidence. It examines the role of cross-examination and the difficulties that arise for child sexual assault complainants during cross-examination. Many of the problems for child witnesses generally relate to their linguistic, emotional and intellectual development, which affect their ability to respond to complex questioning in an intimidating environment. The chapter identifies a number of areas where improvements could be made to the cross-examination process.

The Role of Cross-Examination

3.1 At the outset, the Committee notes the essential role of cross-examination in a fair trial. Cross-examination is the principal means by which the accused can test the prosecution's case and challenge the testimony of the complainant. The importance of a vigorous defence, including robust cross-examination, in ensuring a fair trial was emphasised by Mr John Nicholson SC:

> The primary focus of the criminal trial is (or at least for defence counsel should be) to guarantee that the accused gets a fair trial. A fair trial as measured from the defence counsel's perspective is to obtain every legitimate forensic advantage possible for the accused, even if that be at the expense of the victim, or of the prosecution to air evidence which is prejudicial to the accused.[162]
>
> …Defence counsel's duty requires him or her to cross-examine the complainant. Opinions differ as to the tone and mood the cross-examiner should set. Different complainants will require different approaches – but where an accused has pleaded not guilty, and the complainant maintains the allegations, the duty of the defence advocate is clear – he/she must challenge the complainant's version.[163]

3.2 HREOC and the ALRC also noted the vital role of cross-examination to the defence:

> The purpose of cross-examination in an adversarial system is properly an attempt to create reasonable doubt by revealing inconsistencies in testimony, ferreting out untruthful testimony and even discrediting the witness.[164]

3.3 Professor Patrick Parkinson, Professor of Law at the University of Sydney, acknowledged the fundamental rights of the defendant that are promoted by cross-examination, but argued that reforms to cross-examination can be achieved that do not undermine this:

> The defence is entitled to present its case with appropriate vigour, and the presumption of innocence is the foundational principle of the criminal justice

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162 John Nicholson SC, "Defence of Alleged Paedophiles: Why do we need to bother", *Paedophilia Policy and Prevention*, Australian Institute of Criminology, Research and Public Policy Series No 12, Marianne James (ed) 1997, p 51.

163 Nicholson, p 52.

164 HREOC and ALRC, p 343.

> system. Yet these values should not prevent us from reviewing the operation of rules or the use of defence tactics which serve only to mask the truth rather than illuminating it.[165]

Difficulties Arising from Cross-Examination in Child Sexual Assault Trials

3.4 The following sections review the aspects of cross-examination that create particular difficulties for child complainants.

Intimidation and confusion of witnesses

3.5 The Committee notes that previous reports and studies have highlighted the distress and trauma that cross-examination causes to child complainants. For example, a study conducted by Dr Cashmore together with Dr Bussey included the results of their survey of children (and their parents) who had been complainants in child sexual assault trials.[166] The study revealed that cross-examination was identified as one of the most stressful parts of the process:

> Next to seeing the defendant, this was the aspect most commonly mentioned by children as being stressful and needing to be changed. For about 30% of the children, cross examination was the worst part of testifying. The main problems were being accused of lying, the harshness of the questioning techniques, and the length of cross examination.[167]

3.6 A recently released report by Eastwood and Patton argued:

> The way in which children are treated during cross-examination has been described as in itself, child abuse. Despite attempts to legislate to control cross-examination, there is overwhelming evidence that abusive cross-examination continues in many courts in many jurisdictions.[168]

3.7 Submissions and evidence to this current inquiry have presented similar observations. In particular, the intimidation and confusion caused to child witnesses under cross-examination was a source of concern to many participants. For example, the DPP gave evidence that:

> I think it is fair to say … that there are still some defence counsel who are convinced that the most effective way of doing service to their client is to continue on that confrontational, boots-and-all cross examination approach…[169]

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165 Submission 23, p 11.

166 Cashmore and Bussey, *The Evidence of Children,* Judicial Commission of NSW, Monograph Series No 11, June 1995.

167 ibid, p 32.

168 Eastwood and Patton, p 123.

169 Cowdery, Evidence, 26 March 2002, p 6.

3.8 Mr Cowdery advised further that the cross-examination process as a whole runs contrary to known best practice for dealing with child sexual assault victims:

> Following disclosure of sexual assault, children become involved with a number of professions, police, Department of Community Services (DoCS) officers, sexual assault doctors and counsellors. These professionals maintain a professional distance; however, at the same time they convey to the child the message that they have done the right thing to tell someone, that they are not in trouble and that they are not responsible for the assault occurring. Sexual assault counsellors counsel the child for the effects of the abuse and address any issues of guilt, responsibility and self-blame which may arise.
>
> If the case reaches court, children under cross-examination have things put to them which seem to go against everything else that a child has been told. Suggestions that might be put to the complainant include: that they are not telling the truth, that they have been confused, or that they are making up stories. The child can have it suggested that they are making up stories for reasons such as: they do not like the accused, they want some money, they have been persuaded to make this up by someone else. It can also be put to children that they actively encouraged or participated in the sexual assault.
>
> The nature of the disclosure of sexual assault by children presents difficulties for children when under cross-examination. Children often disclose a little at a time to see what response such disclosures receive and then may disclose more over time. Unfortunately, these inconsistencies are used by the defence to demonstrate that the child is not a credible witness. The defence will often suggest that the child has been making things up as he/she goes along.[170]

3.9 The Department of Community Services concurs with the findings of Eastwood and Patton's study that the cross-examination process can in fact be abusive itself:

> Cross-examination, as the primary means of testing evidence, pits the child witness against an adult lawyer whose language, demeanour and manner is designed to undermine, discredit and sow doubt about the child and their evidence. Indeed, some commentators maintain that subjecting children to 'harsh, intimidating and confusing questioning' constitutes child abuse.
>
> There is a pressing need for greater protection of child witnesses during cross-examination, to ensure that they are not 'revictimised' during the trial.[171]

3.10 The Salvation Army also commented on the impact of cross-examination on child witnesses:

> We are concerned that some practices designed for use in testing the testimony of adults are applied to children. It may not always be recognised that, especially in the cross-examination of a child, such practices can have the effect of humiliating and browbeating the child so that evidence given is neither accurate nor without contamination.

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170 Submission 27, p 10.

171 Submission 70, p 8.

> We contend that a child under this kind of duress might become very eager to give the 'answers' he/she thinks is wanted rather than tell the truth.
>
> The traumatic effects of some of these practices amounts to a repeat of the abuse of a power relationship. It must be remembered that sexual abuse is essentially an abuse of power.[172]

3.11 The Child and Adolescent Sexual Assault Counsellors (CASAC) network agreed that the cross-examination process is abusive:

> Offenders of CSA abuse the relationship and this is often the primary issue… This abuse of relationship is often perpetuated by the legal system through the style of questioning used by the defence in cross-examination. Tactics such as being nice and gaining the child's trust and then attacking, bullying and even yelling at the child. The fact that the witness is a child and that their emotional and cognitive development is different than that of an adult should be taken into account. The child's well being should be paramount consideration and limits should be set around the cross-examination of children.[173]

3.12 Comments from complainants about their experiences emphasise the distress caused by aggressive cross-examination. For example, one complainant of child sexual assault stated:

> The actual practice itself of witness testimony/examination and cross examination coupled with what seems to be the defence counsel's right to constantly taunt and harangue a witness for the prosecution needs to be revised.[174]

3.13 The Committee did hear some conflicting evidence that argued that aggressive questioning of child complainants was in fact uncommon. Mr Humphreys, from the New South Wales Legal Aid Commission, for example, argued that intimidating and oppressive cross-examination techniques are rarely used by defence counsel, because it is counter-productive:

> There is no easier or quicker way to lose a jury than to misbehave in approaching a child witness. In fact, good counsel will take a child witness – someone who is young – very carefully and will be very gentle in cross-examining that witness… A defence representative who engages in the sorts of tactics to which you have referred does his client a disservice.[175]

3.14 Mr Fraser, also from the Legal Aid Commission, concurred:

> There is a procedure for preventing unfair questioning; there is nothing to stop the Crown Prosecutor from objecting or a trial judge from disallowing what might be termed unfair questioning. As to the techniques [described above] … when I was a Crown Prosecutor … my experience was, first, it was rare for defence

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172 Submission 42, p 7.

173 Submission 47, p 3.

174 Submission 12, p 2.

175 Humphreys, Evidence, 3 April 2002, p 3.

> counsel to be overly aggressive; and secondly, when defence counsel was overly aggressive it was almost certain that you would win the day when the jury came to consider your case.[176]

3.15 Professor Parkinson also noted the potential damage to the defence case that could arise from harsh questioning tactics:

> … I think there is a widespread understanding in the criminal defence bar that badgering a child, engaging in intimidatory conduct, is a risky strategy. It is risky because although it may be very effective in reducing a child to tears and incomprehensibility, there is the risk of prejudicing one's client in the minds of the jury.[177]

3.16 However, other witnesses did not agree with assertions that defence counsel are reluctant to intimidate a witness. For example, Dr Cossins argued:

> That point of view is … contradicted by the Wood Royal Commission report of 1997; the Australian Law Reform Commission and Human Rights and Equal Opportunity report of 1997; a parliamentary report by the Victorian Crime Prevention Committee of 1995; and a study carried out by Cashmore and Bussey in 1995.[178]

3.17 Dr Cashmore remarked that various techniques are used in trials, but that intimidation does occur:

> Having watched a number of trials and talked to both prosecution and defence lawyers, some of them will say, "Softly, softly, catchee, monkey" basically, that it is much better to go in softly and to in fact invite the child to trust them and then follow their line of questioning. Others are much more blatant in approach. In Henderson's study and in some interviews I have conducted, defence lawyers will admit that if it is necessary to break a child down, they are willing to do that in the interests of their client.[179]

3.18 The Committee observes in this context that whatever restraint the jury's presence may place on defence counsel at the trial stage would be absent at the committal stage when there is no jury.

3.19 The Committee received evidence from a number of participants explaining that distress and confusion can be created in the child witness without actual intimidation or bullying. As the aim for the defence in cross-examination is to cast doubt on the complainant's story, techniques are often used that confuse the witness, make the testimony appear unreliable, and undermine the credibility of the child. These practices seek to create reasonable doubt in the jury so that the defendant will be acquitted.

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176 Fraser, Evidence 3 April 2002, p 3.

177 Parkinson, Evidence, 19 April 2002, p 21.

178 Cossins, Evidence, 23 April 2002, p 11.

179 Cashmore, Evidence, 19 April 2002, p 5.

3.20 Professor Parkinson explained the strategy to the Committee:

> … it is perhaps a much more effective tactic to diminish a child's testimony to engage in subtle questioning. I know of accounts of very calm, very quiet, very patient and very caring sorts of cross-examination that are devastating in the use of tactics which undermine the credibility of the child in a way that does not reflect the truth of the situation or the quality of the child's testimony. One can do that by focusing on peripheral events. One can focus on minor inconsistencies of the child's testimony. One can … jump backwards and forwards to different events and different times so that the child is not clear on what you are talking about. All of that can be done in the most pleasant way without upsetting a jury.[180]

3.21 Similarly, Dr Cossins argued that:

> Cross-examination can also exploit the difficulties that children have in relation to identifying specific times and dates … [If] children report events out of sequence or if they are unable to give a particular date or time in relation to the alleged abuse, this can be exploited by the defence as bearing on the accuracy of the child's complaint, evidence though, the inability to give such details has been shown not to have any bearing on the accuracy of the allegation…[181]

3.22 The DPP suggested that, for developmental reasons, confusion of the witness is a **likely** result of cross-examination of a child:

> …General techniques of cross-examination (eg use of leading questions) are developmentally inappropriate for children … and yet are used to question the credibility of the child and to discredit the child's evidence. This does not represent a "level playing field", or even fairness, nor is it in the interests of justice. There needs to be a balance between what is seen to be a fair question legally and what is linguistically fair for the child.[182]

> Children are reported to rarely seek clarification when they do not understand a question… WAS Officers have reported seeing that a child is not understanding a question and this situation is not picked up by lawyers or the judge who often have their heads down, writing or reading, and who are not observing the child. The child may not admit to not understanding the question and will proceed to try and answer the question.[183]

3.23 This was confirmed in evidence by the Manager of the Witness Assistance Service, Ms Lee Purches:

> Witness Assistance Officers who are present in the remote witness room while the child is giving evidence by CCTV often have a sense of great frustration because they can see problems that are not necessarily being picked up in court…

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180 Parkinson, Evidence, 19 April 2002, p 21.

181 "Answers to Proposed Questions", document tendered by Dr Cossins, 23 April 2002, p 6.

182 Submission 27, pp 11 – 12.

183 ibid, p 11.

> The research and our first-hand experience of seeing children under those circumstances is that children are reluctant to say that they do not understand. Even though in court preparation we can assist children to know that they are allowed to tell the court if they do not understand, I think that children still believe that they might be in trouble if they do not answer questions.[184]

3.24 The submission from Dympna House, a child sexual assault service provider, commented on cross-examination techniques:

> Other tactics used, are to confuse the witness by repetitive questioning of the same abuse details, demanding unrealistic specific times and details, rapid questioning, repeated interruption of child's responses, questioning for long periods of time, asking irrelevant questions, accusing child witnesses of lying, and accusing the child of 'wanting it'.[185]

3.25 The Northern Sydney Child Protection Service expressed similar concerns:

> It has been the experience of sexual assault counsellors working with children, that questioning in cross-examination, where it does not follow a logical sequence, is extremely confusing. Children frequently do not seem to be able to make sense of the questions they are asked and will often submit to the suggestions made to them by the defence solicitors. Questioning around evidence requires clarity without suggestion as children respond to suggestion, particularly when fearful or stressed. This may then be interpreted by the jury as the child being inconsistent in their evidence and therefore unconvincing…
>
> Stringent rules are required in relation to the behaviour of defence lawyers when in the presence of a child witness, that acknowledge the impact of intimidation and unclear questioning on children. Enforcement of such rules consistently by judges is also crucial.
>
> Overall, it is extremely unfair and inconsistent with the pursuit of justice to confuse and intimidate children in the witness stand by applying adult rules of evidence and adult based practices to their evidence…[186]

3.26 An article submitted by Professor Kim Oates, Chief Executive of the Children's Hospital at Westmead, noted that studies indicate that confusion is a frequent problem for children being cross-examined:

> A recent Australian study of court transcripts in child sexual abuse cases has shown that children become quickly confused under cross-examination. This is partly because of the language used in the court situation, but also partly because of the way in which some questions are multi-faceted making a 'yes' or 'no' answer difficult. This study of transcripts also showed that questions would move quickly from one time-frame to another, requiring rapid responses and an adult perception of time and events. This approach puts children at considerable disadvantage in a witness situation. The confusion caused in the child by this type

184 Purches, Evidence, 26 March 2002, p 8.

185 Submission 65, p 9.

186 Submission 60, p 6.

> of questioning tends to confirm the impression in those observing that the child is not able to be a reliable witness, an impression which is not necessarily correct.[187]

3.27 Contributing to the confusion of child witnesses is the **complicated language** used in court, most commonly by defence counsel, as Dr Cashmore noted:

> In particular, the language and concepts used in questioning children need to be age-appropriate. It is obviously necessary to be able to understand the question in order to answer it. There is striking evidence, however, that this is often not the case in court. Several studies have found that children's legal vocabulary is quite limited and that the language used by lawyers is often too complex for children. Brennan and Brennan's study of the "strange" language used by lawyers in the cross-examination of children, for example, found that children often could not even repeat the questions asked of child witnesses of the same age in a form which retained the original meaning of the question. They were, however, much more accurate with teachers' and counsellors' questions.[188]
>
> … [Children] are unwilling to challenge the apparent authority of the court professionals by saying, "Sorry, I don't understand the question". They also may not be very good at monitoring when they do not understand and what happens then is that they may give nonsensical answers or answers that do not follow or answers that are inconsistent. It does not necessarily mean that they cannot tell a consistent story, just that they have not had the opportunity to do so.
>
> We also have evidence that children will attempt to answer questions even when they do not understand the questions… That is particularly the case when you have double negatives, two or three questions in one, jumping around in sequence, reference by pronouns that do not necessarily follow, all of the things that the research has pointed out problems with.[189]

3.28 Cashmore and Bussey concluded in their study that the inappropriate language was a concern because it created additional stress for child witnesses:

> The first and most obvious [concern] is that a trial can be considered fair only if witnesses are able to understand the questions they are required to answer. Secondly, children's behaviour in court and their perceptions of the court process have been shown to be substantially affected by the difficulty of the language. In one study, children were judged to answer more questions, be less anxious, happier, more cooperative, and more effective when defence lawyers used more appropriate language.[190]

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187 Oates, "Children as Witnesses", *The Australian Law Journal*, Volume 64, March 1990, pp 130 – 131, attachment to Submission 4.

188 Cashmore, p 13, attached to Submission 70, footnotes omitted.

189 Cashmore, Evidence, 19 April 2002, p 3.

190 Cashmore and Bussey, p 35.

3.29 In addition, the inability to present their story accurately is a cause of frustration to many child witnesses, according to Dr Cashmore:

> I think the major dissatisfaction that people have is that if children cannot understand the questions they are asked, it is not a fair process, and you are not getting either complete or accurate information from them. And, although they may not be very good at monitoring when they do not understand, they know at the end of the process that they have not been able to say what they wanted to say, and they feel that it is an unfair system that allows that to happen.[191]

3.30 Dr Cashmore also noted that cross-examination is a mode of questioning unlikely to result in the most accurate and reliable evidence being given by the child:

> I think the first issue of the type of questioning and the unfairness of their questioning has been well demonstrated by substantial research, both here by Brennan and Brennan, and overseas. What it clearly shows is that the cross-examination process actually is almost a guide of how you do *not* interview to get to the truth. It is not about seeking truth; it is about persuading a jury to that side of the argument.[192]

3.31 A similar observation was made by the Wood Royal Commission:

> The Commission accepts that in a significant proportion of sexual assault trials, children are examined in a way which, having regard to their level of cognitive and emotional development, is inappropriate. This may be the result of a deliberate attempt to mislead the witness, or it may arise from the advocate's lack of knowledge of child development. Whatever the explanation, evidence extracted from children which may be affected by a lack of understanding of the question, or is a matter of concession derived not out of truth but as a result of bullying or coercion, is of little value to the trier of fact.[193]

3.32 This is also confirmed by a study by Kebbell and Johnson.[194] That study found that where questions containing negatives or double negatives, leading questions, multiple questions and questions containing complex syntax and vocabulary were used, participant-witnesses' accuracy and 'confidence accuracy relationships' were impaired.[195]

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191 Cashmore, Evidence, 19 April 2002, p 2.

192 ibid, p 2.

193 Royal Commission into the New South Wales Police Service, Vol 5, p 1110.

194 Mark R Kebbell and Shane D Johnson, "Lawyers' Questioning: The Effect of Confusing Questions on Witness Confidence and Accuracy", *Law and Human Behaviour*, Vol 24, No 6, 2000.

195 ibid, p 629.

3.33 The HREOC and ALRC inquiry similarly expressed concern about the impact of cross-examination techniques on the efficacy of the child witness:

> No child can be expected to give effective evidence under these circumstances. The contest between lawyer and child is an inherently unequal one. Child witnesses are often taken advantage of because they can be easily confused and intimidated because they are unable to match the linguistic kills of experienced lawyers or because, unlike the lawyer, they are in a hostile, alien environment.[196]

Misrepresentation of typical reactions to child sexual abuse

3.34 The Committee also heard that cross-examination techniques frequently include the misrepresentation of typical reactions to child sexual abuse, so that normal responses to abuse are used to undermine the credibility of the complainant. For example, where a child fails to scream or report the abuse, or does not avoid contact with the offender, these actions are highlighted in cross-examination as a means of suggesting that the abuse did not occur. One complainant described her experience to the Committee:

> The jury was permitted to assess my character on the basis of whether I screamed – a question which misleads people about the deception, psychological coercion and shame embedded in the crime…
>
> Overall, in the committal hearing I was asked eleven times if I screamed. When I challenged the defence barrister about the question he indicated to the court that he wanted to ask the question in cross-examination of my response to each offence before the court (there were 11 charges). I was asked seven times if I had told anyone about the abuse (which was not called abuse at the time). This was over and above being asked about who I had reported speaking with about the crimes.[197]
>
> … The defence was permitted to portray me as willingly entering places where I knew the defendant would be. As one example, I was *very angrily* interrogated about an occasion when the defendant had called me into the kitchen – 'I did not have to walk into the room ("did I")'. The logic follows that if I was as repulsed by the man as I had claimed to the court, why did I not keep walking to my bedroom where I had been heading before the incident occurred.
>
> The accused was a relative 13 years my senior, who had managed to stay in our home, and enter and leave it at his pleasure. The fact that law can portray me as making 'choices' to be with the defendant (when I had stressed that I did not know what to do – such as how to get out of it) not only confounds the concept of consent not being possible, but also presents victims to the court as being a willing participant in their association with the sex offender… Overall, if the portrayal of 'choice' must be permitted, should the law also permit (require) some form of correction about facts of the crime?[198]

196 HREOC and ALRC, p 344.

197 Submission 63, p 12.

198 ibid, p 13, footnotes omitted.

3.35 In evidence, the complainant further explained:

> The issues, particularly of delay and of continued contact with the perpetrator can be couched in such a way under the current rules of evidence that it can be not only extremely misleading to a jury but also emotionally annihilating to a child and/or an adult who has been through the experience as a child.[199]

3.36 The failure of the prosecutor to prevent an unfair cross-examination frequently adds to the distress of the complainant, as one complainant told the Committee:

> If a judge thinks a victim's actions are "contradictory", the DPP does not have any responsibility to explain how the victim's actions may be consistent with the crime… Defendants have legal representation: victims do not. Victims can be subjected to degrading 'legal' proceedings, and harmed, without the right to be represented.[200]

3.37 The DPP commented on this issue:

> … the Crown Prosecutor is not the witness's representative. That is a misconception which is commonly expressed by victims and witnesses in prosecutions. They constantly refer to "their barrister" or "their lawyer" meaning the Crown Prosecutor. The fact of the matter is that the Crown Prosecutor represents the community at large, and not the individual interests of the victim or the witness. That is the way our system is structured, and that is the way it should be, unless there is some fundamental change. But it means that the victim has an expectation which is not realised, an expectation of support, assistance, and perhaps protection, which … is dashed.[201]

3.38 The Committee acknowledges that, to some extent, the process of giving evidence about a crime of sexual violence will always be upsetting for complainants. This view was put forward by Mr Humphreys, representing the Legal Aid Commission, who suggested that the nature of the adversarial system made the witness' discomfort unavoidable:

> The fact is we have a system where evidence has to be tested and you cannot have a person saying 'this did not occur, this is untrue', and on the other hand we can make it all warm and fuzzy for a person to come in and put allegations to the court. There is an essential tension between those two problems of having the evidence tested, which may involve putting those propositions that people might find uncomfortable.[202]

> … the right of an accused to a fair trial must include the right to test the prosecution case by vigorous cross-examination of the complainant and other prosecution witnesses. The *Evidence Act 1995* already includes provisions to prevent undue badgering or harassment of witnesses by allowing the Court to

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199 Evidence, 24 April 2002, p 2.

200 Submission 63, p 10.

201 Cowdery, Evidence, 26 March 2002, p 8.

202 Humphreys, Evidence, 3 April 2002, p 4.

disallow a question put in cross-examination if the question is unduly annoying, harassing, intimidating, offensive, oppressive or repetitive (section 41).[203]

Inadequate judicial intervention

3.39 The Committee notes that mechanisms currently exist to enable judicial officers to intervene in unfair, intimidating or misleading cross-examinations. The Wood Royal Commission identified several provisions of the *Evidence Act 1995*, including sections 41 and 42, that enable a judicial officer to prevent inappropriate cross-examination techniques. These are detailed below, with added emphasis on provisions particularly relevant to child complainants:

> **41 Improper questions**
>
> (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:
>
> (a) misleading, or
>
> (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.
>
> (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:
>
> (a) **Any relevant condition or characteristic of the witness**, **including age**, personality and education
>
> (b) Any mental, intellectual or physical disability to which the witness is or appears to be subject.
>
> **42 Leading questions**
>
> (1) A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.
>
> (2) Without limiting the matters that the court may take into account in deciding whether to disallow the question or give such a direction, it is to take into account the extent to which:
>
> (a) Evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness, and
>
> (b) The witness has an interest consistent with an interest of the cross-examiner, and

[203] Submission 57, p 3.

(c) The witness is sympathetic to the party conducting the cross-examination, either generally or about a particular matter, and

(d) **The witness's age**, or any mental, intellectual or physical disability to which the witness is subject, may affect the witnesses answers.

(3) The court is to disallow the question, or direct the witness not to answer it, if the court is satisfied that the facts concerned would be better ascertained if leading questions were not used.

(4) This section does not limit the court's power to control leading questions.

3.40 Notwithstanding these provisions, a common theme, both in this Inquiry and in previous reports on child sexual assault prosecutions, was the failure of judges and magistrates to intervene to curtail harsh or confusing cross-examinations of children. In this respect, Dr Cashmore told the Committee:

> … the judge, as the so-called neutral umpire, has the opportunity to intervene. But in the research that Kay Bussey and I did when interviewing judges and magistrates in this State, we found that they are often reluctant and sometimes unaware of when children do not understand. A number of them also come from a defence background, so they do not see a problem with the process.[204]

3.41 In addition, Dr Cashmore noted that **intentionally confusing** questioning is more often a problem than **aggressive** questioning, and that judicial officers are less likely to intervene in confusing cross-examination tactics:

> … it depends on the judge and what view the judge takes. The judge may be more willing to intervene in that process and prevent intimidatory, hostile, badgering tactics. But defence lawyers can do a lot which would not amount to that: jumping around all over the place; suggesting the child is lying, which children find extraordinarily offensive and stressful; asking a lot of minute detail about time and place, which they are unlikely to have a good concept or grasp of; and pointing out inconsistencies, many would say is an unfair process and not about getting to the truth.[205]

3.42 Eastwood and Patton's study led them to conclude that judicial officers were disinclined to intercede in unfair questioning:

> However, it is the comments of the legal participants in relation to judges and magistrates that illuminate the problem of cross-examination within the courtroom… Both prosecutors and defence lawyers commented that there is a wide variation as to what judges allow during cross-examination. Many named specific members of the judiciary who are "known" to be either pro-defence or pro-prosecution. Although "judge shopping" is not permitted, it is clear that both

204 Cashmore, Evidence, 19 April 2002, p 3.

205 ibid, p 5.

> prosecution and defence admittedly attempt to have trials adjourned in order to have a more "favourable" judge sitting on a particular case.[206]
>
> It is evident that legislation to control cross-examination has not worked. The reasons for this are varied. First, many judges and magistrates would not even recognise if questioning is, for example, oppressive or intimidating for a child. Second, many judges and magistrates are unwilling to "enter the arena" particularly at committal proceedings where the unspoken assumption is that defence "own" committals and are therefore permitted "open slather". Third, even when judges and magistrates *try* to control brutal defence lawyers, a core of defence lawyers simply refuse to be controlled… Fourth even if defence lawyers repeatedly act in contravention of the legislation, it appears very unwilling to control or discipline even the most brutal defence barristers…[207]

3.43 The Wood Royal Commission also reported on the reluctance of judges to intervene in cross-examination:

> Our adversary system has not encouraged judges to intervene in the conduct of the examination of witnesses unless objection is taken, or the advocate has plainly exceeded the bounds of proper questioning. Some judges fear that undue intervention, even if justified, will excite concern as to prejudice, or cause the jury to be sympathetic to the accused.[208]

3.44 The Women's Legal Resource Centre (WLRC) expressed the view that judicial officers should intercede more frequently in unfair cross-examination of a child:

> … it would be good if the judge would intervene. I know that judges do ask questions, I have seen judges asking questions of witnesses. In my previous life in private practice the defence counsel would usually stand up immediately and make it known to the judge that they do not appreciate it, and start making noises about appeal, and the judge will immediately pull back, because the Director of Public Prosecutions, the defence, the judge and everyone seems to have an eye on the appeal court…
>
> I think the problem for judges is that they have to be neutral and be perceived to be neutral, and it is probably no fault of the judge – if there was a defence counsel who was carrying on with this line of questioning, the judge would have to intervene more and more and more, and in a transcript that could look like the judge was being unduly interfering.[209]

3.45 Because of the need for judges to remain neutral, the WLRC favours the appointment of an advocate for the child witness, whose role would be to object to such questioning, and otherwise represent the interests of the child.[210]

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206 Eastwood and Patton, p 125.

207 ibid, p 126.

208 Royal Commission into the New South Wales Police Service, Vol 5, p 1110.

209 Carney, Evidence, 2 May 2002, p 10.

210 ibid, p 10.

3.46 Crown Prosecutors were also identified in evidence as a possible source of assistance for child complainants under cross-examination:

> Prosecutors can also object, intervene and ask for questions to be rephrased, but, as the Director of Public Prosecutions pointed out, they often do not see it as their job to intervene in the process, and again they may be unaware of what is difficult for children and what is not.[211]

3.47 A Western Australian prosecutor cited in Eastwood and Patton's study considered prosecutors to have a role in protecting the witness:

> So if a child is being traumatized and tortured, that is your responsibility and you simply just can't drag them into court and let them be tortured without thinking about your obligations to them.[212]

3.48 The Public Defenders Office considered that judicial officers should take responsibility for controlling the questioning of witnesses:

> I think it is incumbent, to my mind, on the judge to ensure that questions are appropriate and to ensure that the witness understands the questions so that the answer is going to be probative. I also think it is incumbent on the judge to stop counsel, whether prosecution or defence, overawing or intimidating a witness, whether it be a child or anybody else.[213]

3.49 Ms Helen Syme, Deputy Chief Magistrate of New South Wales, gave evidence that, as a judicial officer, she considered it important to intervene to ensure that the child witnesses understand the questions being put to them:

> In relation to the issue of unfairness, when questions asked in cross-examination may be leading questions – which a cross-examiner, of course, is entitled to do – my main difficulty as the judicial officer would be that the child might not find the form of questioning not so much unfair but completely incomprehensible. I have no difficulty in pointing out to a defence counsel, if their mode of questioning appears to be completely incomprehensible, that that is the case.[214]
>
> …But insofar as criminal procedures are concerned, I think judicial officers do have the ability to be able to say, without interrupting cross-examination and without being unfair that a particular form of questioning is something that "the witness does not appear to understand what you are asking" and, for example, might say "And I wonder how I am going to be assisted by the reply to a question that the witness clearly does not understand".

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211 Cashmore, Evidence, 19 April 2002, p 3.

212 Eastwood and Patton, p 99.

213 Button, Evidence, 9 July 2002, p 11.

214 Syme, Evidence, 3 April 2002, p 20.

3.50 Dr Cashmore commented that it is likely to be difficult to increase judicial intervention, because judges usually consider the cross-examination process to be legitimate. Dr Cashmore quoted judicial officers whom she interviewed in relation to their views on the court process and their role in cross-examinations. One judge said:

> Sure, I can think of a number of ways of helping the kids, but when you realise that the predominant philosophy behind a court trial is the protection of the accused, you have a problem. The purpose of the exercise is not to find the truth but to satisfy the jury of the guilt of the accused beyond reasonable doubt and the whole focus is on the accused.[215]

3.51 Another judge in Dr Cashmore's study commented:

> I think it's very important when cross-examination is proceeding… to permit the evidence to be properly tested and if that means, as it inevitably does, that the child has to be distressed, I'm afraid it's part of the system.[216]

3.52 To improve the experience of children under cross-examination, Dr Eastwood and Professor Patton make the following recommendations:

- Training and accreditation in child development and the dynamics of sexual abuse for all legal practitioners acting in child sexual assault cases
- Disciplinary action against legal counsel who breach cross-examination legislation in relation to child witnesses, including penalties and banning persistent offenders from appearing in such cases
- Opening courts to select personnel to improve accountability of the process
- Codes of ethics for Bar associations, with discipline and penalties for breaches.[217]

3.53 The HREOC and ALRC report recommended that both the Law Society and Bar Association should "be encouraged to amend their rules" to prevent barristers and solicitors questioning children unfairly:

> The advocacy and professional conduct rules incorporated in barristers' and solicitor's rules should specifically proscribe intimidating and harassing questioning of child witnesses. Lawyers should be encouraged to use age appropriate language when questioning child witnesses.[218]

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215 Cited by Cashmore, Evidence, 19 April 2002, p 12.

216 ibid.

217 Eastwood and Patton, p 132.

218 HREOC and ALRC, p 347.

3.54 The Committee notes that there was support amongst some witnesses for legislative amendments to increase the intervention of judicial officers in appropriate circumstances. For example, Professor Parkinson commented:

> I cannot talk from experience of looking at a number of criminal trials but it is certainly my impression that the whole culture of our adversarial system is one in which judicial officers are hands off, particularly in the criminal justice system because there is a very great reluctance to interfere too much in the defence's presentation of its case. It seems to me that here there is room for legislative reform, to overturn that reluctance to some extent and to indicate from Parliament's point of view that in this area one needs to be a bit more interventionist about helping children understand questions… Some of the reforms in the United States along these lines have worked rather well. I do not think any of those reforms are earth shattering. I do not think they change the balance of power in criminal prosecutions but they do give a useful model of directing judicial officers to this problem.[219]

3.55 Professor Parkinson's submission attached an article by Janet Leach Richards, relating to child witnesses in the United States. One matter raised in that article concerns the responsibilities of Californian judges in trials involving child witnesses:

> California charges the court with the specific obligation to control the mode of interrogation of a child witness in order to make the interrogation rapid, distinct, and effective, and to protect the child from undue harassment or embarrassment.[220]

3.56 This refers to section 765(b) of the *Californian Evidence Code*, which states:

> (b) With a witness under the age of 14, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to insure that questions are stated in a form which is appropriate to the age of the witness. The court may in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness.

3.57 DoCS also recommends legislative amendment to require judicial officers to intervene more actively in the cross-examination of child witnesses.[221]

Inadequate training of legal professionals

3.58 A number of witnesses suggested that children's experiences in giving evidence would be improved if the professionals involved in child sexual assault trials were trained specifically

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219 Parkinson, Evidence, 19 April 2002, p 17.

220 Janet Leach Richards, "Protecting the Child Witness in Abuse Cases", *Family Law Quarterly*, Vol 34, No 3, Fall 2000, p 404, Attachment to submission 23.

221 Submission 70, p 9.

in children's development, language and memory as well as the incidence, patterns and impact of child sexual assault and the strategies of perpetrators. For example, the DPP considered that additional training would improve the response of professionals dealing with child sexual assault victims:

> I think it is a matter of increasing the sensitivity in the profession to the particular challenges of these types of cases and bringing out training regimes and our level of expertise up to modern standards. Within our office, we try to do that in relation to prosecutors by having training courses and the like and all the assistance of people such as the Witness Assistance Service officers, but defence counsel are very often from the private bar, and of course what arrangements they make are a matter for them…
>
> There may not be much incentive for [defence counsel] to spend time, and perhaps money as well, obtaining the materials, obtaining the training and gaining the knowledge that enables them to approach the matter in a more sensitive way. They will have to catch up eventually … but until now there have been some fairly alarming examples of the old-fashioned method being used by defence counsel. [222]

3.59 Dr Cashmore suggested that training of prosecutors and judges could assist professionals to be aware of the need to intervene in the cross-examination process:

> Professional training for lawyers and judges in the process is one approach that could be used. I think that may have some role for judges, but it may be more useful if there are specialist judges. I do not think you will necessarily expect every judge to be interested in this area and to pick up on all that is required to do it well…[223]

3.60 Professor Briggs also advocated better training:

> All professionals whose work involves interviewing, representing and making decisions about abused children should have to undertake education in the dynamics of child abuse and theories relating to child development. This should include police, social workers, judiciary, legal professionals, psychologists, Family Court counsellors and psychiatrists. They require an understanding of children's emotional needs, thought processes, thinking relating to abuse, children's use of language and the effects of all forms of abuse. Currently, while pre-school teachers study child development for four years, the professions who have responsibility for the assessment of children and the management of cases may have little or no professional knowledge in these areas and bizarre mistakes are being made.[224]

3.61 The Education Centre Against Violence argued for better training, as well as the use of an child development specialist to act as interpreter:

> Education of the investigative, legal professionals and judiciary on use of age appropriate language and taking into consideration child's developmental age

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222 Cowdery, Evidence, 26 March 2002, p 6.

223 Cashmore, Evidence, 19 April 2002, p 3.

224 Submission 2, p 14.

> when questioning child witnesses is necessary for a better response to children who have been sexually abused. Another way that needs of child witnesses can be better met is through the use of independent professionals who can assist the court by guiding legal professionals in asking their questions in age/developmentally appropriate ways, as well as assisting the child to understand the questions being asked of them. Their role would be that of an advocate/interpreter…
>
> Educational programs for the judiciary on child development, dynamics of child sexual assault and recent research on children as witnesses as to their competence, reliability, memory, language capacities and expression would be recommended in the interests of justice.[225]

3.62 Similarly, the Combined Community Legal Centres submitted:

> Numerous reports and inquiries have highlighted the need for solicitors, police, court staff, judicial personnel and medical staff to develop skills in dealing with children due to their specific requirements. Yet it is apparent that staff in many places are either unaware of best practice principles for dealing with children or are not required to utilise them in the workplace.[226]

3.63 Training was also recommended by the Department of Community Services:

> Guidelines and professional development for judges, magistrates, barristers and solicitors who deal with child witnesses must be developed and become prerequisites for matters where child victims of sexual assault give evidence.
>
> Training programs should include:
>
> - an overview of the intellectual and cognitive developmental capacities of children of different ages
> - the use of age-appropriate concepts and language when interacting with children
> - the factors that enhance and impede a child's ability to give evidence
> - time periods beyond which child witnesses of various ages should not be expected to give evidence without a break, and
> - standard lengths of break needed by child witnesses of different ages.[227]

3.64 However, Dr Cashmore was doubtful about the benefit of educating defence counsel about difficulties faced by child witnesses under cross-examination, as this might simply provide defence lawyers with more expertise in confusing the complainant:

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225 Submission 40, p 14.

226 Submission 64, p 18.

227 Submission 70, p 9.

> In terms of professional training for lawyers, I think it may in fact be counterproductive [to provide training] for defence lawyers. Their training is actually to take full advantage of the adversarial process. Schooling them as to children's vulnerabilities is not necessarily going to be in the best interests of getting full and complete evidence from children.[228]

3.65 Ms Syme, Deputy Chief Magistrate, also expressed concern that there are limitations on the potential effectiveness of training:

> I have noted some suggestions that there should be better training of everybody involved. That is an obvious solution, but there are some situations I think where people should be chosen for the job. You cannot necessarily train people to talk to children.[229]

Cross-examination of Child Complainants: Committee Conclusions

3.66 The Committee is concerned about the experience of child sexual assault complainants under cross-examination and considers the intimidatory and harassing questioning of child sexual assault complainants to be inhumane. The Committee also notes that intentional and inadvertent confusion caused by inappropriate cross-examination is a frequent source of distress to witnesses, and undermines their capability to effectively give evidence. Such cross-examination techniques serve to obscure the truth rather than illuminate it. The Committee is conscious of the importance of the right to a fair trial, and the vital role that cross-examination plays in upholding that right. However, it is the Committee's opinion that the trial should also be fair to the complainant, and that the rights of the accused need to balanced against this.

3.67 Cross-examination techniques that prevent the court and the jury from gaining an understanding of the true credibility of the complainant and his or her story can only impede the jury in determining the facts in question. The defence has a right to reveal inconsistencies in the complainant's story and to expose complainants whose evidence is unreliable or who lack credibility. However, it appears that cross-examination techniques are frequently used that enable the defence to **create** inconsistencies through bullying or confusion. Such tactics misrepresent the true credibility of child complainants by inducing fear and bewilderment and by taking unfair advantage of children's emotional and intellectual stage of development. This obstructs the court in its assessment of the facts.

3.68 In the Committee's opinion, reform of cross-examination to prevent unfair, misleading or intimidating questioning in child sexual assault trials is possible without threatening the rights of the defendant. The Committee is not convinced that such reform would necessarily inhibit a genuine defence of the accused. It would, however, reduce the ability of the defence to unfairly create reasonable doubt through deception of the jury.

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228 Cashmore, Evidence, 19 April 2002, p 3.

229 Syme, Evidence, 3 April 2002, p 25.

3.69 The Committee notes that the *Evidence Act 1995* already permits a judicial officer to intervene where cross-examination is misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. These provisions should have prevented the distressing experiences of child witnesses previously described, but clearly they have often failed to do so. The exact reasons for the reluctance of judicial officers to curtail cross-examination techniques of this kind are unclear, but may relate to judges' lack of awareness about the impact on children of such questioning, a fear of appeals arising from 'excessive' intervention, or a belief that distress to the child complainant is necessary or inevitable.

3.70 The Committee considers that amendment of the *Evidence Act 1995* is required to make clear the role of judicial officers in supervising cross-examination and controlling inappropriate questioning. The Committee's recommended amendment follows the model established in section 765(b) of the *Californian Evidence Code*.

Recommendation 12

The Committee recommends that the *Evidence Act 1995* be amended to insert a section as follows:

With a witness under the age of 18, the court shall take special care to protect him or her from harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to ensure that questions are stated in a form which is appropriate to the age of the witness. The court may in the interests of justice forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness.

3.71 The Committee considers that, given the failure of legislation to prevent inappropriate cross-examination in the past, a comprehensive change in attitudes and approach is required for real change to occur. In Chapter Seven, the Committee will recommend a pilot project for a specialist jurisdiction, which the Committee hopes will overcome a number of problem areas identified in this chapter, including distressful cross-examinations, inadequate judicial intervention, and training of legal professionals.

Cross-Examination in Committal Proceedings

3.72 The requirement for some complainants to give oral evidence at committal hearings was also identified as a continuing problem for child witnesses. The Committee notes that, in 1996, the *Justices Act 1902* was amended to create a presumption that an alleged victim of a violent offence is not required to attend and be examined at committal proceedings. However, Section 48E(2)(a) of the *Justices Act 1902* allows a Justice to direct the alleged victim to appear if the Justice is "of the opinion that there are special reasons why, in the interests of justice, the witness should attend to give oral evidence". The Committee understands that the purpose of the amendment was to minimise the distress of victims of crime by relieving them of the requirement to give evidence and be cross-examined twice: first at committal and then at the trial itself.

3.73 However, the Committee heard that, notwithstanding section 48E, child victims of sexual assault are frequently required to give oral evidence at the committal stage. According to one recent study, approximately one-third of child complainants were required to give evidence in committal proceedings.[230]

3.74 The DPP told the Committee that this is disadvantageous to the child:

> This results in the child having to tell about the sexual assault more than once in court, which can add to re-traumatisation. If children appear at 48E committal hearings this can be seen as a chance to see how the child performs as a witness and how he/she can manage the court process. However this also increases the chance of inconsistency due to the fact that they have to give evidence twice, there is delay between proceedings where children's linguistic ability and style changes and the defence can highlight these inconsistencies through use of semantics and linguistic agility.[231]

3.75 The DPP advised of the possible reasons for children being required to give evidence at committal proceedings, in spite of section 48E(2) of the *Justices Act*:

> There may have been inconsistencies in statements made by the victim in the course of the investigation and those inconsistencies may need to be explored at the committal hearing. There may be inconsistencies between what the witness says and what another witness says, or what another piece of evidence exposes and that inconsistency needs to be tested. There may be uncertainty about time or place where events happened and defence counsel wants to explore that. But the courts have become better at protecting witnesses from unnecessary examination and in many cases the court, when making the order to allow a witness to be cross-examined, will confine the areas in which that cross-examination may take place. Nevertheless, that does not happen all the time and there are still cases where child victims are required to testify and be cross-examined.[232]

3.76 Ms Purches, the Manager of the WAS, commented on the difficulty for children giving evidence at trial concerning different statements made by them during different stages of the investigation and prosecution process:

> Having observed the process, when a child who is being cross-examined on a number of sources – the child's statement to the police and the transcript of the committal hearing – it is often not made clear the source that the material is coming from. The child has been asked to comment on the inconsistency between one version and another and they are very difficult conceptual issues for a child to struggle with. I would support the proposition that, where possible, it would be best for children not to have to go through that process.[233]

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230 Eastwood and Patton, p 54.

231 Submission 27, p 12.

232 Cowdery, Evidence, 26 March 2002, p 19.

233 Purches, Evidence, 26 March 2002, p 19.

3.77 Several witnesses were critical of the requirement for children to give evidence at committal. For example, a Sexual Assault Service submitted:

> … the benefits of legislation that has been put in place to protect victims… is constantly eroded by an effective and diligent 'Defence industry' so that the processes of the court become very unpredictable. Will they be required to give evidence at a Committal Hearing or not? We must now answer 'Most probably, yes'. This Service heard one magistrate essentially apologize for his inability to deny the Defence the opportunity to cross-examine the witness at the Committal, in the spirit of that Legislation, not because he considered that the evidence should be tested in that Court, but because precedents set in other Courts denied him the ability to appropriately exercise that decision.[234]

3.78 The Children's Legal Issues Committee of the Law Society of New South Wales suggested the need for a study to be undertaken to examine the use of a number of provisions relating to child witnesses, including "the circumstances in which complainants in child sexual assault matters are being directed to give oral evidence at committals."[235]

3.79 The Eastwood and Patton study noted that cross-examinations in committals are often more harsh than those of the trial itself, largely because of the absence of a jury, and that an intimidatory cross-examination on committal serves to increase the child's fear of the trial:

> The most damaging element is the fact that the child is frequently cross-examined at committal proceedings, not always for the purpose of truly testing the evidence, but rather in order to intimidate the child…[236]

3.80 The Committee considers it disappointing that section 48E has not been successful in abolishing the requirement that child sexual assault complainants appear at committals. The resultant need for the child to give evidence and be cross-examined more than once, and the ability for defence counsel to use the opportunity to 'roughen up' the witness is unfortunate.

3.81 The Committee notes that, in the interests of justice, it will sometimes be necessary for the child to be cross-examined at committal. The special measures that are recommended by the Committee in Chapters Six and Seven, relating to the pilot project and the pre-recording of evidence, would enable this to occur without additional stress being placed on the child.

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234 Submission 61, p 1.

235 Submission 75, p 5.

236 Eastwood and Patton, p 128.

Chapter 4 Rules of Evidence

Rules of evidence guide the courts in determining what information or evidence can be considered in cases before them, how the evidence is presented and how it is assessed.[237] In New South Wales, the rules of evidence are regulated by the *Evidence Act 1995*. This chapter reviews the rules of evidence relevant to child sexual assault trials, how they influence the trial outcome and how they impact on complainants. This includes rules rendering hearsay evidence inadmissible, governing the admission of tendency or similar fact evidence, and regulating the directions and warnings given to juries.

Provisions Relating to Admissibility of Evidence

4.1 The rules relating to admissibility of evidence establish a number of steps in determining whether information can be admitted in a proceeding. The first requirement is that the evidence is **relevant** to a proceeding**.** Section 55 of the *Evidence Act 1995* describes relevant evidence as "evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding". Under section 56, evidence that is **not** relevant is **not** admissible, while evidence that **is** relevant **is** admissible, **unless** it is affected by one of the exclusionary rules.

4.2 The *Evidence Act 1995* establishes a number of **exclusionary rules** – that is, grounds on which evidence that is otherwise admissible can be excluded. The rules relate to: hearsay evidence; admissions by a party to a proceeding; opinion evidence; evidence of judgments and convictions; tendency or coincidence evidence; evidence relevant only to credibility; character evidence; identification evidence; and privileged information.[238] These provisions mean that even if the evidence is relevant, it may still be ruled inadmissible on other grounds.

4.3 In addition, a number of **judicial discretions** exist in Part 3.11 of the Act that allow a court to exclude evidence that would otherwise be admissible.[239] This includes evidence that is misleading or confusing or which has been illegally obtained.[240] One such discretion is found in section 137, which provides a general protection to the accused in all criminal proceedings. It relates to unfairly prejudicial evidence and provides that:

> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

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237 Colin Ying, *Essential Evidence*, Second Edition, Cavendish Publishing, Sydney and London, 2001, p 2.

238 See chapter 3, *Evidence Act 1995*. See also Stephen Odgers, *Uniform Evidence Law*, 4th Edition, LBC Information Services, 2000, p 108.

239 ibid.

240 ss 137 – 138 *Evidence Act 1995*.

4.4 According to Odgers, evidence cannot be considered 'unfairly prejudicial' to the accused "merely because it makes it more likely that the defendant will be convicted".[241] He cites the Australian Law Reform Commission, which noted:

> By risk of unfair prejudice is meant the danger that the fact-finder may use the evidence to make a decision on an improper, perhaps emotional, basis ie on a basis logically unconnected with the issues in the case.[242]

4.5 In addition, section 135 provides a discretion to exclude evidence adduced by **either party** if it might:

> (a) be unfairly prejudicial to a party, or
>
> (b) be misleading or confusing, or
>
> (c) cause or result in undue waste of time.

4.6 Matters that may be considered by the court in exercising a discretion, including whether to give leave for evidence to be adduced, are set out in section 192(2):

> Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:
>
> (a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and
>
> (b) the extent to which to do so would be unfair to a party or to a witness, and
>
> (c) the importance of the evidence in relation to which the leave, permission or direction is sought, and
>
> (d) the nature of the proceeding, and
>
> (e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

Tendency and Coincidence Evidence

4.7 The following section examines the impact of the rules excluding tendency evidence and coincidence evidence, which were known as propensity or similar fact evidence at common law.[243]

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241 Odgers, p 362.

242 ibid, p 363.

243 Ying, p 87.

Admissibility of tendency and coincidence evidence

4.8 Tendency evidence is described by Odgers as "evidence that a defendant had committed crimes, or other 'wrongful' acts, similar to that with which he or she is charged, thereby disclosing a propensity to commit the crime charged".[244]

4.9 Section 97 of the *Evidence Act 1995* sets out the requirements for admissibility of tendency evidence:

> **97 The tendency rule**
>
> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:
>
> (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence, or
>
> (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

4.10 Odgers explains that the tendency rule "prohibits use of evidence of "character, reputation, or conduct" to prove that a person has a tendency to act or think in a particular way, unless the requirements of the provision are satisfied".[245] The requirements are: that adequate notice is given and the evidence has "significant probative value".

4.11 The coincidence rule, as detailed in section 98 of the *Evidence Act 1995*, regulates the admission of evidence of two or more similar acts (that is, conduct of the accused). The section provides as follows:

> **98 The coincidence rule**
>
> (1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidently, a person did a particular act or had a particular state of mind if:
>
> (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence, or
>
> (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

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244 Odgers, p 229.

245 ibid, p 217.

> (2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:
>
> (a) they are substantially and relevantly similar; and
>
> (b) the circumstances in which they occurred are substantially similar.
>
> (3) Paragraph (1)(a) does not apply if:
>
> (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
>
> (b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

4.12 Importantly, for both tendency evidence and coincidence evidence led by the prosecution, a further restriction is imposed by section 101, which requires that "the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant".[246] The requirement for the court to exclude all evidence unfairly prejudicial to the defendant, pursuant to section 137, also applies.

4.13 The Committee notes that, in regard to child sexual assault prosecutions, tendency evidence can pertain to other **uncharged** acts (sexual assaults) by the accused against the complainant or another child or to **charged** acts against another child.

4.14 Dr Cossins, senior lecturer in law at the University of New South Wales, explained the use of tendency and coincidence evidence as it is likely to be relevant in child sexual assault trials:

> In the context of a CSA trial, the admission of tendency evidence under ss 97 and 101 … will most likely arise where a child (other than the complainant) can give evidence of the defendant's sexual behaviour with him or her, or where another witness can give evidence of what they know about the defendant's sexual behaviour with children.
>
> There might be circumstances where a particular, distinctive pattern of behaviour on the part of the defendant would see the evidence being defined as coincidence evidence under s 98. In other words, "this may be established where there was something 'strikingly similar' about … two [or more] crimes, permitting the inference that they were likely to have been committed by the same person".[247]

4.15 The Committee notes that judicial interpretation of the tendency and coincidence rules has resulted in strict limitations on the admissibility of such evidence. For the test of "significant probative value" in sections 97(1)(b) and 98(1)(b) to be met, the courts have required that the evidence show "striking similarities, unusual features, underlying unity, system or pattern such that it raises, as a matter of common sense and experience, the

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246 Section 101(2).

247 Submission 69, p 14 (footnotes omitted).

objective improbability of some event having occurred other than as alleged".[248] The test provided for in section 101 has been interpreted using the common law approach established in the High Court case of *Pfennig*.[249] This requires that, for the evidence to be admitted, it must possess "a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged".[250]

4.16 Dr Cossins advised that the courts frequently rule tendency evidence inadmissible:

> Generally speaking, it can be expected that under these provisions, any evidence given by a child complainant, by another witness or even the Crown that the accused had a *tendency* to act in a sexual way with children would be held to be inadmissible either because the court decided that the evidence did not have significant probative value under s97(1)(b) or, more likely, because the probative value of the evidence *would not* substantially outweigh any prejudicial effect it may have on the defendant under s 101(2).[251]

4.17 The case of *Crofts*[252] was referred to as an example illustrating the High Court's rulings on tendency evidence:

> … the High Court held that the trial had miscarried when comments about the accused's tendency on previous occasions had been admitted into evidence (in cross-examination, the complainant had said: "He started playing around with me *as usual*"; in re-examination, the prosecutor had said to the complainant, "Over the years that he was doing these sexual things to you…"). Although this case did not concern the NSW *Evidence Act*, it highlights the artificial context that is created when the Crown decides to only prosecute a few of the offences committed by a defendant over a long period of time and also demonstrates the High Court's concern about the prejudicial effect that tendency evidence will have on a defendant in a CSA trial.[253]

4.18 The Committee learnt that particular issues arise where the tendency evidence relates to similar acts alleged to have been committed against several different children. In determining the probative value of evidence of multiple child complainants, the key consideration, as formulated by the New South Wales Court of Appeal case *OGD*,[254] is that

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248 *Jacara Pty Ltd v Auto-Bake Pty Ltd* [1999] FCA 417 (15 April 1999), Sundberg J at paras 10 – 11, cited in Odgers, p 219.

249 *Pfennig v The Queen* (1995) 182 CLR 461.

250 ibid at 481, citing *Hoch v The Queen* (1988) 165 CLR 292 at 294, cited in Odgers, p 232.

251 Submission 69, p 14.

252 *Crofts v R* (1996) 186 CLR 427, cited in Submission 69, p 15.

253 Submission 69, p 15.

254 *R v OGD (No 2)* [2000] NSWCCA 404, cited in Submission 69, p 16.

there be no possibility that the witnesses have jointly concocted their evidence. The trial judge is required to:

> … make an assessment of whether the evidence tendered for its tendency purpose "is capable of reasonable explanation on the basis of concoction. If so, then the evidence must be excluded… Relevant factors include the relationship between the potential witnesses, and opportunity and motive on their part to concoct their accounts… The exercise is … a fact finding one, the fact to be determined being whether there was a real possibility of concoction" (at para 70 [of *OGD*]). This exercise on the part of the trial judge would be sufficient to exclude the evidence under s 97(1)(b), since the evidence would probably *not* be considered to have "significant probative value", such that s 101 would not then need to be applied.[255]

4.19 Dr Cossins notes that this decision effectively rules out the admission of evidence of all related or acquainted children:

> Such a decision raises the obvious question as to whether it would ever be possible to exclude "the reasonable possibility of concoction" where the children in question had previously known each other…[256]

4.20 The approach taken by the courts in relation to admission of evidence of victims of the same alleged perpetrator was a focus of criticism by participants in the Inquiry because it ignores the reality of the circumstances of child sexual assault. In this respect, Dr Cossins argued:

> Such an approach to tendency evidence in CSA context distorts the reality of the experiences of many children who are sexually abused;… a wealth of research tells us that child sex offenders are notorious recidivists who usually have more than one victim and that it is not uncommon for an offender to select victims from the same family, school, kindergarten, scouting group etc. Nonetheless, as a result of *OGD (No 2)*, potentially relevant evidence about the context in which an accused carried out his sexual activities with children has a high probability of being excluded under the *Evidence Act*. This will, of course, have significant ramifications where a trial judge has ordered separate trials for the prosecution of offences against each particular child.[257]

4.21 Moreover, Dr Cossins argued that the assumption that children will jointly concoct an allegation of child sexual abuse is not legitimate:

> There is no empirical evidence to show that children frequently concoct allegations of sexual abuse… The belief that children are prone to concoction has been repeated so frequently in the case law in the last 100 years that the mere reiteration of the belief has become evidence of the truth of the belief. However,

255 Submission 69, p 17.

256 ibid, p 17.

257 ibid, p 17.

> psychological evidence shows that in relation to lying, children do not have the ability to sustain a lie in the face of repeated questioning.[258]

Reform proposals for tendency and coincidence evidence

4.22 Legal opinion is not unanimous on whether tendency evidence should be more widely admitted. The Committee observes that McHugh J in his judgement in *Pfennig*[259] stated that propensity evidence should be admitted whenever the interests of justice require it. This would be where:

> …the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.[260]

4.23 However, the restrictions on admissibility of tendency evidence were considered by some witnesses to be essential to the accused receiving a fair trial because unfair prejudice could be created by admitting it:

> The idea upon which evidence of other crimes is excluded is the belief that if a jury hears about a plethora of other crimes, it will not look to the evidence with regard to each individual crime and it will simply convict on prejudice.[261]

> It is fundamental to our system that if a person is accused of a crime, except in exceptional circumstances, evidence of other crimes said to have been committed by that same person will not be led against them… That is a rule of fairness and freedom from prejudice in front of juries. And it is even more important, I think, if the other allegations are unproven or not admitted by the accused. The general exception is when there is a striking similarity between the allegations … and clearly that is predicated on a lack of contact between the complainants, because if there has been contact the striking similarity loses its force…[262]

4.24 The Committee notes that the extent to which the evidence of one child's experience of sexual abuse by the defendant should be able to corroborate the evidence of another child is problematic. Clearly, the allegation that a person has acted in a certain way in the past does not of itself prove that he or she is guilty of the offence charged. Alternatively, it could be argued that a pattern of behaviour is a relevant consideration for the fact-finder in a trial, particularly in relation to child sexual assault, where studies have revealed repeated offending to be the norm.

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258 "Answers to Proposed Questions", document tendered by Dr Cossins, 23 April 2002, p 14.

259 *Pfennig v The Queen* at 528-529, cited in Odgers, p 233.

260 ibid.

261 Button, Evidence, 9 July 2002, p 15.

262 ibid, p 14.

4.25 The question for the Committee is whether the bar has been set too high in determining the admissibility of tendency evidence in child sexual assault trials. It is clear that the courts frequently have considered evidence relating to patterns of sexual conduct to be too prejudicial to the accused. This appears often to be based on the conclusion that, in relation to evidence from multiple complainants, the chance of concoction between witnesses who are known to each other is sufficient to undermine the probative value of their evidence.

4.26 However, the Committee understands that the targeting of multiple victims, from the same area, school, family, or community group is a typical feature of child sexual assault. As a result, a significant proportion of victims of a single child sex offender are likely to know each other. The Committee considers it to be unjust that the fact of a pre-existing relationship between victims is in itself sufficient to rule their evidence of similar acts inadmissible and considers that the difficulty in admitting evidence of this type is likely to be a factor in the low success rates for child sexual assault prosecutions.

4.27 The Committee is of the view that the rules relating to the admission of tendency evidence should be modified. The reality of child sexual assault cases is that perpetrators very often display a pattern of conduct of abuse of one or more children. The rule excluding tendency evidence that is not of 'significant probative value' has created a situation in which juries in child sexual assault cases often are not presented with relevant evidence about the defendant's full range of offences against the complainant or other children. As a result, the Crown's case can be significantly and, in the Committee's opinion, unfairly weakened.

4.28 The Committee has reviewed possible alternatives as proposed by Dr Cossins and as found in the approaches to similar fact evidence in Queensland and Victoria.

4.29 Dr Cossins' recommendation for reform focuses on the issue of concoction and rulings relating to the probative value of tendency evidence. She suggested that section 97 be amended as follows:

> 97(3) In assessing the probative value of tendency evidence under paragraph (1)(b) in a child sexual assault trial, the court cannot take into account whether or not the witness giving the evidence and the complainant had a prior relationship.[263]

4.30 However, Dr Cossins is not confident that her recommendation would be sufficient to prevent the exclusion of evidence of victims of the same offender:

> Even so, such an amendment is unlikely to be sufficient to address the archaic views expressed by judges in *Hoch* and *OGD (No 2)* since tendency evidence that passes the significant probative value test under s 97 can still be excluded under the balancing test in s 101(2).[264]

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263 Submission 69, p 18.

264 ibid.

4.31 Queensland amended its *Evidence Act* to achieve the same objective. The *Criminal Law Amendment Act 1997* (Qld), sought to prevent tendency evidence being ruled inadmissible on the grounds of possible joint concoction, arguing that that is a matter for the jury to consider. Section 132A of the *Evidence Act* (Qld) now states:

> **Admissibility of similar fact evidence**
>
> 132A. In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.[265]

4.32 The Committee considers that there are advantages in this approach. It allows the jury, as fact-finder, to determine for itself whether there is a likelihood of concoction that discounts the value of the evidence. It seems to the Committee that this is an appropriate role for the jury. However, this provision still requires the evidence to be 'more probative than prejudicial'. As a result, it appears likely that most tendency evidence would still be excluded, given the courts' view on the prejudicial effect of evidence of sexual tendencies and offences.

4.33 An alternative approach is taken in Victoria, where section 398A of the *Crimes Act 1958* (Vic) provides:

> **398A. Admissibility of propensity evidence**
>
> (1) This section applies to proceedings for an indictable or summary offence.
>
> (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.
>
> (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).
>
> (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.
>
> (5) This section has effect despite any rule of law to the contrary.

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265 Cited in Justice T H Smith and O P Holdenson QC, *Comparative Evidence: Admission of evidence of Relationship in Sexual Offence Prosecutions*, Vol 73, June 1999, p 442, tendered by Professor Parkinson, 19 April 2002.

4.34 The legislative purpose of section 398A was to replace the 'no other reasonable explanation' test for admissibility of propensity evidence, as developed by the High Court in the cases of *Hoch* and *Pfennig*, with a 'just to admit the evidence despite its prejudicial effect' test. The latter test is in accordance with the approach of the House of Lords in England in the case of *DPP v P*.[266]

4.35 The approach taken in section 398A broadens the circumstances under which tendency evidence is admissible. Firstly, it allows the evidence to be admitted *even if* it is prejudicial to the accused, so long as it is in the interests of justice to do so. This requires the judge to consider issues beyond the prejudice to the accused when determining whether to admit the evidence.

4.36 Secondly, section 398A explicitly states that the existence of an alternative, reasonable explanation of the evidence consistent with the innocence of the accused (eg concoction) is not to be considered when determining the *admissibility* of the evidence. In other words, a judge is to assess the probative value of the evidence, on the assumption that it is true, for the purpose of deciding whether it is admissible. Note that an alternative reasonable explanation *can* be considered by the court when determining the *weight* to be given to the evidence or the credibility of the witness.

4.37 The leading case on the interpretation of section 398A is the Victorian Court of Appeal case of *R v Best*.[267] The Court's interpretation of section 398A is described by the Victorian Law Reform Commission (VLRC) as follows:

> The Court of Appeal has suggested that section 398A requires the judge to compare the *strength of the evidence*[268] against the *risk of an unfair trial*. It is suggested that a judge is required to make a value judgment about whether the strength of the evidence is such that 'fair minded' people would think that the public interest in putting all the relevant evidence of guilt before the jury must have priority over the risk of an unfair trial (emphasis added).[269]

4.38 The VLRC also stated:

> The approach taken by the Court of Appeal in a number of cases appears to indicate that, as long as there is sufficient similarity between the various counts, propensity evidence that may not previously have been admissible is now being treated as admissible in Victoria.[270]

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266 *Director of Public Prosecutions v. P.* [1991] 2 A.C. 447.

267 *R v Best* [1998] 4 VR 603, 617.

268 The probative value of evidence that more than one complainant has made similar sexual offence allegations against the same person rests on the improbability that more than one complainant would independently make up such allegations if they were not true: *R v Best* [1998] 4 VR 603, 610, 616.

269 Victorian Law Reform Commission, *Sexual Offences: Law and Procedure*, Discussion Paper, September 2001, p 135. Footnote included.

270 ibid.

4.39 The Committee has considered the different means of reforming the admissibility requirements for tendency evidence in the child sexual assault context. The Committee has concerns that the Queensland approach, which prohibits the exclusion of evidence on the grounds of possible concoction, may not be sufficiently far-reaching. In child sexual assault trials, it is likely that tendency evidence would in any case be excluded under the Queensland-style provisions because it would be considered too prejudicial to the accused.

4.40 The Committee notes that the Victorian approach provides a wider discretion to admit tendency evidence. It incorporates the Queensland provisions in that it allows tendency evidence to be admitted despite any alternative explanation for the evidence, such as coincidence or concoction. In addition, it allows potentially prejudicial evidence to be admitted in the interests of justice. However, the Committee would prefer a mechanism that renders tendency evidence prima facie admissible in child sexual assault trials, whilst retaining the general discretion to exclude evidence that is unfairly prejudicial under section 137. The Committee has suggested amendments along these lines in Recommendation 14 in the following section of the report.

Uncharged acts

4.41 The term 'uncharged acts' refers to criminal conduct by the accused for which he or she has not been charged. These are a type of tendency evidence that, in the child sexual assault context, typically relates to sexual assaults by the accused on the complainant that are not the subject of charges, usually due to insufficient evidence or lack of specificity in the details of the allegation. As uncharged acts are considered tendency evidence, they are affected by the rules for excluding tendency evidence that were reviewed in the previous section (relating to the probative and prejudicial values of the evidence).

4.42 The Committee notes the evidence and submissions which indicate that, in cases of repeated sexual abuse of a child, it is common for only a selection of the assaults against the complainant to be prosecuted, with no charges laid for the remainder of the assaults. The existence of uncharged acts is therefore not unusual in criminal proceedings for child sexual assault. The Committee considers that the issue of admissibility of uncharged acts against the same complainant in child sexual assault trials is of sufficient importance for it to receive separate analysis. This is done in the following section.

Problems arising from rules on admissibility of evidence of uncharged acts

4.43 Many inquiry participants were critical that evidence of uncharged acts is often excluded in child sexual assault proceedings. For example, Professor Parkinson, Professor of Law at the University of Sydney, considered the exclusion of such evidence to be contrary to the interests of justice:

> In a criminal trial, the evidence which is allowed to be heard by a jury is often very narrow. Any evidence which is more prejudicial to the defendant than probative of the offence is excluded, and in this way the incident may be shorn of some of its context. The focus is only on the incidents charged, and evidence will be excluded about any incidents which did not form the basis of criminal charges,

> unless it falls within the rules admitting tendency evidence, coincidence evidence or other such rules.[271]

4.44 Professor Parkinson drew the Committee's attention to a High Court decision[272] which upheld an appeal on the grounds that a complainant had referred in her evidence to other incidents of sexual assault committed against her, for which the defendant had not been charged. The Court found that the trial judge should have discharged the jury and ordered a new trial. Professor Parkinson commented:

> The non-legal observer might well be left wondering … that the legal system could be so perverse first, to charge the defendant with only some of the offences which she alleged, and secondly, to regard the trial as miscarrying when she made reference to the totality of her experience. No doubt, as she stepped into the witness box, she promised to tell the truth, the whole truth and nothing but the truth. The law did not allow her to tell the whole truth, and when she tried, regarded her testimony as prejudicial and inflammatory.[273]

4.45 The Coffs Harbour Child and Adolescent Sexual Assault Service submission illustrates this problem with reference to a case of a 14 year old girl, who had been abused from the age of seven until she was twelve years old. The submission advised:

> The defendant was charged with:
>
> - Sexual intercourse with a child under 16
> - Two counts of Aggravated Indecent Assault
>
> Before the trial, the girl was advised by the Crown, that if she made references to the abuse being constant, chronic or ongoing, the case could be aborted.
>
> This information made the child hesitant to give her evidence. When asked about specific incidents eg whether she was sitting, standing, lying down etc at the time of the abuse, she became confused.[274]

4.46 This issue was also a subject of criticism in a submission to the Committee by a complainant:

> Child sexual abuse can take many forms, it may be one, but nonetheless, devastating event, or as in my case, a habitual abuse occurring over a long period of time. The legal system should be able to give some consideration to this effect, however it seems, for the benefit of the accused, it is not able to do so unless there are clearly defined and proven incidents. As in my case, out of 11 years of

271 Submission 23, p 7.

272 *Crofts v The Queen* (1996) 186 CLR 427.

273 Submission 23, p 7.

274 Submission 33, p 5.

> abuse by my Grandfather only 4 charges were made… As with my Uncle, over a period of 4 years or more abuse, only 2 charges were laid.[275]

4.47 Similarly, another complainant described her frustration that:

> A jury is not told that the law forces victims to only give details of the crime that reflect law's construction of it, which actively excludes some aspects of the crime.[276]
>
> … [The] jury got half the story because I was not allowed to say – I tried to say that the abuse was ongoing. I was reprimanded severely for that.[277]

4.48 In terms of the efficacy of the child complainant's evidence, a number of problems arise from isolating specific incidents for prosecution. Child sexual assault counsellors noted that in circumstances of frequent abuse, it becomes difficult for children to distinguish between the separate incidents of abuse that form the separate charges, as is required by the legal system:

> Children often do not remember specific events down to each detail. If it has been ongoing abuse it may have happened many many times. How are children supposed to remember dates, what they were wearing, the time, what he was wearing etc. If they confuse one offence with another the defence highlight this. The defence actually targets this, knowing that they can discredit the child.[278]

4.49 Similarly, the Northern Sydney Child Protection Service noted:

> Rules of evidence do not take into account the dynamics of child sexual assault, particularly where the sexual assault occurs within the context of the family. Intra-familial child sexual assault often occurs over an extended period of time, often in different places and contexts and in varying degrees of intrusiveness. Children may be abused across a range of developmental stages that will have an impact on their recollection of the abuse and the perception of the abuse. In some situations, children find it difficult to be specific about times and dates, in particular if the abuse began at a very young age…[279]

4.50 Academic studies confirm that experiencing multiple incidents of abuse can affect children's memory of a particular incident:

> Although repeated exposure generally facilitates memory, and may also minimise age differences, it may create some difficulties in the presentation of evidence because repeated events tend to take on the form of a "script" of the **typical** event. Specific incidents may then "run into" each other and be difficult to

275 Submission 21, p 14.

276 Submission 63, p 10.

277 Evidence, 24 April 2002, p 6.

278 Submission 47, p 4.

279 Submission 60, p 5.

> differentiate whereas legal requirements necessitate the laying of specific charges in relation to specific incidents.[280]

4.51 The inability of a child to provide sufficient detail about each offence can prevent the full extent of the sexual abuse being prosecuted, according to Professor Parkinson:

> Young children in particular often provide very little detail about what has happened, and the criminal courts require not only that the offence be proved beyond reasonable doubt, but that the elements of each offence be proved specifically…
>
> For many victims of child sexual assault, however, it may be very difficult to remember each specific event in which they were abused. They may be able to describe with painful detail the story of how they were abused over a period of time. But what exactly happened when, what he did on one occasion or another, may be quite difficult to describe in a way which does not appear suspect under cross-examination. Where a child has been abused over a long period of time, one incident of abuse may blur with another. Details may become confused, and descriptions vague. This is particularly so if the child dissociates during the abuse. Consequently, the police or the Director of Public Prosecutions may decide not to press charges because the child is unable to give the detail required.[281]

Reforms to rules of evidence about uncharged acts

4.52 Some attempts have recently been made to overcome the problems caused by this approach. In 1998 the *Crimes Act 1900* was amended to insert section 66EA, which relates to the persistent sexual abuse of a child. Under this provision a person can be charged with persistent sexual abuse of a child if he or she commits three or more separate sexual assaults on a child. The section relaxes the specificity required in charges of child sexual assault, so that evidence of the dates and the exact circumstances of the assaults is unnecessary.

4.53 The DPP explained section 66EA to the Committee:

> A s.66EA offence is established when a person commits a sexual offence on 3 or more separate occasions on separate days with a particular child… It is immaterial whether or not the conduct is of the same nature, or constitutes the same offence, on each occasion (s66EA(2)) or that the conduct on any of those occasions occurred in New South Wales (s66EA(3)). The charge must specify the nature of the offences alleged to have been committed during the period (s66EA(5)) but it is not necessary to specify or prove the dates or exact circumstances of the 3 occasions (s66EA(4)).[282]

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280 Cashmore, "The Reliability and Credibility of Children's Evidence", p 7, footnotes omitted, Attachment to Submission 70.

281 Submission 23, p 5.

282 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, pp 10 - 11.

4.54 Several participants in the inquiry commented on section 66EA. For example, the Northern Sydney Child Protection Service noted:

> Section 66EA of the *Crimes Act 1900* covering the issue of persistent sexual abuse of a child, states it is not necessary to specify or prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred. If the child is able to recall three separate occasions of the abuse occurring, this is sufficient information for the matter to be heard under this section. This provision would possibly enable the successful prosecution of child sexual assault matters in those instances where the assaults extended over a significant period of time. However, this provision is apparently used only infrequently, due to a lack of knowledge amongst Police and prosecutors of its availability.[283]

4.55 Professor Parkinson argued that, while the new offence is a useful reform, it has not solved the evidentiary problems that arise in relation to an abusive relationship:

> It was a helpful reform and a welcome one… But one must still prove three events, with sufficient specificity, so that the jury is convinced. The jury must be convinced of all the same three events. If there is a history and the child says, "He came into my room virtually every Saturday night for 1 ½ years", the jury still has to be convinced of the same three events. Often victims give an account that psychologists call a script – what typically happened with those events – and that may not be sufficient information for the jury in regard to three specific events. The reform is not the entire answer.[284]

4.56 The Committee notes the argument that a failure to identify particular incidents can create difficulties for the **accused** in defending himself or herself. One submission, based on a personal experience, argued:

> Also the fact that no solid dates of offence were ever put forward, simply general comments such as "it may have been in summer because the sun was shining in the back window …, or maybe it was before school holidays etc". Very difficult to prove where you were and what you were doing in a general time frame of such length.[285]

4.57 The DPP also acknowledged this dilemma:

> On the one hand, an offence of "persistent sexual abuse of a child" raises a number of issues of principle with regard to whether or not the accused is in a position that permits him or her to properly defend a serious allegation. On the other hand, the problems normally faced by the prosecution in the area of sexual offences against children are a weighty factor. The question is ultimately one of attaining an acceptable balance.[286]

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283 Submission 60, p 5.

284 Parkinson, Evidence, 19 April 2002, pp 23 - 24.

285 Submission 77, p 1.

286 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 10.

4.58 The Committee notes that, to date, the charge of persistent sexual abuse of a child has seldom been used. The DPP advised the Committee in March 2002 that only two prosecutions had been approved under section 66EA.[287] Given the potential for the section to reduce the difficulties for children in providing the details necessary for successful prosecution, the Committee is uncertain as to the reasons that it appears to be so infrequently used. One possible cause for the lack of use is that the delay in complaint typical of child sexual assault has meant that there have been few disclosures of persistent sexual abuse of a child since the provision was enacted.

4.59 The Committee considers that it would be valuable for the DPP to review the use of section 66EA, with a view to determining whether it could or should be more frequently used. The proposed review should take place after s66EA has been operational for five years, to allow for the usual delays in reporting the assaults to pass.

Recommendation 13

The Committee recommends that the Director of Public Prosecutions review the use of section 66EA of the *Crimes Act* 1900 after it has been operational for five years, with a view to determining whether it could or should be more frequently used.

4.60 The Committee observes that, as noted by Professor Parkinson (paragraph 4.55), section 66EA is unlikely to be adequate to overcome the problems relating to the admission of evidence of uncharged acts. The Committee considers that, where there has been ongoing sexual abuse of a child, evidence of uncharged acts frequently is essential to understanding the context of the assaults and should be admissible. Preventing the jury from hearing such evidence, and prohibiting the child from making reference to it, will in many cases be contrary to the interests of justice.

4.61 Excluding evidence of uncharged acts not only can create difficulties for the complainant in providing the necessary details about the offence, the resultant loss of context can cause the jury to doubt the credibility of the complainant's story. For example, a jury may hear a case relating to a complaint by a 16 year old girl alleging a sexual assault on her when she was aged 14 years. There may be numerous other sexual assaults by the defendant on the complainant pertaining to the past ten years for which there was insufficient evidence to charge the defendant. If the jury did not receive evidence that the defendant had repeatedly sexually abused the complainant since the age of five years, it may appear incredible to them that a 14-year-old sexual assault victim would not scream or immediately report the sexual assault. Lacking essential contextual information, the jury may doubt the complainant's story.

4.62 The Committee therefore recommends that the *Evidence Act 1995* be amended to provide that evidence of uncharged acts relevant to facts in issue in a proceeding for child sexual assault offences **is admissible**. The new provisions should also address the concerns identified in the previous section relating to the admission of tendency evidence more

287 ibid, p 10.

generally. The Committee notes that, even if such amendments were made, adequate protection for the accused remains because the evidence could still be ruled inadmissible pursuant to section 137 of the *Evidence Act 1995* if its probative value is outweighed by the danger of unfair prejudice to the accused.

4.63 The Committee is of the view that, in relation to tendency evidence in child sexual assault proceedings, there would be benefit in providing the court with guidelines to assist with the balancing test required by section 137, in addition to those provided by section 192. The Committee suggests that the following matters should be taken into account when considering the unfair prejudice to the accused, based on similar provisions applying to the sexual assault communications privilege[288]:

- the nature of the other evidence in the proceeding
- the public interest in admitting all relevant evidence
- the likelihood of any harm that may be caused by excluding the evidence.

4.64 In addition, the Committee considers that it should be made clear that any prior relationship between the complainant and other witnesses should not be taken into account when assessing the probative value of the tendency evidence under section 137. In the Committee's opinion, the likelihood of joint concoction by witnesses in a child sexual assault prosecution should be assessed and weighed up by the jury.

4.65 The Committee considers that this objective would be best achieved by the creation of a separate and distinct provision that governs the admission of tendency evidence (including uncharged acts) in child sexual assault trials. The Committee recommends the following approach.

Recommendation 14

The Committee recommends that the Attorney General amend the *Evidence Act 1995* to provide that:

(1) In relation to the prosecution of a child sexual assault offence, and subject to (2) and (3), tendency evidence relevant to the facts in issue is admissible and is not affected by the operation of ss 97, 98 and 101.

(2) In relation to evidence admitted under (1) a court must, in applying the balancing test under s 137, take into account the following in addition to the matters set out in s 192:

- the nature of the other evidence in the proceeding
- the public interest in admitting all relevant evidence
- the likelihood of any harm that may be caused by excluding the evidence.

(3) In relation to evidence admitted under (1) a court must not, in applying the balancing test under s 137, take into account the prior relationship between the complainant and other witnesses.

288 see section 150(4) of the *Criminal Procedure Act 1986*.

Evidence of Relationship

4.66 Evidence of previous wrongful acts may be admitted if it is neither tendency evidence nor coincidence evidence. Evidence of related acts (also known as relationship evidence) appears to meet the definition of evidence of conduct that can be considered **not** to be tendency evidence and is thus admissible.[289]

4.67 Relationship evidence seeks to establish background information to explain the context in which the criminal act occurred. It does not relate only to conduct that is criminal in nature, but can include non-criminal acts. In relation to child sexual assault prosecutions, relationship evidence can include evidence of previous sexual misconduct or physical violence, or related acts such as 'grooming'. Grooming refers to the tactics commonly used by child sexual assault offenders to create a relationship with a child that will enable the perpetrator to obtain and maintain sexual access to the child. This includes measures such as developing trust in the child by providing gifts or taking the child on special outings, establishing a relationship with the family to ensure ongoing contact with the child, psychologically isolating the child from his or her mother or other sources of support and gradual blurring of physical boundaries through increasingly inappropriate touching.[290]

4.68 The DPP noted a lack of consensus in the case law about the admissibility of contextual relationship evidence.[291] Odgers states that the admissibility of relationship evidence will depend on whether the evidence is more probative than prejudicial in the specific circumstances of the case.[292]

4.69 The differing judicial opinions about the admissibility of relationship evidence is illustrated in the High Court case of *Gipp v The Queen.*[293] In that judgment, McHugh and Hayne JJ considered relationship evidence of previous violence or sexual assault to be admissible to provide a context that prevents the complainant's story from appearing "unreal and unintelligible".[294] In the same case, Gaudron J "considered that such evidence may be admissible to explain lack of surprise or failure to complain, but only if these are made

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289 Non-tendency evidence of conduct can also be admitted if it is considered to be conduct forming part of a relevant transaction – that is, if it is evidence of an event that was an "integral part of a connected series of events". *R v Adam* (1999) 106 A Crim R 510; NSWCCA 189, the Court at paras 26 – 27, cited in Odgers, p 231.

290 Beatriz Reid, *Incest Offenders' Tactics*, Paper presented at the Relationships Australia (NSW) Conference, 12 June 1997, pp 1 – 6, tendered by Mr Tolliday, 10 May 2002.

291 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 9.

292 Odgers, p 231.

293 *Gipp v The Queen* (1998) 1984 CLR 106.

294 ibid, cited in Odgers, p 231.

issues at the trial by the defence".[295] Callinan J argued that the purpose of such "background" evidence needed to be made clear, while Kirby J raised the possibility that the "sexual relationship" evidence was more prejudicial than probative.[296]

4.70 Professor Parkinson considers the frequent failure to admit evidence of related acts on the grounds of prejudice to be a major shortcoming in the justice system:

> At the heart of the problem is that the law sees child sexual abuse as an event, an incident, and does not allow evidence of abusive relationships. The charges laid take specific events out from the overall narrative of the child's experience of abuse and isolate them as if they were discrete and separable events. For the criminal justice system, each separate act of abuse is a separate criminal act, just as each robbery or car theft is a separate criminal act. While for the child, individual 'events' matter less than the cumulative experience of the abuse and the betrayal of trust it so often involves, the lawyer dissects the cumulative picture into tiny pieces, and selects only some of those pieces as being legally relevant.[297]

4.71 Professor Parkinson argued that the existing approach prevents crucial information being considered by the jury:

> So there is all the history of that relationship, all the context of grooming the child, of engaging the child in incidents, events, circumstances, which may not give rise to a criminal charge, which are part of the essential context of understanding the dangerousness of the offender and the dangerousness and seriousness of the abuse…[298]

4.72 He proposed that the rules of evidence be amended to overcome this:

> Reforming the rules of evidence to allow witnesses to provide greater information which places the events within the context of their experience of improper behaviour by the alleged perpetrator. It is my impression that the rules on admissibility of evidence of this kind are excessively technical and restrictive. Whatever value they may have in ensuring relevance and avoiding unfairly prejudicial material in offences which do not occur in the context of ongoing relationships, their application to crimes such as child sexual assault is highly problematic. The child witness needs to be able to tell his or her story without artificial constraints which can only operate to ensure the whole truth is not told….[299]

4.73 The Committee considers that relationship evidence, like uncharged acts, provides contextual information relevant to the facts at issue in child sexual assault trials. This is often essential to an understanding of the nature of the crime and the credibility of the

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295 Odgers, p 231.

296 ibid.

297 Submission 23, p 10.

298 Parkinson, Evidence, 19 April 2002, p 15.

299 Submission 23, p 10.

complainant's version of events in child sexual assault cases. The Committee considers that any ambiguity about the admissibility of related acts in child sexual assault proceedings should be removed. It is the Committee's view that the *Evidence Act 1995* should be amended to make clear that relationship evidence is admissible in child sexual assault prosecutions, and is not subject to sections 97 and 101. The discretion to exclude the evidence on the grounds of unfair prejudice (pursuant to s137) should be retained.

4.74 As with tendency evidence, the Committee is of the view that there is value in providing the court with guidance on the matters to be taken into account when balancing the probative and prejudicial value of the relationship evidence under s137. The Committee recommends a similar approach to that that it recommended in respect of tendency evidence. That is, the court should be required to take into account:

- the nature of the other evidence in the proceeding
- the public interest in admitting all relevant evidence
- the likelihood of any harm that may be caused by excluding the evidence.

4.75 It may be useful in this context to codify the types of related acts that are to be considered relationship evidence for child sexual assault proceedings. However, the Committee did not receive sufficient evidence to enable it to suggest its own definition and examples of related acts. The Committee therefore recommends that the Attorney General, after appropriate consultation with relevant experts on child sexual assault, consider the matters that should be included in a definition of the types of acts to be considered admissible as relationship evidence in child sexual assault proceedings.

Recommendation 15

The Committee recommends that the Attorney General amend the *Evidence Act 1995* to provide that, in proceedings for child sexual assault offences, relationship evidence relevant to the facts in issue is admissible and is not subject to sections 97 and 101.

Recommendation 16

The Committee further recommends that the Attorney General amend the *Evidence Act 1995* to provide that, in relation to the admission of relationship evidence in a child sexual assault trial, a court must, in applying the balancing test under section 137, take into account the following in addition to the matters set out in section 192:

- the nature of the other evidence in the proceeding
- the public interest in admitting all relevant evidence
- the likelihood of any harm that may be caused by excluding the evidence.

Recommendation 17

The Committee further recommends that the Attorney General amend the *Evidence Act 1995* to define the types of related acts that are defined as relationship evidence in the child sexual abuse context and are therefore admissible pursuant to Recommendation 16.

Multiple Proceedings Against One Defendant

4.76 Where an accused is charged with child sex offences against more than one child it is common for the offences against each child to be tried separately. The DPP noted that section 64 of the *Criminal Procedure Act 1986* allows a trial judge to grant separate trials for various counts of an indictment in order to prevent injustice to the accused. Separate trials for multiple sex offences are common, because such offences are "liable to arouse prejudice".[300] This practice of separating trials was the subject of criticism by several inquiry participants.

4.77 The tendency rule is relevant to consideration of whether to order separate trials. As explained in the Wood Royal Commission report, for a joinder of charges relating to offences against more than one child, the evidence of one child must be considered admissible (under the tendency or coincidence rules) in the charges relating to another child:

> An indictment may contain counts alleging the commission of offences against a number of different complainants. Again, the trial judge has a discretion to direct that there be separate trials. Unless the evidence in respect of the allegations made by one complainant is admissible in respect of the trial of the counts relating to the other complainant(s), a trial judge should direct that there be separate trials.[301]
>
> Evidence relating to one complainant is admissible in the trial of a charge relating to another complainant, if it has significant probative value within the 'tendency and coincidence' rules contained in Part 3.6 of the Evidence Act [which the Committee discussed above].[302]

4.78 As with tendency and coincidence evidence, the possibility of joint concoction and the potential for prejudice against the accused are issues in determining whether to try charges separately.

4.79 The Court of Criminal Appeal, in *De Jesus'* case, made clear its belief that joint charges can work an injustice on the accused.[303] The case involved four separate complainants, each under 10 years of age, which was successfully appealed on the grounds that corroborating evidence from each complainant should not have been admitted at trial. The DPP explained:

> The new trial was ordered on the basis that a jury having heard the evidence supporting one of the girls may not have approached the determination of the balance of the charges with a fresh and independent mind.[304]

300 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 3.

301 Royal Commission into the New South Wales Police Service, p 1123.

302 ibid.

303 *De Jesus v the Queen* (1986) 61 ALJR 1.

304 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 4.

4.80 As a result, it is common for trials involving more than one complainant to be separated, particularly where the complainants are known to each other. One implication of this is that the jury does not obtain the full picture of the allegations against the accused, which could reduce the likelihood of a guilty verdict. A New South Wales Judicial Commission study compared the outcomes of child sexual assault trials for single trials with multiple complainants compared to multiple trials that separate the complainants, and found that separating the trials reduced the likelihood of a conviction:

> Looking at verdict outcomes only, the proportion of guilty and not guilty verdicts were quite similar when there was one trial, while for multiple trials the vast majority resulted in not guilty verdicts.[305]

4.81 In addition, where the victims are from one family, the stress to the family is multiplied over several trials. One confidential submission to this inquiry from a victim of child sexual assault described her experience as a complainant. Three of her siblings were abused by the same offender, as was one child unknown to the family, and each was given a separate trial. The defendant was found not guilty on each count. The author queried the inadmissibility of evidence of each complainant as support for the evidence of the others:

> There were five complainants and the judge told every jury for each trial that there was no corroboration in the case. While I understand that this is normal legal procedure, I question why a standard of law is applied to analysis of a crime that occurs in the absence of corroboration, and if in cases of multiple victims, it is misleading to ***imply*** that no other information exists.[306]

4.82 The impact and propriety of multiple proceedings involving children have been considered by several reports in the recent past. The HREOC and ALRC report on children in the legal process concluded that the separation of trials gave rise to increased difficulties for children, particularly where they may be required to give evidence several times, both in their own trial and in the trials of other children. The report recommended:

> Multiple proceedings involving more than one incident concerning the same child victim and accused or more than one child victim and the same accused should be joined in a single trial to avoid the necessity of children giving evidence in numerous proceedings over long periods of time and the problems associated with rules against tendency and coincidence evidence. To this end, joinder rules and rules against tendency and coincidence evidence should be reviewed in light of the hardship these rules cause to particular child victim witnesses.[307]

4.83 The Wood Royal Commission noted that the existing provisions for separating trials aim to protect the accused from the 'real prejudice' that may arise from joint trials. The Commission expressed some support for allowing consideration to be made to the impact of severance on the crown witnesses in deciding whether to direct separate trials. The Commission agreed with the HREOC and the ALRC report which recommended that these issues should be considered by the State Commonwealth Attorneys General

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305 Judicial Commission of New South Wales, *Child Sexual Assault*, Monograph Series 15/1997, p x.

306 Submission 63, p 12.

307 HREOC and ALRC, p 335.

(SCAG).[308] The Committee understands that these recommendations have not been implemented.

4.84 While agreeing that there are some cases where a joint trial is appropriate under current legislation, the Legal Aid Commission did not support any change to the law:

> As it currently stands, if section 97 and 98 and the test laid down in section 101(2) of the *Evidence Act* are met and there is no realistic possibility of concoction then the courts allow for a joinder of charges in those circumstances. Let us assume this scenario. If two complainants who do not know each other give stories which very much overlap one can see the strong probative force. It is almost an affront not to run those trials together. But one has to bear in mind – and the High Court has recognised this in a number of cases, including *De Jesus'* case – that in the ordinary course of events these are cases which generate strong emotions and without that strong probative force, generally speaking, trials involving separate complainants should be dealt with separately, and I think the law should remain as it is now. Otherwise there is a danger that someone may not get a fair trial. The prejudice would be just overwhelming.[309]

4.85 Others consider that it is unfairly disadvantageous to the Crown to routinely separate trials. The DPP, for example, argued:

> Although as a matter of fairness, if there is a close relationship, opportunity and motive for concoction, the trials of various complainants should be separated, routine separation of trials of children with some connection with one another can work an injustice upon the prosecution. Where several children in a class complain of similar impropriety by a teacher and separate trials are ordered, each jury is presented with a single child out of the class of perhaps 30 and the natural assumption is that this must be the only child who has complained, as, if it were otherwise, the prosecution would have alluded to it. A quite inaccurate picture of the available evidence is thereby presented. The situation can arise when one child who has complained of being a victim but who also offers some corroborative evidence in relation to another child, must give evidence in the trial of the other child without making reference to his or her own direct experience.[310]

4.86 Victoria has recently altered its approach to trial joinder rules. The Victorian *Crimes Act 1958* was amended in 1997 to reduce the incidence of separate trials for multiple counts in sexual assault cases. The amendment created an assumption that, if two or more counts charging sexual offences are joined in the same presentment, then those counts are triable together.[311] Section 372(3AB) states further that this presumption "is not rebutted merely because evidence on one count is inadmissible on another count". However, where there is

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308 Royal Commission into the New South Wales Police Service, Vol 5, pp 1124 – 5.

309 Fraser, Evidence, 3 April 2002, pp 14 – 15.

310 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 4.

311 Section 372(3AA), *Crimes Act 1958* (Vic).

a chance of "prejudice or embarrassment" to the accused, the trial judge may order separate trials.[312]

4.87 In her second reading speech, the Victorian Attorney General, Mrs Wade, observed that the amendments were required because the conservative interpretation of the rules relating to joint trials frequently resulted in separate trials where charges should appropriately have been run together:

> The common law that has developed in relation to the use of propensity evidence and the application of the judicial discretion to sever trials has been very conservatively interpreted by the Victorian courts. The approach has invited controversy and calls for a review of that area of the law. It has not been well received by the community generally, and more specifically by victims of serial sexual offenders.[313]

4.88 She stated further in support of the amendments:

> Accordingly, the mere possibility of concoction, collusion, infection or coincidence will not be a ground for inadmissibility of propensity evidence leading to the separation of trials. However, implicit in the provision is the notion that where the court is satisfied that there is a substantial risk of concoction having occurred it would not be just to admit the evidence in a single trial.
>
> Where a joint trial proceeds and there are allegations that victims have concocted or colluded in their allegations, or that their allegations are tainted by infection or coincidence, that will be a matter the jury can consider in assessing the credit of the witness, and the judge can direct the jury to that effect. Overall, the provision will ensure a more consistent and fair approach to the prosecution of multiple victim sexual assault cases.[314]

4.89 The Committee did not receive any evidence about the efficacy or otherwise of these provisions. However, the Committee notes that the Queensland Law Reform Commission (QLRC) recommended against allowing for a joinder of charges in cases where the evidence of the complainants is not mutually admissible. The QLRC argued that this could lead to the jury hearing unacceptably prejudicial evidence that would not otherwise be admissible. [315]

4.90 The Committee agrees with arguments that injustice can be caused to the prosecution's case as a result of the practice of routinely separating trials. Amending the rules relating to the admission of tendency evidence, as recommended by the Committee in recommendation 14, will, the Committee hopes, reduce the incidence of separation of trials. That is, such a reform should reduce the occasions that separate trials are ordered because the evidence of one complainant is inadmissible in relation to the other/s (since

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312 Section 372, *Crimes Act 1958* (Vic).

313 Parliament of Victoria, Hansard, 9 October 1997, p 431.

314 ibid.

315 QLRC, p 400.

the evidence itself would be less likely to be inadmissible). It is probable, however, that even in spite of that recommended amendment, separate trials will still be granted on the grounds of prejudice to the accused.

4.91 The Committee acknowledges that balancing the rights of the accused and the rights of the complainant to a fair trial is complicated in relation to multiple proceedings. However, the Committee considers that the appropriate balance has not been attained in relation to decisions about joint trials in child sexual assault matters, and that routinely separating trials for offences against multiple victims can conceal relevant information from the fact-finder.

4.92 The Committee recognises concerns that where there are multiple complainants who are acquainted, they may have colluded to jointly accuse the defendant. However, as the Committee previously noted, assaults by an offender on multiple victims, known to each other, is a common characteristic of child sexual assault, and is not necessarily (nor usually) a signifier of collusion among the complainants. The possibility of joint concoction should, in the Committee's opinion, be a matter for the jury in assigning the appropriate weight to be given to the evidence, and in assessing the credibility of the witnesses.

4.93 The Committee is of the opinion that, in child sexual assault prosecutions, there should be a presumption that multiple counts of an indictment will be tried together and that rules for separating trials should be set out in the *Criminal Procedure Act 1986*. Consideration to severing charges should be based on the following principles:

- Where two or more counts charging sexual offences are joined in the same presentment, then those counts are triable together
- In considering an application for separation of charges, the court should not take into account the prior relationship or acquaintance of the complainants. The possibility of collusion or joint concoction should be a matter for the jury to determine
- In considering an application for separation of charges, the interests of justice should at all times be paramount.

4.94 It is the Committee's opinion that the final of these points is essential, and sufficient, to ensure that the right of the accused to a fair trial is protected.

Recommendation 18

The Committee recommends that the Attorney General amend the *Criminal Procedure Act 1986* to create a presumption that, in child sexual assault prosecutions, multiple counts of an indictment will be tried together.

Recommendation 19

The Committee further recommends that the Attorney General amend the *Criminal Procedure Act 1986*, to ensure that, when considering the severance of trials, the court:

- is not permitted to take into account the prior relationship or acquaintance of the complainants, and
- must ensure that the interests of justice are at all times paramount.

Evidence of Complaint and the Rule Against Hearsay

4.95 Evidence of a victim's first complaint to another person about having been sexually assaulted is information that, if corroborated, can support the complainant's version of events. Complaint evidence is considered to be a 'previous consistent representation', and is a type of hearsay evidence, the admission of which is regulated by the *Evidence Act 1995*. Section 59(1) places a broad prohibition on the admission of hearsay evidence:

> Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation.

4.96 The rationale for excluding hearsay evidence is that comments made outside of the court are not made under oath, and the court is unable to test the accuracy of the statements if the person making the statement is not available to be examined.

4.97 The *Evidence Act* provides a number of exceptions to the hearsay rule, which allow admission of hearsay evidence in certain circumstances. Most relevant to child sexual assault prosecutions is hearsay evidence of recent complaint, which may be admissible under section 66:

> **66 Exception: criminal proceedings if maker available**
>
> (1) This section applies in a criminal proceeding if a person who made a previous representation is available to give evidence about an asserted fact.
>
> (2) If that person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
>
> (a) that person, or
>
> (b) a person who saw, heard or otherwise perceived the representation being made,
>
> if, when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.

4.98 Put into plain English, in relation to child sexual assault trials, this rule allows the admission of the evidence of the child's complaint of having been sexually assaulted, if the complaint was made when the assault was 'fresh in the child's memory', as long as the child is available to give evidence.

4.99 Dr Cossins provided the Committee with a detailed and valuable analysis of recent complaint evidence, including its historical context:

> The law relating to evidence of recent complaint appears to be derived from a 13th century prescription that a woman's failure to immediately raise the 'hue and cry' after being raped was a defence to an allegation of rape…[316]

4.100 She stated further:

> The admission of recent complaint evidence under s.66(2) is based on the common law assumption that a victim of sexual assault will complain "at the first reasonable opportunity and that if complaint is not then made, a subsequent complaint is likely to be false" [317]

4.101 Dr Cossins quoted McHugh J, who recognised in the High Court case of *Suresh*[318] that:

> The admissibility of [recent] complaint evidence 'is based on male assumptions, in earlier times, concerning the behaviour to be expected of a female who is raped, although human behaviour following such a traumatic experience seems likely to be influenced by a variety of factors, and vary accordingly'.[319]

4.102 The problem that the section 66 exemption poses for child sexual assault trials relates to the interpretation of the term 'fresh in the memory'.[320] In this regard, Dr Cossins referred to recent developments in case law that have narrowly interpreted the circumstances in which a complaint of sexual assault will be admissible under s66:

> In *Graham*[321], the High Court was required to consider the scope of s.66(2) since, instead of evidence of recent complaint, evidence had been admitted of what the complainant had told a girlfriend some six years after the events which led to the complainant's father being convicted of various counts of child sexual assault when the complainant was aged 9 and 10 years. The High Court held that this evidence was *not* admissible under s66(2) … on the grounds that, because the complaint was made six years after the alleged sexual abuse, the complainant had not told her girlfriend when the events were fresh in her memory. The High Court interpreted the word 'fresh' to mean:
>
> > "recent" or "immediate". It may also carry with it a connotation that describes the quality of the memory (as being "not deteriorated or changed by lapse of time"…) but the core of the meaning intended, is to describe the temporal relationship between "the occurrence of the asserted fact" and the

316 Submission 69, pp 9 – 10.

317 ibid, p 12.

318 *Suresh v R* (1998) 72 ALJR 769 at 770 per Gaudron and Gummow JJ, cited in submission 69, p 12, footnotes omitted.

319 ibid.

320 *Papakosmas v R* [1999] HCA 37

321 *Graham v R* [1998] HCA 61.

> time of making the representation. Although questions of fact and degree may arise, the temporal relationship required will very likely be measured in hours or days, not, as was the case here, in years. (*Graham* [1998] HCA at para 4, per Gaudron, Gummow and Hayne JJ).[322]

4.103 Dr Cossins summarised the effect of *Graham*:

> As a result of the decision in *Graham*, evidence of a complaint made more than hours or days after the events in question will not be admissible under section 66 [of the *Evidence Act*]. The only possible route is via s108 as a prior consistent statement for the purposes of re-establishing the complainant's credibility, although admissibility will depend on leave by the court to adduce the evidence, which in turn depends on satisfaction of s192.[323]

4.104 Dr Cossins considered that the High Court had based its decision in *Graham* on stereotypical beliefs that sexual assault victims who do not complain immediately are fabricating their allegations:

> *Graham's* case illustrates the unstated assumption that evidence of complaint made months or years after the alleged events is to be treated with … suspicion… In particular, the decision displays no understanding of the context in which child sexual abuse occurs and the relationship of power between the child victim and adult offender.[324]

4.105 The Committee notes the overwhelming evidence (described previously in paragraphs 1.17-1.21) that delayed disclosure of sexual assault is a **typical feature** of the way that victims respond to child sexual abuse. The High Court's ruling in *Graham* will therefore lead to the exclusion of evidence of complaint of most victims of child sexual assault.

4.106 This point was argued by Dr Cossins in a public hearing:

> In child sexual assault cases, the most common response of children is not to tell anyone for periods of perhaps months or years. It is very uncommon in all the studies that I have seen for a child to tell someone within hours, days or weeks about what happened to them. This means that in the vast majority of cases … the person to whom the child first disclosed will not be able to give evidence of that child's very first disclosure. It seems to me that that type of evidence could be critical in the minds of a jury when assessing the credibility of the complainant's evidence.[325]

4.107 Dr Cossins submitted that the *Evidence Act 1995* should be amended in light of the High Court's judgment in *Graham*, to clarify that a fact may be 'fresh in the memory' regardless of the passage of time. This would enable evidence of complaint of child sexual assault to

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322 Submission 69, p 10.

323 Submission 69, p 13. See also *Adam v The Queen* [2001] HCA 57 for another possible pathway for admission, although that case dealt with a prior **inconsistent** statement.

324 ibid, p 12.

325 Cossins, Evidence, 23 April 2002, p 3.

be admitted under section 66. Dr Cossins' recommendation is that section 66 be amended to include a definition of 'fresh in the memory' as follows:

> the quality of the memory (not having deteriorated or changed by lapse of time) of the asserted fact irrespective of the time that has elapsed between the making of the representation and the occurrence of the asserted fact.[326]

4.108 Mr Paul Winch, from the Public Defenders Office, opposed Dr Cossins' proposed amendment:

> The first thing is that the evidence of complaint, if it exists, can presently be admitted in any case under section 108(3) of the *Evidence Act*, where it is to be submitted to the complainant that the allegation is fabricated, in re-establishing of credit… The effects of what Dr Cossins is proposing is to give it the additional power of being evidence of the fact of what happened; that is evidence of the truth of what happened. It seems to me that the problem with [Dr Cossins' proposal] is that it will elevate evidence that presently is not sufficiently recent and does not fit within the category set out in Graham of days, months and weeks rather than years, a probative value that it otherwise would not have and, in many circumstances – most circumstance because it is so delayed – does not deserve.[327]

4.109 The Committee notes that the High Court, in *Papakosmas*, has previously held that evidence of a recent complaint **is** relevant to a fact in issue, that is, as 'evidence of the truth of what happened'.[328] Dr Cossins considers that applying this principle to child sexual assault proceedings, "evidence of recent complaint would be relevant to whether or not the alleged sexual conduct had taken place, since consent is not a fact in issue in relation to the majority of child sex offences".[329]

4.110 Moreover, the Committee understands that any evidence of complaint admitted under section 108(3) to re-establish credibility can in any case be used as evidence of the **truth** of the previous representation under section 60. Section 60 states that:

> The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation.

4.111 The ability to use hearsay evidence of a previous representation admitted for non-hearsay purposes in this way was confirmed in the recent High Court case of *Adam*.[330]

4.112 The Committee can see no reason for a distinction to be drawn between evidence of **recent** complaints and evidence of **delayed** complaints, particularly as it relates to child

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326 Submission 69, p 14.

327 Winch, Evidence, 9 July 2002, pp 13-14.

328 *Papakosmas v R* [1999] HCA 37. The court found that evidence of complaint was relevant to whether the complainant consented to sexual intercourse with the defendant.

329 Submission 69, p 9.

330 *Adam v The Queen* [2001] HCA 57

sexual assault, where delayed complaints are common and the event is likely to remain 'fresh in the memory' of the victim regardless of the amount of time that elapses. In this respect, the Committee notes that the NSW Court of Criminal Appeal's definition of 'fresh in the memory' in its consideration of *Graham* differed from that of the High Court. Levine J, of the Court of Criminal Appeal said:

> Shortly stated, common sense would seem to indicate that the notion of 'freshness' particularly in this area of the law is not anchored to nor determined by simple notions of 'lapse of time'. It is concerned with, in my opinion, the 'quality of the memory. A person might never forget the details of an event many years previously because it took place in circumstances which impressed it into the witness' memory.[331]

4.113 It is the Committee's opinion that evidence of complaint of child sexual assault should be admitted, whether or not that complaint is delayed (as is likely to be the case for child sexual assault prosecutions). The Committee considers that the probative value of any such evidence is a matter that is appropriately for the jury to decide, but that the evidence of a complaint having been made is a potentially useful piece of information for the jury in its deliberations.

Recommendation 20

The Committee recommends that the Attorney General amend section 66 of the *Evidence Act 1995* to insert a provision defining 'fresh in the memory' in child sexual assault trials as being the quality of the memory (not having deteriorated or changed by lapse of time) of the asserted fact irrespective of the time that has elapsed between the making of the assertion and the occurrence of the asserted fact.

Sexual Assault Communications Privilege

4.114 One matter identified by the legal profession as a source of concern was the sexual assault communications privilege which protects counsellors' notes from being subpoenaed. The Attorney General's Criminal Law Review Division outlined the sexual assault communications privilege provisions:

> Section 150 [*Criminal Procedure Act 1986]* which commenced on 1 January 2000, regulates the production of sexual assault counsellor's notes in criminal proceedings. Section 150 allows the sexual assault counsellor to object to production of the notes for example in response to a subpoena issued in criminal proceedings. If there is such an objection then a Court must inspect the documents and may only require the document to be produced if satisfied that:
>
> - The contents of the document have substantial probative value
> - Other evidence of the information recorded in the document is not available, and

[331] Levine J, cited in Submission 69, p 11.

- The public interest in preserving the confidentiality of this type of information and in protecting the complainant is substantially outweighed by the public interest in allowing inspection of the document (emphasis added).[332]

4.115 The 2002 amendment to this provision, confirming that the privilege also covers the records of counsellors who are not psychologists or psychiatrists, was also explained:

> The purpose of the amendments is to make it clear that the sexual assault communications privilege does protect confidential communications made in connection with counselling:
>
> - which takes the form of listening to the thoughts and feelings of the alleged sexual assault victim and providing verbal and other support by way of validation and the like, rather than providing expert advice
>
> - by counsellors who lack formal training or qualifications in the diagnosis of psychiatric and/or psychological conditions.[333]

4.116 Evidence presented to the Committee suggested that legal practitioners generally do not appear supportive of the sexual assault communications privilege. For example, the Legal Aid Commission submitted:

> The evil sought to be addressed by the introduction of the sexual assault communications privilege relates to the possibility of victims being reluctant to seek professional counselling. The Commission feels strongly that the privilege should be restricted to professional therapeutic counselling relationships…[and not include] communications with persons other than professional counsellors, such as sexual assault support workers or victims' support organisations…
>
> There is a real risk of contamination of a child complainant's evidence, if the child discusses the facts of the case or the child's evidence with a non-professional support person. The Commission is concerned that victim support groups, made up of untrained volunteers, may "coach" the child or otherwise contaminate the child's evidence in a genuine attempt to assist the child to recover from the assault or to prepare for the coming trial. To protect the interests of the accused, such discussions must not be protected from disclosure.[334]

4.117 The Public Defenders Office was similarly critical:

> An underlying principle in the criminal justice system as it operates in this state, is that one indicator of the truthfulness of a witness may be the consistency of the account given. That is, an account given by a witness or a victim which has been told in a consistent fashion from the time of the event to the time of giving evidence, is more likely to be truthful and accurate and reliable than an account which has not been consistently told.

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332 Submission 66, p 5.

333 ibid, p 5.

334 Submission 57, p 3.

> As a consequence, occasions when a witness or a victim has given an account before giving evidence are of importance in order to demonstrate the consistency or inconsistency of that account…
>
> Of course, counsellors take a history from the client and the client gives an account to the counsellor of the events which are later the subject of evidence. The concern of defence lawyers in relation to the role of counsellors arises in least in part because of the secrecy which surrounds the counselling process, a secrecy now enshrined in legislation pursuant to ss147-150 Criminal Procedure Act 1986.
>
> The bar is set too high in our submission for defence lawyers seeking inspection of documents relating to counselling sessions between an alleged victim of sexual assault and counsellor.
>
> Section 150(1) sets out the very limited circumstances in which production of such documents can be compelled. They include satisfying the court that the contents of the documents sought, have substantial probative value. In the absence of any prior knowledge of what is contained in them it is almost impossible to ever satisfy this test.
>
> It is submitted that production of the documents to the court ought be required in all cases in response to a subpoena so that a decision can then be made by the court as to any claim of privilege…
>
> It is submitted that while there is strong public interest in ensuring that the counselling of persons who have been sexually assaulted is as effective as it can be, there is a competing public interest in ensuring that people wrongly accused are not convicted.[335]

4.118 The Law Society of New South Wales also opposed the sexual assault communications privilege provisions, particularly the recent amendment:

> The Criminal Law Committee fears that the … legislation will operate as a virtual prohibition on any access being granted to an accused person to potentially very relevant material which could amount to evidence exculpatory upon the trial of the accused.[336]

4.119 The Australian False Memory Association also has concerns about the sexual assault communications privilege, arguing that false memories of sexual assault can be triggered by certain counselling techniques:

> In the interest of fairness in the administration of the justice system, particularly in the preparation of the defence of persons arising from accusations of child sexual abuse, we recommend that the notes made by all therapists and counsellors consulted by the accusing persons be disclosed to the defence. This would ensure that procedures likely or known to give rise to false memory may be identified and used in evidence.[337]

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335 Submission 59, pp 2 – 3.

336 Submission 73, p 4.

337 Submission 56, p 6.

4.120 This was also a concern to Dr Lucire, a psychiatrist, who submitted:

> It has been impossible to defend some innocent people without access to the therapy notes for alleged sex abuse therapy conducted by naïve and unskilled practitioners.[338]

4.121 Another individual, in a confidential submission, expressed a similar opinion:

> I understand that the Evidence Act 1995 (as amended) bars the admission of a sexual assault counsellor's notes into evidence unless the alleged victim provides a waiver. This bar was introduced to protect the privacy of those seeking counselling after being sexually assaulted.
>
> Whereas the concern for privacy is understandable, the disallowance may deny access by the defence to vital exculpatory evidence. The barrier goes further in NSW than in other major Australian state jurisdictions. It allows many kinds of evidence including recovered memory therapy and other suggestion-based counselling/therapeutic techniques which are known to induce delusions, to be overlooked…
>
> I suggest that defence counsel (but not their clients) be allowed access to counsellors' notes under judicial discretion, and under strict in camera conditions.[339]

4.122 Other witnesses, however, supported the sexual assault communications privilege, including the Commissioner for Children and Young People, who noted the importance of counselling to the recovery of the complainant:

> The Commission also approves of the Criminal Procedure (Sexual Assault Communications Privilege) Bill 2002 (NSW) combating potential incursions into the [professional confidential relationship privilege of the *Criminal Procedure Act 1986*], through common law developments narrowly interpreting the law. It is vital that complainants' and particularly child complainants' counselling and treatment is not hindered by considerations of the availability of such information for prosecution purposes.[340]

4.123 A child sexual assault complainant noted that the potential that her counselling records could be subpoenaed increased her difficulties during a period of "highly competing, devastating emotions":

> The emotions were compounded by the fact I could not seek therapeutic intervention – at a time when there is no doubt I most needed it. Why couldn't I? Because the defense barrister in the committal tried to gain access to my counselling records.[341]

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338 Submission 24, p 7.

339 Submission 54, p 2.

340 Submission 80, p 6.

341 Submission 63, p 44.

4.124 The Committee notes the opposition of some individuals and organisations to the sexual assault communications privilege. Ultimately, the question of admissibility of communications with a sexual assault counsellor is a matter of achieving a balance. The Committee considers that the provisions relating to sexual assault communications privilege in New South Wales provide sufficient safeguards for the accused as they allow the court to admit such evidence if it is of substantial probative value, and if the public interest in admitting the evidence substantially outweighs the interest in maintaining the complainant's privacy.

The 'Rape Shield'

4.125 Some submissions received by the Committee raised the issue of the 'rape shield'. The 'rape shield' refers to the prohibition on raising the complainant's sexual experience and reputation, previously regulated under section 409B of the *Crimes Act 1995,* but now covered by section 105 of the *Criminal Procedure Act 1986*. The Public Defenders argued that this prohibition could cause injustice to the accused in particular circumstances:

> … a child's familiarity with sexual organs and adult sexual practices could if unexplained be very damaging to an accused before a jury. Such knowledge however could well have arisen because the sexual assault was committed, but by a person who is not the accused… The prohibition on ventilating [prior sexual experience] can obviously cause injustice. It is submitted that section 105 of the Criminal Procedure Act should be amended in line with the findings of the Law Reform Commission's Review of 1988.[342]

4.126 Dr Cossins expressed a different view, arguing:

> My view is that the concept of sexual experience in relation to sex offences against children is redundant since consent is not a fact in issue in relation to most such offences… and any such evidence is, therefore, irrelevant under s 55 to whether or not the alleged sexual behaviour occurred.[343]

4.127 Dr Cossins went on to recommend:

> That s 105 of the *Criminal Procedure Act* 1986 be amended to prohibit the admission of any evidence relating to the sexual experience of a child complainant in the following way:
>
> S 105 (2A): Evidence relating to the sexual experience of a complainant in a child sexual assault trial is inadmissible.[344]

342 Submission 59, p 3.

343 Submission 69, p 18.

344 ibid.

4.128 The Committee notes that the New South Wales Law Reform Commission conducted a detailed examination of the "rape shield" provisions in its 1998 Report entitled *Review of Section 409B of the Crimes Act 1900* (NSW).[345] The Committee considers it unnecessary to re-examine the issues detailed in the comprehensive review undertaken by the Law Reform Commission.

Expert Evidence

4.129 The Committee heard that expert evidence is seldom admitted in child sexual assault trials in New South Wales, due to restrictions under the *Evidence Act 1995*. Several inquiry participants suggested that admission of expert evidence to explain the dynamics of child sexual assault and children's development would be a useful means of ensuring that the jury's deliberations are not obscured by common misconceptions.

Common misconceptions about child sexual abuse

4.130 Studies have revealed that jurors' knowledge of the responses of child victims to sexual assault and the reliability of children's evidence is relatively poor. A 1992 study examined the knowledge of jurors about child sexual assault and concluded:

> Jurors were less knowledgeable about numerous issues associated with the reliability of victim reports and typical victim responses. In particular, jurors were less knowledgeable about empirical data which indicate that allegations of sexual abuse made by children rarely proved to be false; that in the majority of CSA cases there is no physical evidence to substantiate the allegation; that retracted, delayed and inconsistent accusations are fairly common; that children are reluctant to report; that they are not easily manipulated into giving false reports about sexual abuse; and that typically they do not react to the abuse by trying to resist, cry for help or escape.[346]

4.131 The study reported further that a number of misconceptions were strongly held by jurors:

> Large numbers of jurors who appear to be clearly misinformed cause concern with regard to these issues. For example, over half the jurors believed that children are easily manipulated into giving false reports and that most children are physically damaged; consequently there should be accompanying physical evidence. Slightly more than one third of jurors believe that sexual abuse allegations often prove to be false and that that the typical reaction of a victim would include resistance, crying for help, or escape.[347]

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345 NSW Law Reform Commission, *Review of the Section 409B of the Crimes Act 1900* (NSW), Report 87, November 1998.

346 Susan Morison and Edith Greene, "Juror and Expert Knowledge of Child Sexual Abuse", *Child Abuse and Neglect*, Vol 16, 1992, p607.

347 ibid, p 608.

4.132 Dr Cashmore's evidence before the Committee also commented on current knowledge about jurors' understanding of child sexual assault:

> There is some interesting research that relates to the use of expert witnesses and … what sort of beliefs [jurors] take into that process. One study showed that jurors have some of the same sorts of beliefs that defence lawyers and some judges have: they believe that children are unreliable witnesses, that they may be making it up, that children fantasise, that they expect that there will be physical evidence so that if there is no physical signs of abuse that tends to discount the truth of the allegation in their eyes. They believe that children can be easily manipulated and that delayed complaint and retraction indicates inconsistency much more than do people who have knowledge of the area.[348]

4.133 The Committee notes that such studies suggest that many jurors are unaware of the typical reactions to child sexual abuse, and that the erroneous views of many jurors could be impacting on their ability to assess the credibility of the complainant and determine the guilt or innocence of the accused. It is such misconceptions that expert opinion evidence seeks to overcome.

Advantages of admitting expert evidence in child sexual assault trials

4.134 Several inquiry participants asserted that expert witnesses could provide valuable assistance to the court. For instance, Dr Cashmore told the Committee:

> There are various ways in which it could be used. One is to allow an expert witness to provide a framework or background to explain the behaviour of children. One of the complaints that is often made by prosecution or by families themselves is that they have been misrepresented or misinterpreted. So typical reactions like delayed complaint, a gradual getting out of the story and so on are seen as evidence of inconsistency, making it up, having ulterior motives, telling the story because the child becomes angry with the person for something else. Those sorts of misinterpretations. So one of the suggestions is that expert evidence could be given to provide the general background.
>
> Secondly, that it could be used to rehabilitate the child's credibility when it has been attacked in that way so that it would not be introduced unless the defence had actually used that type of tactic to undermine the child's credibility.
>
> The other is the direct opinion role of expert evidence. Again, that is something that is much more contentious. Although doctors can give opinion evidence as to whether or not physical signs they see indicate or are consistent with child sexual abuse, it is very rare that behavioural reactions would be used for the same purpose, partly because the evidence is not as clear.[349]

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348 Evidence, 19 April 2002, p 5.

349 ibid, p 4.

4.135 Dr Cossins observed:

> It is naïve in the extreme to expect a group of 12 lay people, most of whom will have little knowledge about the psychological, behavioural and emotional responses of sexually abused children, to have any particular commonsensical understanding of these issues, other than what they hear in court, unless they have some particular professional or personal understanding of the issues.[350]

4.136 The use of expert evidence to counter erroneous preconceptions held by the jury or the judge is sometimes known as 'counter-intuitive evidence', or 'myth-dispelling evidence'. An editorial in the Journal of Law and Medicine described its potential use in child sexual assault trials:

> Counterintuitive evidence has been argued to be vital in many contexts, including … the reasons why child victims of sexual abuse may fail to report or complain promptly, may be equivocal or imprecise in their allegations, or may even retract or recant…
>
> Myth-dispelling evidence in relation to difficulties experienced by children who are the victims of familial sexual abuse may focus upon the impact of the secrecy orchestrated by the perpetrator; the numbing effects of a child's sense of helplessness in face of the abuse; processes of entrapment and accommodation by child victims as measures commonly adopted to survive in face of repeated abuse; and the phenomena of delayed, conflicted, retracted and unconvincing disclosures by such victims.[351]

Current provisions for admitting expert evidence

4.137 The admission of expert evidence in child sexual assault trials may at present occur in strictly limited circumstances because of the restriction on admitting opinion evidence under section 76. The current provisions for admissibility of expert evidence under the *Evidence Act 1995* were explained by the DPP:

> 1. The evidence must be relevant (section 55) and have sufficient probative value (section 135).
>
> 2. The witness must have specialised knowledge based on training, study or experience (section 79).
>
> 3. The opinion expressed by the witness must be based wholly or substantially on that knowledge (section 79).[352]

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350 "Answers to Proposed Questions", document tendered by Dr Cossins, 23 April 2002, p 4.

351 "Counterintuitive Evidence", Editorial, *Journal of Law and Medicine, Vol 4*, May 1997, pp 303 – 304.

352 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 18.

4.138 The DPP advised the Committee that courts have tended to exclude expert evidence:

> Expert opinion is not generally admissible, especially if it is designed in some way to bolster the child's evidence… Can expert comment as to the consistency of certain behaviour of the complainant with prolonged sexual abuse be admissible? This area of expertise is used in the United States and has been considered in New Zealand, Tasmania and more recently in NSW. In all cases it was ruled inadmissible; not, however because it is never admissible, but because in the instant cases the consistency alleged was too weak and the expertise not sufficient.[353]

4.139 The DPP also referred to several recent cases which ruled expert opinion inadmissible that related to the reactions of children to sexual abuse.[354] While it was held that expert evidence was inadmissible in these particular cases, the courts did not rule out "the option that evidence properly led may be admissible" in future cases.[355]

Proposals for reform of expert evidence provisions

4.140 The Northern Sydney Child Protection Service advocated a role for court appointed expert witnesses in child sexual assault trials:

> The matter of the expert witness role needs further evaluation. The ability of the court to interpret the relevance of "expert" evidence can be compromised by the introduction of other experts with conflicting opinions. It is suggested that court appointed development experts could assist in clarification of matters relating to children's understanding of issues, language, recall of events and a range of other matters. The use of experts by either party is currently possible but rarely used. This approach is unlikely to be useful, however, as adversarial experts will not clarify matters for the court. This practice will also escalate the costs for both defence and the crown.[356]

4.141 Similarly, a local Sexual Assault Service submitted that expert evidence should be admitted:

> The introduction of [expert] evidence … would facilitate an understanding of children's behaviour when confronted with abuse, eg, accommodation syndrome. To illustrate, this Service has had several cases where the ODPP has not proceeded with cases because it has been recorded in SAS or Child and Family Health files that at some stage the child or young person denied being abused, before any first disclosure occurred, or retracted abuse at some stage but

353 ibid, pp 18 – 19.

354 *Ingles v R* CCA Tasmania, 4 May 1993; *R v Accused* [1989] 1 NZLR 714; Regina v F CCA NSW, 2 November 1995, cited in "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 20.

355 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 20.

356 Submission 60, p 7.

> subsequently proceeded with a complaint. If contextual information was given for this, it could be understood by a jury what psychological and other processes were occurring that resulted in the witness behaviour.[357]

4.142 The submission also suggested that expert testimony could be used to explain "the way children recall and describe material and process questions", and evidence about patterns of offender behaviour. [358]

4.143 The Journal of Law and Medicine editorial states that, where in the past the higher courts have ruled expert evidence inadmissible on the grounds that it is too general, or because they considered the evidence sought to suggest that there can be no adverse reflection on a complainant who is inconsistent, the purpose of the evidence was misunderstood by the court:

> The evidence elicited was designed to disabuse of the expectation that an abused child will always straightaway report his or her traumatic experiences to persons such as a mother, friend, teacher or doctor. The function of the proffered information was to factor out some bases upon which inferences adverse to the complainant may have been drawn inappropriately…
>
> The knowledge that children who are the victims of sexual assault may change their stories for reasons other than the stories' falseness, assuming this to be empirically provable in a reasonable percentage of children, is an important piece of information that has the potential to avoid a wrong inference being drawn by the tribunal of fact. The information does not answer the question definitively of what the triers of fact should make in the child's shift in story. It simply removes from the evaluation process one potential source of error and enables the jury to exercise its evaluation in a more informed fashion.[359]

4.144 Recent law reform reports have also favoured broadening the circumstances in which expert evidence can be admitted in a child sexual assault trial. The joint report by the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Law Reform Commission (ALRC), for example, recommended in 1997 that:

> Expert opinion evidence on issues affecting the perceived reliability of a child witness should be admissible in any civil or criminal proceeding in which abuse of that child is alleged. In particular, evidence that may assist the decision maker in understanding patterns of children's disclosure in abuse cases or the effects of abuse on children's behaviour and demeanour in and out of court should be able to be admitted.[360]

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357 Submission 61, p 6.

358 ibid, p 6.

359 "Counterintuitive Evidence", Editorial, *Journal of Law and Medicine, Vol 4*, May 1997, p 305.

360 HREOC and ALRC, op cit, p 329.

4.145 In the same year, the Wood Royal Commission recommended that amendments to the *Evidence Act* be passed to enable expert evidence to be admitted in child sexual assault trials.[361] The Royal Commission's proposals were supported by the DPP, but have not been implemented:

> My Office supported this recommendation; but as of today, no legislative change has been forthcoming from the Government.[362]

Arguments against reform of expert evidence provisions

4.146 Other inquiry participants opposed any reform to the expert evidence provisions. For example, Mr Winch, from the Public Defenders Office expressed several concerns:

> The first problem that I see arising out of allowing expert evidence to be given about children's responses is that it could lead to a battle of the experts – that is, there would be an expert who would say that this response is typical and there would be perhaps an expert called who might then say that this is atypical or that this is not typical, or the expertise of the first expert is not up to scratch…. Second, in one sense the typical response of a person in those circumstances is at one side to the real issue that is to be decided by the court, which is whether this person is telling the truth about this instance and the expertise would need to be linked to the particular person for it to have real cogency as I see it.[363]

4.147 Mr Button, also from the Public Defenders Office, identified other potential difficulties:

> It is true that expert evidence is not usually led in child sexual assault trials. I am not sure that it is ruled out entirely. If it is useful I can give a couple of references to cases where it has been discussed… One of the first issues would be: is there a real area of expertise that is going to be probative to a jury about the behaviour of children or the behaviour of adults or victims of crime, or is it really going to be very much a matter of commonsense and a matter of common knowledge that children are different from adults and that people who are taken advantage of will sometimes not come forward and that people who have had a crime committed against them will sometimes say inconsistent things? That is the first question that I have about it.
>
> The second question I have is: even assuming that there is an area of expertise, can that expertise effectively be related to the particular complainant? In other words, one might be able to say well, there is a syndrome or a tendency of children to behave in a certain way, but will the expert be able to say usefully this particular child or adult is behaving in that way.[364]

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361 Royal Commission into the New South Wales Police Service, Vol 5, p 1118.

362 "Answers to Proposed Witness Questions", document tendered by Mr Cowdery, 26 March 2002, p 20.

363 Winch, Evidence, 9 July 2002, p 9.

364 Button, Evidence, 9 July 2002, pp 9 – 10.

4.148 Mr Button considered that it was a matter for the Crown Prosecutor's address to the jury to argue that the defence's cross-examination raised irrelevant matters or misconstrued the witness's experience:

> … I think it is important to remember that in his or her address the Crown Prosecutor is entitled forcefully to put to the jury his or her submissions about the evidence in the trial and, in particular, if it is being put for example to a person in cross-examination, "Why didn't you at the age of four go to the police" or something of that nature, it is perfectly open to the Crown Prosecutor in our adversarial system to come back and say, "Use your commonsense and common knowledge, members of the jury, and regard that cross-examination as completely worthless." It is not as if this cross-examination can take place and the Crown is estopped from attacking it in reply, in effect.[365]

Committee conclusions on expert evidence

4.149 The Committee has considered the information provided to it relating to the assistance that expert witnesses could provide to the court. It is apparent to the Committee that a lack of understanding about the dynamics of child sexual assault and typical responses by victims could, when manifested in a jury or judicial officer, negatively affect the outcome of a child sexual assault prosecution. A jury that is ignorant that it is common for child sexual assault victim to retract their allegations, to disclose the abuse gradually and after a long delay, to forget details of the abuse, or to maintain contact with their abusers could easily acquit an offender based on misconceptions about how such actions impact on the credibility of the complainant.

4.150 The Committee is of the opinion that providing a jury with the necessary knowledge to accurately assess the credibility of the complainant's allegation is vital to a just outcome of the trial. Such evidence does not exclude the possibility that a complaint may be concocted: it clearly would be illogical to argue that delayed complaints, inconsistent stories or lack of detail can **never** be a sign of a fabricated complaint. However, expert evidence can inhibit a jury from assuming that such reactions **must be** a sign of fabrication, an assumption that studies have now shown to be incorrect.

4.151 The Committee has not been convinced that admitting expert evidence of a general nature about the impact of child sexual assault would create an unfair disadvantage for the accused. As the Wood Royal Commission noted, such measures would merely create a level playing field, in which misconceptions held by the jury were countered by specialist knowledge. The Committee does not envisage that the expert would necessarily comment on the likely truth of a particular complainant's allegations; merely that general information about children's behaviour would be provided to the court.

365 ibid, p 10.

4.152 The Committee notes that other jurisdictions have removed the barriers to the admission of expert evidence in some circumstances. Tasmania recently enacted a revised *Evidence Act 2001*, in which section 79A permits the admission of expert opinion based on specialised knowledge of child behaviour:

> 79A. A person who has specialised knowledge of child behaviour based on the person's training, study or experience (including specialised knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse) may, where relevant, give evidence in proceedings against a person charged with a sexual offence against a child who, at the time of the alleged offence, had not attained the age of 17 years, in relation to one or more of the following matters:
>
> (a) child development and behaviour generally;
>
> (b) child development and behaviour if the child has had a sexual offence, or any offence similar in nature to a sexual offence, committed against him or her.

4.153 New Zealand also has provisions for expert evidence in child sexual assault trials, following 1989 amendments to its *Evidence Act 1908*. These provisions permit an expert witness to comment on particular complainants:

> 23G. Expert witnesses---
>
> (1) For the purposes of this section, a person is an expert witness if that person is-
>
> (a) A medical practitioner registered as a psychiatric specialist under regulations made pursuant to section 39 of the Medical Practitioners Act 1968, practising or having practised in the field of child psychiatry and with experience in the professional treatment of sexually abused children; or
>
> (b) A psychologist registered under the Psychologists Act 1981, practising or having practised in the field of child psychology and with experience in the professional treatment of sexually abused children.
>
> (2) In any case to which this section applies, an expert witness may give evidence on the following matters:
>
> (a) The intellectual attainment, mental capability, and emotional maturity of the complainant, the witness's assessment of the complainant being based on---
>
> (i) Examination of the complainant before the complainant gives evidence; or
>
> (ii) Observation of the complainant giving evidence, whether directly or on videotape:
>
> (b) The general development level of children of the same age group as the complainant:

> (c) The question whether any evidence given during the proceedings by any person (other than the expert witness) relating to the complainant's behaviour is, from the expert witness's professional experience or from his or her knowledge of the professional literature, consistent or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

4.154 The Committee notes that the Wood Royal Commission recommended that provisions similar to those of New Zealand be adopted in New South Wales. However, the Royal Commission preferred that, unlike in New Zealand, the expert called by the Crown should be someone who is independent of the investigation, as this would "reduce the number of interviews to which the child is subject and avoids any suggestion of unfairness arising from the fact that the defence expert does not have access to the complainant".[366]

4.155 While either of these models would provide a useful starting point on which to base New South Wales amendments, the Committee prefers the Tasmanian approach that allows for the admission of general child development information, and explanations of the way in which children commonly respond to sexual assault. This would obviate the need for either a defence or prosecution expert to interview the child, while still providing the necessary information for jurors to assess the credibility of the complainant's evidence of abuse.

Recommendation 21

The Committee recommends that the Attorney General amend the *Evidence Act 1995* to permit in child sexual assault proceedings the admission of expert evidence relating to child development (including memory development), and the behaviour of child victims of sexual assault along the lines of section 79A of the *Evidence Act 2001* (Tas).

Judicial Warnings

4.156 In the course of a criminal trial before a jury, the trial judge may, and in some circumstances must, give a warning to the jury as to the weight to be given to certain evidence, or inferences that may or may not be drawn, and how, if at all, these are to affect the jury's deliberations. Judicial warnings are also known as judicial *directions*. There are several particular judicial warnings that were identified by witnesses and submissions as especially relevant to child sexual assault trials. These are discussed below.

Warnings about delayed complaints

4.157 Dr Cossins explained to the Committee that there are two different jury directions concerning cases where a victim's complaint of sexual assault is made after some delay: the common law warning, known as the *Crofts* warning, and the statutory warning pursuant to section 107 of the *Criminal Procedure Act 1986*.

366 Royal Commission into the New South Wales Police Service, Vol 5, p 1118.

4.158 The common law *Crofts* warning was originally the *Kilby* warning. The Wood Royal Commission Report explained the *Kilby* warning, which was given in cases of an absence of complaint or delayed complaint by the victim:

> This was to the effect that, in determining whether to believe the complainant, the jury might take into account his or her failure to complain at the earliest reasonable opportunity. The direction assumed that a prompt complaint was consistent with an assault having taken place, while a delay or absence of a complaint was contrary to normal expectation and hence a matter properly taken into account in determining the witnesses' credibility. In relation to child complainants, the courts adopted a more flexible approach to the concept of what constitutes earliest reasonable opportunity, to take into account their limited comprehension of the wrongfulness of the act.[367]

4.159 Over the years, the *Kilby* warning was the subject of some criticism, on the basis that it ignored research that showed that delay or absence of complaint was a common reaction by sexual assault victims. Instead, the *Kilby* warning allowed conclusions about the complainant's credibility to be drawn based on stereotypical views of how a victim 'should' act after being sexually assaulted.

4.160 Reforms attempted to overturn this approach by altering the warning given to juries in sexual assault trials. A new legislative provision aimed at providing more accurate directions about the implications for credibility arising from delayed complaints was enacted. In this respect, section 107 of the *Criminal Procedure Act 1986* requires that, when evidence is given relating to an absent or delayed complaint, a trial judge should direct the jury that:

> (a)… the absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and
>
> (b) … there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.[368]

4.161 In spite of section 107, many judges are still giving a *Kilby*-style warning that the delayed complaint may cast doubt on the complainant's credibility. This is possible because section 107 does not **prohibit** the common law warning: it merely requires that the statutory warning is given. The New South Wales case of *Davies*[369]and the High Court decision in *Crofts*[370] have confirmed this. In *Crofts* the High Court found that:

> The enactment of specific provisions altering the general rules of practice as to the directions given to a jury concerning the reliability of the evidence of alleged victims of sexual offences did not affect the requirement to give specific and

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367 Royal Commission into the New South Wales Police Service Report, Vol 5, pp 1121 – 1122.

368 Section 107, *Criminal Procedure Act 1986*.

369 *R v Davies* (1985) 3 NSWLR 27.

370 *Crofts v R* (1996) 186 CLR 427, cited in Submission 69, p 23.

> particular warnings where they were necessary to avoid a perceptible risk of a miscarriage of justice arising from the circumstances of the case.[371]

4.162 Dr Cossins explained that the High Court in *Crofts* found that the trial judge had erred in not informing the jury that:

> … they were entitled to take a six year delay in complaint into account when assessing the complainant's credibility. As a result, the High Court quashed the appellant's convictions, thus reinforcing the historical view that delay in making a complaint is relevant to an assessment of a complainant's credibility in a sexual assault trial…[372]

4.163 The High Court explained its view of the need for a warning to be given in particular cases:

> Delay in complaining may not *necessarily* indicate that an allegation is false. But in the particular circumstances of a case, the delay may be so long, so inexplicable or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false.[373]

4.164 Since the case of *Crofts*, therefore, a *Crofts warning* is given to the jury to the effect that:

> The absence of a complaint or a delay in the making of it may be taken into account in evaluating the evidence of the complainant, and in determining whether to believe him or her.[374]

4.165 This is to be given, according to Wood CJ at CL, whenever a section 107 warning is given.[375]

4.166 When combined, the statutory and common law warnings therefore can result in warnings to the jury *both* that there are good reasons why a complainant might delay making a complaint about a sexual assault, *and also* that this delay should be considered when the complainant's credibility is evaluated.

4.167 The Committee received evidence criticising the *Crofts* warning, especially as it applies to child sexual assault trials. Dr Cossins noted that the *Crofts* warning has "particular implications" for child sexual assault trials, because of "the typical situation in which the complainant has delayed reporting child sexual abuse for a period of months or years".[376]

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371 ibid at 446 and 448.

372 Submission 69, p 21.

373 *Crofts v R* at 448, per Toohey, Gaudron, Gummow and Kirby JJ, cited in Submission 69, p 23.

374 *Regina v BWT* [2002] NSWCCA 60, per Wood CJ at CL at p 32.

375 ibid.

376 Submission 69, p 21.

She considers that the High Court decision in *Crofts* "reinforces the historical stereotypes" about the credibility of complainants who delay disclosure of their assault. [377]

4.168 In relation to the case of *Crofts* in particular, Dr Cossins argued that:

> … the delay by the complainant in *Crofts* was neither inexplicable nor unexplained, since the delay was explained at trial and it is the very type of behaviour that is characteristic of child sexual abuse victims. Such considerations seem to have been obscured by the prejudicial belief that, contrary to documented research, a true allegation of CSA [child sexual assault] is made at the earliest opportunity.[378]

4.169 Dr Cossins noted that according to the High Court approach:

> …a delay of six years becomes suggestive, not of a sexually abused and traumatised child, but a child prone to fabrication. No reference was made by the High Court to the substantial body of literature that has documented the actual experiences and responses of sexually abused children.[379]

4.170 Dr Cossins suggested that legislative amendment is required to ensure that the *Crofts* common law warning on delay is expressly abrogated.[380] This proposal was supported in evidence by the Women's Legal Resource Centre.[381]

4.171 However, Mr Button, from the Public Defenders Office, supported the judicial warnings as they currently stand:

> [The *Crofts*] warning must be given, and I personally do not think juries have trouble with receiving a section 107 warning and then the judge, if he or she sees fit, saying something along the lines of, "In this particular case, however, members of the jury, you have heard evidence that nothing was said until after there was a custody dispute" or some other aspect. I appreciate that there are a large number of things that have to be said to juries in a child sexual assault trial. To me, each one of them seems understandable so long as simple language is used, because, after all, most of the warnings and directions are commonsense.[382]

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377 Submission 69, p 21.

378 ibid, p 24.

379 ibid, p 24.

380 ibid, p 25.

381 Carney, Evidence, 2 May 2002, p 14.

382 Button, Evidence, 9 July 2002, p 18.

4.172 The Committee notes that previous inquiries into child sexual assault prosecutions have examined the issue of jury directions about delayed complaints. For example, the Wood Royal Commission questioned the appropriateness of the common law warning's assumption that the absence of, or delay in, complaint is a reflection on the complainant's credibility. The Commission suggested an alternative approach:

> … a preferable approach in many child sexual assault cases, where an issue is raised as to delayed or absent complaint, would be for the trial judge to direct the jury in terms such as:
>
> - The experience of the courts is that children who are sexually abused frequently do not complain
> - There are many reasons why children may hesitate before making a complaint; these include embarrassment, fear of getting into trouble, misplaced shame or guilt…
> - You have been invited to regard the delay in complaining in this case as affecting the complainant's credibility; and
> - It is open for you to do so if you wish, but you should also bear in mind the matters I have just mentioned.[383]

4.173 The Committee considers the provision of the *Crofts* warning to be entirely inapt for child sexual assault trials. As has been repeatedly shown in academic studies, a child's delay in reporting a sexual assault is in no way a reflection on the truth of the complaint. Rather, it is usually a reflection of the fear, embarrassment, shame, stress, confusion and trauma felt by many victims of child sexual assault.

4.174 While the Committee notes the argument that the *Crofts* warning was "not meant to revive the stereotypical view that delay is invariably a sign of the falsity of the complaint," [384] the Committee is of the opinion that such is the unavoidable result of a warning to the jury that in assessing the complainant's credibility, they should take into account the complainant's failure to complain promptly.

4.175 The Committee acknowledges that there will be individual cases where a delay also accompanies a false complaint, but considers that that argument is a matter to be argued at trial rather than being the subject of a judicial warning.

4.176 The Committee therefore recommends that the *Criminal Procedure Act 1986* be amended to explicitly prohibit the giving of the *Crofts* warning about delayed complaints in cases of child sexual assault.

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383 Royal Commission into the New South Wales Police Service Report, p 1122-23.

384 Wood CJ at CL in *Regina v BWT* [2002] NSWCCA 60 at para 32.

Recommendation 22

The Committee recommends that the Attorney General amend the *Criminal Procedure Act 1986* to expressly prohibit judicial officers from giving jury directions stating or suggesting that the credibility of a complainant is affected by a failure to report, or delay in reporting, a child sexual assault.

'*Longman*' warning on delayed and uncorroborated complaints

4.177 An additional warning about delayed and uncorroborated complaints, known as the *Longman* warning, focuses on the difficulties for the defence in such circumstances.

4.178 Wood CJ at CL commented on the *Longman* warning at length in the recent New South Wales Court of Criminal Appeal case of *BWT*: [385]

> … the *Longman* direction (as reinforced in *Crampton and Doggett*), [advises] that by reason of delay, it would be "unsafe or dangerous" to convict on the uncorroborated evidence of the complainant alone, unless the jury scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy…[386]

4.179 The rationale for the *Longman* direction is cited by Wood CJ and CL as follows:

> The need for such a warning and not merely a comment, their Honours observed, arose because there was "one factor which may not have been apparent to the jury". That factor, they went on to say:
>
> > "…was the applicant's loss of those means of testing the complainant's allegations which would have been open to him had there been no delay in prosecution. Had the allegations been made soon after the alleged event, it would have been possible to explore in detail the alleged circumstances attendant upon its occurrence and **perhaps** to adduce evidence throwing doubt upon the complainant's story or confirming the applicant's denial. After more than twenty years that opportunity was gone and the applicant's recollection of them could not be adequately tested. The fairness of the trial had necessarily been impaired by the long delay…[387]

385 ibid.

386 ibid per Wood CJ at CL at p 32.

387 Brennan, Dawson and Toohey JJ in *Longman v The Queen* (1989) 168 CLR 79 at 91, cited in *Regina vs BWT*, at 7.

4.180 Wood CJ at CL also cites passages from the case of *Crampton*[388] which highlight the difficulties for the defence case where a complaint is delayed:

> An accused's defence will frequently be an outright denial of the allegations. That is not a reason for disparaging the relevance and importance of a timely opportunity to test the evidence of a complainant, to locate other witnesses, and to try to recollect precisely what the accused was doing on the occasion in question. In short, the denial to an accused of the forensic weapons that reasonable contemporaneity provides, constitutes a significant disadvantage which a judge must recognise and to which an unmistakable and firm voice must be given by appropriate directions.[389]
>
> In practical terms, after 20 years, the appellant's defence could never rise much above a mere denial and protest of innocence. He had lost the chance of obtaining effective evidence from other children who were in the class at the time of the alleged offence concerning his alleged conduct. He had lost the chance of procuring effective evidence from other teachers said to have been coming and going near the class at times relevant to the events alleged…[390]

4.181 Mr Winch, from the Public Defenders Office, considers that this judicial warning should be retained, as it has been developed as a response to need:

> … the warnings have arisen, as I said, because the court has come to the view that, in cases of substantial delay, there is the difficulty caused to the defence along the lines set out in *Longman.*[391]

4.182 Wood CJ at CL expressed some concern that the *Longman*, *Doggett* and *Crampton* decisions have led to a situation where every case involving substantial delay results in a warning that the accused has *in fact* lost the opportunity to defend the charges, when in reality the accused merely *might have* been denied this chance:

> Put another way, the effect of these decisions has been to give rise to an irrebuttable presumption that the delay *has* prevented the accused from adequately testing and meeting the complainants evidence; and that, as a consequence, the jury must be given a warning to that effect irrespective of whether or not the accused was in fact prejudiced in this way.
>
> The difficulty which I have with this proposition is that it elevates the presumption of innocence, which must be preserved at all costs, to an assumption that the accused was *in fact* innocent, and that he or she might have called relevant evidence, or cross examined the complainant in a way that would have rebutted the prosecution case, had there been a contemporaneity between the alleged offence and the complaint or charge. That consideration loses all of its force if, in fact, the accused **did commit** the offence. In that event there would have been no

388 *Crampton v The Queen* (2000) 176 ALR 369

389 ibid, Gaudron, Gummow and Callinan JJ at para 45, cited in *Regina vs BWT* at 9.

390 ibid, cited in *Regina vs BWT* at 10.

391 Winch, Evidence, 9 July 2002, p 12.

> evidence available of a positive kind, relating for example to the existence or ownership of the premises, or of a motor vehicle or other item associated with the offence charged, or going to establish an alibi for the relevant occasion, no matter how contemporaneous the complaint or charge was with the offence… My concern lies … with the unequivocal nature of a *warning*, which must be given by a trial judge who does not himself or herself know where the truth lies, that the accused *was unable* to adequately test and meet the prosecution case.
>
> If in fact the accused did commit the offence charged, any such warning or direction would be misleading if not positively untrue.[392]

4.183 His Honour goes on to suggest that there is need for modification of the warning, to make clear that it should be given only where "there is evidence, or good reason to suppose positively, that the accused *has been* prejudiced".[393]

4.184 The Committee agrees with this suggestion, and considers that the *Longman* warning would appropriately be prohibited where there is no good reason to conclude that the accused has been prejudiced by the delay.

Recommendation 23

The Committee recommends that the Attorney General amend the *Criminal Procedure Act* 1986 to prohibit the issuing of the *Longman* judicial warning where there is no evidence or good reason to suppose that the accused was prejudiced by the delay in complaint.

'*Murray* warning' on uncorroborated evidence of a complainant

4.185 Under the common law, warnings have traditionally been given to juries about 'the danger of convicting on the uncorroborated evidence of a complainant in a sexual assault trial'. Dr Cossins submitted that the basis of this warning was the view stated in the seventeenth century that complaints of sexual assault by women and girls were generally unreliable – easily made and difficult to defend.[394] Dr Cossins rejected the arguments on which the warning is based:

> When the corroboration warning is examined in light of the prevalence of child sexual abuse in the Australian community and low conviction rates, the falsity of the premises on which the warning is based (that child sexual abuse is rare and that a complaint of sexual abuse is easy to make and difficult to refute) are obvious.[395]

392 *Regina vs BWT*, at 13 – 20 (original emphasis).

393 ibid, at 22.

394 Submission 69, pp 25 – 26.

395 ibid, p 26.

4.186 The requirement to give a warning about uncorroborated evidence was abolished by the *Evidence Act 1995*, which states:

> **s 164(3)** Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge:
>
> (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect, or
>
> (b) give a direction relating to the absence of corroboration.

4.187 However, while the corroboration warning is no longer mandatory, judicial officers retain a discretion to issue a warning to the jury concerning the lack of corroboration, confirmed in the case of *Murray*.[396] A number of studies have reported that judicial warnings about corroboration in sexual assault trials are commonplace.[397]

4.188 The Murray warning is described by Wood CJ at CL in the case of *BWT*:

> … the *Murray* direction …[is] to the effect that where there is only one witness asserting the commission of a crime, the evidence of that witness "*must be scrutinized with great care"* before a conclusion is arrived at that a verdict of guilty should be brought in…[398]

4.189 Dr Cossins considers the provision of corroboration warnings to be a contributing factor to the low success rates for prosecutions of child sexual assault:

> Judicial warnings about lack of corroboration combine with other rules of evidence to create a presumption of unreliability in relation to children's evidence. This analysis of the continued operation of the corroboration warning in child sexual assault trials, despite attempts to restrict its application, suggests that it has been and continues to be one of the barriers to the successful prosecution of child sex offences, although it is likely that the warning operates in conjunction with other factors associated with the accused and the complainant and the conduct of the trial.[399]

4.190 Dr Cossins cited Dr Cashmore's research which indicated that the "strength of the warning given" was one variable that appeared to affect the jury's decision in a trial.[400] Dr Cossins suggested that Dr Cashmore's findings indicated that juries could misinterpret the warning as "a hint to acquit".[401]

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396 *R v Murray* (1987) 11 NSWLR 12. Section 165(2) of the *Evidence Act* provides another avenue for a warning about lack of corroboration – see Submission 69, pp 28 – 30.

397 Such as the ALRC and HREOC Report, p 326.

398 *Regina vs BWT*, at 32.

399 Submission 69, p 31.

400 ibid.

401 ibid, p 25.

4.191 The Commissioner for Children and Young People also expressed concern about the impact of the *Murray* warning on successful prosecutions for child sexual assault, given the likelihood that the complainant's evidence will be uncorroborated in such cases:

> It is highly likely that the form of the *Murray* corroboration warning, along with other warnings, affects the likelihood of an individual's conviction even though clinical and prevalence studies have found that lack of corroboration of evidence is a typical rather than aberrant characteristic of the crime of sexual assault. The Commission recommends that further empirical work be conducted to assess the impact of this particular judicial practice in relation to children's evidence with a view to potentially reforming the law in this regard.[402]

4.192 The Committee understands the need for juries to carefully consider evidence before them and considers appropriate the part of the *Murray* warning that reminds juries of their duty in that regard. However, the Committee is concerned that the *Murray* warning's emphasis on the absence of corroboration could result in juries unfairly doubting the credibility of uncorroborated complainants. As noted above, warnings can easily be misinterpreted by the jury as a hint to acquit. Given that child sexual assault overwhelmingly occurs without corroborating evidence, the Committee considers that the existing *Murray* warning is inappropriate in such proceedings.

4.193 The Committee suggests that the *Murray* warning should be reformulated so that child sexual assault juries are advised that the evidence of one witness, if it is believed, is sufficient to prove a fact in issue. Juries could still be reminded of their duty to scrutinise all evidence with great care. The Committee suggests a warning along the following lines:

> Your role as the jury is to scrutinise the evidence you have heard with great care, however the evidence of one witness, if believed, is sufficient to prove a fact in issue in the trial.

4.194 The Committee considers this formulation would change the emphasis of the *Murray* warning, ensuring that the jury carefully considers the evidence before it, without inappropriately creating the perception that the evidence is necessarily unreliable. The legislative amendment should make clear that the existing *Murray* warning on corroboration of complainant's evidence should no longer be given.

Recommendation 24

The Committee recommends that the Attorney General amend the *Criminal Procedure Act 1986* to provide for a judicial warning on the uncorroborated evidence of a child sexual assault complainant. The Committee recommends that this judicial warning should advise the jury that, while they are required to scrutinise the evidence before the court with great care, the evidence of one witness, if believed, is sufficient to prove a fact in issue in the trial.

402 Submission 80, p 8.

Recommendation 25

The Committee further recommends that the amendment proposed in Recommendation 24 make clear that the existing *Murray* warning about uncorroborated evidence of a complainant is no longer to be given in child sexual assault proceedings.

Section 165B(2)(a) warning

4.195 A further judicial warning relevant to child sexual assault trials is found in section 165 of the *Evidence Act 1995*. Section 165 allows a judicial officer to direct the jury concerning 'evidence of a kind that may be unreliable', if requested by the defence. This provision, until recently, included children as a class of witness that could be classified as unreliable.

4.196 Commissioner Wood, in reporting on the paedophile section of the Royal Commission on the New South Wales Police Service, expressed concern about the use of section 165, where warnings come to be given routinely in cases involving child complainants:

> This would be an unfortunate development since, no matter how carefully it is given, such a warning is easily mistaken by a jury as an instruction to acquit. The common law rule of practice as to the giving of warnings, in cases involving children, seems to have grown from notions that children were inherently fanciful and unreliable historians… Research has been undertaken in this area which tends to suggest that child witnesses are as a class no more likely to be unreliable than adult witnesses.[403]

4.197 An amendment to the *Evidence Act* that commenced in July 2002, prohibits warnings about the unreliability of the evidence of children as a *class* of witness.[404] However, warnings may still be given about the unreliability of a *particular* child's evidence as a result of the child's age. The relevant amendments are:

> **165A Warnings about children's evidence**
>
> (1) A judge in any proceeding in which evidence is given by a child must not warn a jury, or make any suggestion to a jury, that children as a class are unreliable witnesses.
>
> (2) Without limiting subsection (1), that subsection prohibits a general warning to a jury of the danger of convicting on the uncorroborated evidence of any child witness.
>
> (3) Sections 164 and 165 are subject to this clause.

403 Royal Commission into the New South Wales Police Service, p 1120.

404 *Evidence Legislation Amendment Act 2001*

165B Warnings about a particular child's evidence

(1) This section applies to evidence given by a child in proceedings before a jury.

(2) A judge in any proceedings in which evidence to which this section applies is given may:

(a) warn or inform the jury that the evidence of the particular child may be unreliable because of the child's age, and

(b) warn the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it.

(3) Such a warning or information may be given only:

(a) if a party has requested that it be given, and

(b) if that party has satisfied the court that there are circumstances particular to that child in those proceedings that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

(4) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

4.198 The Committee supports section 165A(2), which prevents any suggestion that there is danger in convicting on the uncorroborated evidence of a child. This provision should reduce a significant barrier faced by some child witnesses in sexual assault trials.

4.199 However, section 165B(2)(a) allows the judge to warn or inform the jury that the evidence of the particular child may be unreliable **because of the child's age** if there are circumstances particular to that child that warrant the warning. The Committee is concerned that this could still be interpreted to allow a trial judge to give a warning about the reliability of a particular child's evidence merely on account of that child's age.

4.200 The Committee considers that the amendments to section 165B, described above, should be more explicit in their regulation of warnings that are given about the reliability of evidence of a particular child because of his or her age. The HREOC and ALRC report of 1997 recommended the following approach:

> Judicial warnings about the evidence of a particular child witness should be given only where (1) a party requests the warning and (2) that party can show that there are exceptional circumstances warranting the warning. Exceptional circumstances should not depend on the mere fact that the witness is a child, but on objective evidence that the particular child's evidence may be unreliable.
>
> Warnings should follow the *Murray* formula to reduce the effect of an individual judge's bias against, or general assumptions about, the abilities of children as witnesses.[405]

[405] HREOC and ALRC, p 327.

4.201 The Wood Royal Commission supported this recommendation.[406] The Committee agrees with the approach recommended by HREOC and the ALRC. The Committee suggests that section 165B of the *Evidence Act 1995* should be further amended along the lines proposed it the HREOC and ALRC report. This would ensure that the age of a child witness is not in itself a ground for a warning about reliability but would still allow the trial judge to warn or inform the jury if there are particular characteristics of the child's evidence that suggest it may be unreliable.

Recommendation 26

The Committee recommends that the Attorney General amend section 165B of the *Evidence Act 1995* to ensure that warnings about the reliability of a child's evidence are given only when (1) a party requests the warning and (2) that party can show that there are exceptional circumstances warranting the warning. Exceptional circumstances should not depend on the mere fact that the witness is a child, but on objective evidence that the particular child's evidence may be unreliable.

Recommendation 27

The Committee further recommends that the amendment suggested in Recommendation 26 should require that any warning given relating to the reliability of a child's evidence should follow the *Murray* formula that requires the jury to consider the evidence "with great care" before reaching a verdict.

4.202 The Commissioner for Children and Young People submitted that judicial officers need to be informed about current knowledge relating to the reliability of child witnesses, so that any decision they make about warning a jury about the reliability of the evidence of a child is not based on misconceptions about children's credibility as witnesses:

> On the basis of extensive empirical research, it is also generally accepted that children's evidence is unlikely to be dishonest, fabricated or otherwise unreliable. It may therefore be appropriate that trial judges are assisted in the exercise of their discretion to warn juries about children's evidence, and that up to date and accurate information is disseminated amongst the legal profession, in relation to the reliability of the child witnesses.[407]

4.203 Commissioner Calvert suggests that the New South Wales Judicial Commission undertake the task of providing such information to judicial officers.[408] In this regard, the Committee observes that its recommendations relating to the proposed pilot project in Chapter Seven include proposals for the education and training of judicial officers. Nevertheless, the Committee considers that there would be benefit in the provision of training to improve judicial officers' understanding about child development and what it means for the

406 ibid.

407 Submission 80, p 8.

408 ibid, p 9.

reliability of children as witnesses. The Committee recommends that the Judicial Commission undertake this task.

Recommendation 28

The Committee recommends that the Judicial Commission provide training courses to judicial officers regarding child development and the reliability of child witnesses.

General comments on judicial warnings

4.204 The Committee heard evidence that a high proportion – estimated at 75% – of convictions for child sexual assault go on to appeal at the New South Wales Court of Criminal Appeal.[409] Where such appeals result in a retrial, the child complainant is faced with a repetition of the entire trial process. The Committee understands that it is not uncommon for children to withdraw from the prosecution at that stage, as the prospect of giving evidence and being cross-examined another time is unbearable to them. The difficulty caused to complainants in such circumstances was noted by Wood CJ at CL. In the case of *BWT*, he wrote:

> … it does remain particularly burdensome for any such person to be called on to give evidence for a second trial when a new trial becomes necessary for reasons which may have involved little more than a technical failure to deliver, in precise terms one or more of the directions earlier identified, or even a deliberate decision not to do so following a request by trial counsel. The risk of harm to a true victim is only multiplied in such a case. Particularly is that so if, by reason of the trauma potentially involved to the victim in having to go through a second trial, a decision is made to no bill the proceedings.[410]

4.205 Dr Cossins also noted broader public interest concerns arising from the incidence of appeals:

> Generally speaking, criminal appeals proceed on the basis of very technical arguments about the admissibility/non-admissibility of evidence, the interpretation of particular rules of evidence or shortcomings in the trial judge's summing up. If an appeal is successful it does not necessarily mean the accused is innocent, merely that he did not in some way receive a fair trial. If as the DPP's submission states, many of the appeals that are sent back for re-trial are not in fact re-tried, this has to have ramifications in terms of the administration of justice and child protection. Where re-trials do occur this raises issues about court resources and re-traumatisation of the complainant.[411]

409 Cowdery, Evidence, 26 March 2002, p 18.

410 *Regina vs BWT*, at 37.

411 "Answers to Witness Questions", document tendered by Dr Cossins, 23 April 2002, p 12

4.206 One factor that contributes to the frequency of appeals is the number and complexity of judicial warnings required. The DPP told the Committee:

> Most matters that result in conviction at trial go on appeal to the Court of Criminal Appeal. As there is an abundance of case law pertinent to sexual assault matters and directions that are to be made by the trial judge, matters are frequently sent back for retrial on the basis that the judge misdirected the jury in the summing up. Often in these cases the child or his or her family decide that it is not in the interests of the child to proceed to a further trial.[412]

4.207 Other witnesses also noted that a failure to give various judicial warnings often prompts a retrial. For example, the Women's Legal Resource Centre submitted:

> Legislative changes over the last few years to assist the prosecution process, such as removing the requirement for judges to give a corroboration warning are continually undermined by the higher courts on appeal. It is our experience that when trial judges do not give the corroboration warning, their decisions are often successfully appealed, the verdicts quashed and new trials ordered. The prospect of giving evidence for a second or third time, is often too traumatic for child victims and matters are regularly discontinued.[413]

4.208 Similarly, Dr Cossins reported that:

> …in circumstances where a complainant's evidence is uncorroborated, the failure to give a *Murray* or *Longman* warning or a direction under s 165(2) is a basis upon which a conviction is likely to be quashed.[414]

4.209 Wood CJ at CL, in his judgment in the case of *BWT*, expressed concern about the proliferation of warnings in child sexual assault trials.[415] His Honour noted at least eight warnings that must be given to the jury in a child sexual assault trial, in addition to the standard warnings given in criminal trials generally. He describes this as a "formidable task" for a trial judge, and confusing for the jury:

> The jury is similarly faced with a potentially bewildering array of considerations, some of which may appear highly technical, if not inconsistent, to the lay mind and which, in any event, are likely to vex an experienced trial lawyer… Added to that is the circumstance that any direction, framed in terms of it being "dangerous or unsafe" to convict, risks being perceived as a not too subtle encouragement by the trial judge to acquit, whereas what in truth the jury is being asked to do is to scrutinize the evidence with great care.[416]

412 Submission 27, p 11.

413 Submission 67, p 8.

414 Submission 69, p 29.

415 *Regina vs BWT* at 32 – 37.

416 ibid, at 34.

4.210 His Honour therefore concluded that there is a need for reform of the law relating to the number of warnings in such cases:

> I consider it timely for there to be a further review of the evidentiary, and other requirements of procedural law that apply to cases of sexual assault, particularly those involving children.[417]

4.211 The Eastwood and Patton study cited previously in this report argued that reform to jury directions was essential, as existing warnings are discriminatory, and "cast unwarranted doubt" on the child's evidence. Their study suggests a legislative amendment that is "clear and unequivocal to ensure the intent of the legislation is not continually thwarted by the courts". [418] They recommend a framework for jury directions as follows:

> (1) A person may be convicted of an offence on the uncorroborated testimony of one witness.
>
> (2) In a proceeding for a sexual offence against a child, the trial judge is **required** to direct the jury –
>
> (a) that one witness, if believed, is sufficient to prove a fact.
>
> (3) Judges must **not** warn, in any case –
>
> (a) That children are in any way an unreliable and untrustworthy class of witness
>
> (b) That complainants of sexual assault are in any way an unreliable and untrustworthy class of witness
>
> (c) That the evidence of the child is to be regarded as unreliable due to the age of the child
>
> (d) That delay in making a complaint makes the evidence of the child unreliable
>
> (e) That corroboration is necessary or desirable in order to convict
>
> (4) Subject to (2) and (3), if it is in the interests of justice to do so, a judge may
>
> (a) Make comments to the jury about the specific evidence given, or
>
> (b) Where there is only one witness asserting the commission of an offence, advise the jury that

417 ibid, at 35.

418 Eastwood and Patton, p 133.

> the evidence should be scrutinised with great care.[419]

4.212 In Dr Cossins' view, the difficulties relating to judicial warnings may require more radical reform than just amending the rules of evidence:

> The continued role of the corroboration warning raises questions about the effectiveness of law reform within the child sexual assault trial and whether it is particular rules of evidence that require reform or the adversarial system itself… In other words, we need a better system than one in which so much reliance is placed on prejudicial beliefs about, in particular, girls' behaviour.[420]

4.213 The Committee acknowledges concerns that confusion may arise about judicial warnings required to be given to juries in certain circumstances in child sexual assault cases, and observes that requirements for judicial warnings appear to contribute to the high number of appeals and retrials. The impact on child complainants is considerable and harmful.

4.214 The Committee further notes that its recommendations in this chapter would again alter the rules relating to jury directions in child sexual assault trials. Specifically, the Committee's recommendations would have the following effects:

Existing warning	**Committee recommendation**
Kilby/Crofts warning on the credibility of complainants who delay reporting sexual assault	Abolished (Recommendation 22)
Longman warning on difficulties for defence arising from delayed, uncorroborated complaints	Retained in certain circumstances only (Recommendation 23)
Murray warning on the need to scrutinize uncorroborated evidence with care	Reformulated (Recommendations 24 and 25)
Section 165B(2)(a) warning on the reliability of children's evidence	Abolished (Recommendation 26)

Table 3: Committee recommendations relating to judicial warnings

4.215 The Committee is of the view that the recommendations it has proposed to judicial warnings will not unfairly disadvantage the accused, or undermine the right of the accused to a fair trial. **The Committee notes that section 165 of the *Evidence Act 1995* retains a mechanism for appropriate warnings about unreliable evidence.**

4.216 The Committee's proposed reforms to judicial warnings do not seek to prevent judicial officers from giving directions to the jury in relation to evidence given in a particular case that may be unreliable. However, the Committee considers it essential that warnings reflect

419 ibid.

420 Submission 69, p 33.

current scientific knowledge about common reactions to child sexual assault and the reliability and credibility of children as witnesses, rather than the misconceptions and myths that have formed the basis of existing and past judicial warnings. The Committee's recommendations aim to achieve this.

Chapter 5 Court Practices and Procedures

This chapter reviews the court practices and procedures that impact upon child sexual assault complainants in the criminal justice system. As shall be seen, court processes frequently intensify the feelings of stress for child sexual assault complainants. In this sense, they can be considered to contribute to the failure of many child sexual assault prosecutions, since an anxious, distressed and overwhelmed child will not perform well as a witness. Adjournments and court delays form the principal focus of this chapter and court environments are also briefly examined.

Adjournments and Delays

5.1 Witnesses and submissions were critical of the delay between the reporting of a complaint and the commencement of the committal and trial, noting the additional stress this causes to child complainants. For example, Professor Briggs submitted:

> Currently, child victims may have to wait a year before a case is heard. If there is a re-trial, the delay can be longer. This constitutes a form of institutionalised psychological abuse given that neither the children nor their families can move on with their lives while cases are pending. Further more, the longer the delay, the greater the advantage for the offender and the greater the chance of confusing the victim.[421]

5.2 The Eastwood and Patton study found that, in New South Wales, the typical length of delay between reporting a child sexual assault and the trial was 16.4 months.[422] The study noted that New South Wales children identified court delays as the area they considered most in need of reform, due to the "ongoing disruption to education and … the trauma of waiting."[423]

5.3 One child sexual assault counsellor gave an extreme example relating to the lengthy delays experienced by one of her clients:

> I went to court with a child earlier this year whose matter was first listed in November 1999 and has been adjourned 15 times since then until February this year. It is very traumatic for this family to repeatedly turn up at court ready to proceed only to see the matter adjourned again.[424]

5.4 The DPP identified a number of causes of court delays, such as:

- multiple listings of child sexual assault matters in the one court on the same day resulting in lack of certainty as to which matter will proceed

421 Submission 2, p 13.

422 Eastwood and Patton, p 37.

423 Eastwood and Patton, p 71.

424 Wightman, Evidence, 23 April 2002, p 20.

- lack of, unavailable or malfunctioning electronic equipment (closed-circuit television, audio and video recording links)
- delay in allocation of representation for accused person or accused person being self-represented
- delays in cases not being ready to proceed through non-availability of witnesses or counsel.[425]

Impact of adjournments and delays

5.5 The DPP acknowledged the problem of court delays, and observed that delays have specific impacts in relation to child complainants, including:

- frustration and the build up of anxiety for the complainant and the family
- memories that become less clear over time and which can impact on evidence and defence arguments about consistency, accuracy, and "false memory"
- child's development in linguistic ability may mean inconsistency in language used and interpretation by the court
- distress for the family, especially carers, who notice the impact of prolonged legal process on their child's ability to move on beyond the abuse and delay aspects of their development
- protection issues where the child may be more at risk because the legal process is unresolved
- court delay has been documented as one of the major court-related stressors for children by Lipovski and Stern (1997); Cashmore (1993) Sas, et al (1991).[426]

5.6 DoCS also commented on the effects of court delays on child witnesses:

> In matters where the defendant pleads 'not guilty', children may wait between 6 months and 2 years before the trial begins. During the trial they will be cross-examined and re-examined, and although a child may be 'refreshed' with their video evidence-in-chief, a child's ability to recall detailed information over time fades. This invariably favours the accused, who is better placed to attack the reliability of the child's evidence and introduce doubts about the child's credibility.
>
> The problem of excessive delay between the complaint and trial presents particular difficulties for children who experience the lapse of time more slowly than adults. It drags out the stress associated with impending litigation, and may

425 Submission 27, p 8.

426 ibid.

> slow the child's recovery from the assault as counsellors avoid certain issues so as not to risk tainting the evidence.[427]

5.7 The Eastwood and Patton study provided first-hand descriptions of the impact of such delays on child witnesses. One thirteen year old, who waited two years for her complaint to be tried, commented:

> Because of the hearing I was really emotional until the trial. When everyday came closer to the trial I was getting more tense and all that. Then I started to have nightmares which were telling me to kill myself… Everyone was saying that it [the trial] is bigger than the hearing and they'll be yelling at me more, and that kind of scared me because I don't like getting yelled at…
>
> I wasn't allowed to speak to Mum until after the trial was over. So I wasn't allowed to bring out my feelings to Mum … and then when there was a hung jury, I still couldn't say anything to Mum.[428]

5.8 Professor Parkinson also identified repeated adjournments and the resultant trial delays as a problem for child complainants:

> Another problem is adjournments, which may occur for a variety of reasons. During [March 1992 and December 1994 in NSW], in 20.6% of all cases in which a trial date was set, the matter was adjourned, not reached or stood over by the court. This means that in more than 20% of cases, the child was emotionally prepared for trial on a certain date, only to find that he or she would have to wait for weeks or months before the case could be listed again. These adjournments can be very stressful for children.[429]
>
> …There are three categories [of delays and adjournments] here. There are cases in which the matter was adjourned, where it was not reached or where it was stood over. Court matters are over-listed because we try to use court time efficiently and I understand the reasons for that. But a great many problems arise. We must look at the consequences for vulnerable children and look at the dangers of offenders continuing to offend in society. In other words, we make a short-term gain by overlisting but we experience a long-term cost. That long-term cost is borne particularly by some of the most vulnerable people in our society, that is the children who are the victims of sexual assault…[430]
>
> If we can deal with delays and adjournments, we will at least make the system a lot more caring towards children.[431]

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427 Submission 70, pp 7-8.

428 Eastwood and Patton, p 51.

429 Submission 23, p 3.

430 Parkinson, Evidence, 19 April 2002, p 23.

431 ibid, p 22.

5.9 Other participants also commented on this matter. The Education Centre Against Violence for example, criticised:

> Multiple listing at court of other matters, with children turning up at court to find their matter has been adjourned. This can be experienced as very disruptive and stressful for the child.[432]

5.10 Similarly, the Salvation Army noted:

> Frequent postponements lead to enormous pressure and distress especially for children. For example: in one case we know of, the magistrate said he hadn't had time to look at the documents – this led to two postponements after what had already been an extensive wait.
>
> We are aware that long postponements may lead to the problem of contamination of evidence. Abused children have a need for debriefing – this conflicts (time wise) with the need for uncontaminated evidence.[433]

5.11 A local Sexual Assault Service submitted:

> A further matter that gives rise to difficulties for children in giving evidence is the delay between when the incident occurs, the statement taking and when the matter gets to court. Again there is no recognition of the differences in memory processes for children. To expect that a 5 year old child who may have made an excellent statement will be able to remember the details of abuse 2 years or even 12 months later with sufficient clarity for the Court does not recognise the development of memory in children. However, if the matter had been heard within 3 – 6 months the child may have been able to recall the incident well.[434]

5.12 The Wood Royal Commission also criticised excessive delays in the prosecution of child sexual assault matters:

> It is plainly unsatisfactory for a young child to have the prospect of a court attendance hanging over his or her head for a period as much as 12 to 18 months after the suspected offender is charged. It is understandable that health professionals should have identified the criminal justice system as itself a contributor to the abuse of children in these cases, since it is important that they be allowed to resume their lives, and try to get over the event, as quickly as possible.
>
> Moreover, there is a real risk that justice will not be done to the child, where there is a substantial delay between the complaint and trial, because:
>
> - Of the risk of distortion or loss of memory over the intervening period, which may lead to an apparent inconsistency between the earlier disclosures and the evidence

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[432] Submission 40, p 13.

[433] Submission 42, p 5.

[434] Submission 61, p 10.

- The child giving evidence will have developed, become more knowledgeable and may have a totally different appearance and manner to that at the time of the abuse
- Gathering stress and anger over the intervening period may cause the child to give a most unfavourable impression in the witness box, particularly if there has been an acrimonious family break up and loss of support; and
- Accumulating pressure from other members of the family, associated with the matter last mentioned, may bring about a retraction of the complaint, even though it is true.[435]

5.13 The Royal Commission considered a reduction in delay between arrest and trial to be essential:

> The Commission considers that it is imperative that the time taken for bringing on trials involving children under 16 years at the time of arrest are reduced. For children in this group it is not appropriate that trial should be brought on for hearing any more than six months from the time of charge.[436]

5.14 The Department of Community Services recommended that there be statutory time limits for each stage of the complaint and prosecution process:

> To prevent undue delay, legislative time limits and priority listing for trial should be considered. Time limits should exist at all steps throughout the process, such as from complaint to charge, from charge to committal and from committal to trial.[437]

Committee conclusions about adjournments and delays

5.15 It appears to the Committee that there is general agreement that pre-trial delays for child sexual assault trials are excessive, and are exceptionally detrimental to the well-being of child complainants and the effectiveness of their testimony. The Committee believes that the delays being experienced by child sexual assault complainants are entirely unacceptable. It has been identified by children themselves as a key stressor, and experts have identified delay as having a significant and detrimental impact on the complainant's memory of the details of the abuse that are necessary for successful prosecution.

5.16 It is clear that previous attempts to reduce waiting periods between charging and trial have been unsuccessful, despite such matters being given a high priority by the ODPP (second in priority after matters for which the accused is in custody).[438]

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435 Royal Commission into the New South Wales Police Service, Vol 5, p 1100.

436 ibid, p 1101.

437 Submission 70, p 9.

438 Royal Commission into the New South Wales Police Service, Vol 5, p 1100.

5.17 The Committee notes the Royal Commission's suggestion that all child sexual assault trials should be commenced within six months from the date of charges being laid. However, given the lack of success of previous genuine attempts to minimise delays, the Committee is not confident that this timeframe can be met under current court processes. The Committee's recommendations relating to pre-trial recording of evidence, detailed in Chapter Six, should help to reduce the impact of waiting times.

Court Environment

5.18 A theme common to several previous reports and studies on the experience of child sexual assault complainants is the inappropriateness of the court environment for children and the additional strains this causes.

5.19 Cashmore and Bussey's study commented on the inadequacies of the courtroom:

> Less obvious but still significant is the intimidating formality of the courtroom and the inappropriate design of some courtroom furniture. In some cases, because they could not be seen while sitting, children had to stand during the whole of their testimony. In another, the child was propped up on cushions and had afterwards commented to her mother that she had to hold on tightly to the arms of the chair because she was scared she was going to fall off. Suitable chairs are a minimal requirement, easy to procure and inexpensive, but their need is often overlooked by court officials.[439]

5.20 Similar concerns were raised as far back as 1985, in the report of the Child Sexual Assault Taskforce:

> The chairs in the witness box and the height of the witness box itself allow adults to sit comfortably … and be seen, whereas children cannot. In these circumstances, children are often required to stand for lengthy periods whilst giving evidence. Furniture should be used which will allow the child to be accommodated.[440]

5.21 The Education Centre Against Violence submitted to the Committee its concerns about court environments:

> The intimidating and formal environment of the courtroom … adds to the stressful nature of appearing as a witness. Children and young people are receiving more information and preparation about their role as witnesses, however no amount of preparation can take away the anxiety that a courtroom environment can generate not just for children but also adult witnesses. Such environments are outside of the child's known and lived experience and the question raised here is there are ways to make the environment more 'child friendly' without compromising the rights of the accused to a fair trial. Some examples include waiting areas dedicated to child witnesses that are more child centred, different entry to the court house for child witness so at no time are they put into the position of seeing the offender, having a scheduled time to give evidence so they

439 Cashmore and Bussey, p 39.

440 Report of the Child Sexual Assault Taskforce, March 1985, pp 93 – 94.

> do not wait at the court not knowing when they will be called and then told their matter will not proceed on that day, and the formalised dress of wigs and gowns by the legal professionals be considered as not suitable in child sexual assault matters. Examples of the less formalised environment are from the Children's and Family Law Courts.[441]

5.22 The formality of court attire was also noted by the Wood Royal Commission as contributing to children's anxiety:

> Courts are almost always an unfamiliar and intimidating environment for child witnesses. To add to the child's sense of bemusement is the fact that the judge and barristers wear wigs and gowns (robes). The wearing of robes in the higher courts is justified on a number of grounds apart from tradition. These have to do with reinforcing the solemnity of the proceedings and the authority of the court. Such considerations are not appropriate when it comes to dealing with child witnesses.[442]

5.23 The Royal Commission recommended the removal of judges gowns and wigs during the examination of child witnesses in sexual assault trials.[443]

5.24 Previous reports have also revealed that the inadequacy of waiting areas in courts and the length of the wait were areas of specific concern for child witnesses. This was particularly the case where a lack of an alternative waiting area required child complainants to wait in close proximity and in view of the defendant. Children were reported to find this extremely disturbing (as discussed at paragraphs 6.2 and 6.3). In this regard, Cashmore and Bussey's report found that:

> Parents were also critical of the amount of time children had to wait at court before or while testifying. In several cases, children had to wait several hours in cold windowless rooms while there was a lengthy legal argument. Indeed it is common for children to be told to be at court between 9 and 10 am although in a trial, the empanelment of the jury, opening addresses and legal argument often takes several hours. This means that children may have to wait up to five hours or more (eg, after the lunch break) before giving evidence. In the words of one parent, "Why can't they sort out all those preliminary matters before the case starts or before the child is called? We couldn't even go anywhere more pleasant to wait because we didn't know when she would be called."[444]

5.25 The HREOC and ALRC report observed that:

> Children waiting to appear as witnesses in criminal proceedings are particularly concerned about seeing the accused. Many courts lack separate waiting facilities. The Inquiry was told that in the public areas of the court children have been

441 Submission 40, p 12.

442 Royal Commission into the New South Wales Police Service, Vol 5, p 1112.

443 ibid, p 1125.

444 Cashmore and Bussey, p 39.

> intimidated and harassed by the accused, his or her family, defence counsel and the media.[445]

5.26 More recently, the Eastwood and Patton study, which entailed interviews of child sexual assault complainants, included the following observations:

> New South Wales children commented on the poor waiting conditions in the courts. In the most extreme case, a child who was required to attend court at committal for five days straight from 9am until 4pm "in a little room with nothing… he was allowed to walk around and we weren't" (NSW Child 13 yrs).
>
> The children also experienced lengthy waits of between 2 hours and five days and described becoming increasingly nervous as the hours passed. "We waited in exactly the same room with nothing. I remember because it was for so long. It was about three days before I got in (NSW Child 16 yrs). Another child waited for three days in a witness room before being told the trial was aborted.[446]

5.27 One surveyed child commented about the wait:

> At least they could get us out of the (waiting) room for lunch. He was allowed to go out and get his lunch but we had to stay in. He was allowed to walk around outside and we weren't… that's what I mean, they make it look like we had done it to him (NSW Child 16 yrs).[447]

5.28 The CASAC network's submission highlighted the need for improved waiting areas for child witnesses:

> …[The] child still has to see the perpetrator at the courthouse and in some courts there is no where else to sit except in the same room as the perpetrator.[448]

5.29 In relation to waiting rooms, the DPP advised the Committee:

> The availability of suitable facilities depends on location and age of the court facilities and whether they have been renovated. Even where courts have been renovated to include witness waiting rooms these are often very small and there is a confined space for children while waiting a considerable time to give evidence.[449]

5.30 While the Committee received only limited direct evidence of the difficulties caused to child complainants as a result of the formality of the court environment, the absence of child-appropriate furniture and the lack of appropriate waiting areas, the information it has

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445 HREOC and ALRC, p 347.

446 Eastwood and Patton, p 53.

447 ibid, p 72.

448 Submission 47, p 4.

449 "Answers to proposed witness questions", document tendered by Mr Cowdery, 26 March 2002, p 8.

received and the details provided by previous studies indicate that these factors make the experience of the child complainant even more arduous.

5.31 The Committee considers it unsatisfactory that the inadequacies of court furnishings have not been addressed in the seventeen years since it was identified as a problem in the report of the Child Sexual Assault Taskforce. The Committee observes that simple measures, such as purchasing adjustable, non-swivel chairs and adjustable microphone stands, could have overcome this difficulty. The Committee is also of the view that it is unacceptable that court environments can result in child complainants coming into contact with the accused and his or her family when waiting to give evidence, particularly in view of the large body of evidence that points to contact with the accused as a principal source of fear for child victims of sexual assault. The situation for child witnesses who are required to spend many hours or even days in inappropriately furnished waiting rooms is also a source of concern to the Committee.

5.32 The Committee believes that its proposed pilot project, which would allow for pre-trial recording of evidence, should reduce the impact of court delays on child complainants. It would also provide court environments specially designed to meet the needs of children, and ensure that child complainants do not come into contact with the accused. The full details of the pilot project are provided in Chapter Seven.

Chapter 6 Special Measures

This chapter examines what are often termed 'special measures'. Special measures are mechanisms that are used in courtrooms to reduce the stresses and fears of child witnesses. The first section reviews opinions about the extent of the need for special measures for child complainants of sexual assault. The chapter then reviews and assesses the existing special measures, including giving evidence via closed-circuit television (CCTV) or behind screens and allowing for the admission of previously recorded interviews. A suggestion for an additional special measure – pre-trial recording of evidence – is also evaluated.

Need for Special Measures

6.1 The previous chapters of this report have reviewed a number of areas in which child complainants are particularly vulnerable in the court system. These include being distressed and disadvantaged by court delays and by the cross-examination process as well as having their credibility questioned as a result of misconceptions about their reliability as witnesses.

6.2 Other difficulties faced by child witnesses were brought to the Committee's attention in support of arguments favouring the use of special measures for child witnesses. According to Professor Kim Oates, seeing or coming into contact with the alleged offender was a key stressor for the child:

> … [We need to] recognise the difficulty of the child seeing the offender, if it is the offender, in court. I know there are techniques like screens and closed-circuit television, but they are certainly not always used and sometimes when they are available they do not work. But if you think of it from a four or five-year-old's point of view, that has been told, for example if it is a stranger assault or relative assault, "If you ever tell anybody that I have done this I will kill you" or "I will cut your fingers off", the young child is not really capable of knowing that the person over there in court will not jump up and attack, even though we know that will not happen.[450]

6.3 Cashmore and Bussey's 1995 study on the evidence of children made a similar observation, concluding that facing the defendant was exceptionally distressing for child complainants:

> Clearly the major issue for children and their parents was seeing the defendant in court and in the waiting area or court precincts. Over 75% of child respondents and 65% of parent respondents referred to seeing the defendant as either the worst aspect or the aspect they would most like to change in relation to going to court.[451]

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450 Oates, Evidence, 17 May 2002, p 15.

451 Cashmore and Bussey, pp 29 – 30.

6.4 Cashmore and Bussey noted further that the results of other studies have concluded that the fear of the accused also had an impact on the *quality* of the child's evidence. The evidence of children was seen to be less accurate and detailed if given in the presence of the offender.[452]

6.5 More recent research by Eastwood and Patton also identified seeing the defendant as a significant stressor:

> Almost all child complainants (in Queensland and New South Wales) expressed fear at seeing the accused during court proceedings… They were frequently confronted with the accused outside the courtroom before, during and after giving evidence.[453]

6.6 That this was a source of fear for the children was often overlooked by judges and magistrates, with less than half speculating that seeing the defendant would be the worst part of the trial for the child.[454]

6.7 Cashmore and Bussey examined judicial perceptions of the need for special measures. Their study revealed that the majority of judicial officers considered that there *sometimes* can be a need for special provisions for child witnesses, with 95% of magistrates and 62% of judges holding this view.[455] The authors published the following table showing the level of support amongst judicial officers for various special measures for child witnesses:[456]

Provision	**Magistrates (n = 24)**	**Judges (n = 22)**	**Total (n = 46)**
Support person	91.7	86.4	89.1
Videotaped interviews	78.3	88.3	82.5
Partition (screen)	57.1	59.1	63.9
Videotaped depositions at committal	68.4	56.3	62.8
Closed-circuit television	74.1	45.5	61.3
Videotaped depositions at trial	55.5	36.8	45.9
Closed-circuit television (defendant out [of the room])	50.0	36.4	43.5

Table 4: Percentage of judges and magistrates in favour of special provisions for child witnesses

452 Cashmore and Bussey, p 32.

453 Eastwood and Patton, p 54.

454 Cashmore and Bussey, p 30.

455 ibid, p 16.

456 ibid, p 17.

6.8 Some judicial officers were sceptical about the need for special measures for the child complainant's testimony. Cashmore and Bussey summarised the opposition of some surveyed judicial officers as follows:

> … special measures were seen as either unnecessary or dangerous because [judicial officers] perceived children to be "more resilient than we think" or "likely to tug at the heartstrings"; alternatively, children were seen as "less likely to lie but more vulnerable to the influence of third parties". [Others believed in] the need to maintain the adversary system without change ("it's a system that has generally served the community fairly well") and to recognise that the focus of the trial is on the accused and his/her rights (not the witness). Existing judicial discretion in running the court was seen as providing adequate protection for witnesses without infringing the rights of the accused. These rights included the right to confront one's accuser and to have all evidence presented in the same way without prejudicing the assumption of innocence.[457]

Existing Special Measures

Electronic recording of evidence

6.9 The *Evidence (Children) Act 1997* contains provisions relating to the recording of interviews with children and the admission of the electronic recording into court as all or part of the child's evidence-in-chief.

6.10 Section 7 of the Act states that all interviews with children must be electronically recorded:

> **7 Interviews with children to be recorded**
>
> An investigating official who questions a child, who the investigating official has reason to believe is under the age of 16 years, in connection with the investigation of the commission or possible commission of an offence by the child or any other person is to ensure that any representation made by the child in the course of the interview during which the child is questioned, and that the investigating official considers may be adduced as evidence in a court, is recorded.

6.11 The Law Society of NSW advised the Committee that section 7 (Part 2) has not yet been proclaimed.[458] The Law Society referred to advice from the Police Minister in 1999 that practical problems had delayed the commencement of the provisions:

> The Act poses a number of practical difficulties for police. Logistically, it will be very difficult for police to tape all interviews in all circumstances – for example, where they need to interview a child at the scene of a crime and equipment is not readily available. At the moment training of joint investigation teams in how to conduct interviews for the purpose of taping is completed. Once these matters have been resolved the final part of the Act will be proclaimed.[459]

457 Cashmore and Bussey, op cit, p 16.

458 Submission 75, p 2.

459 Legislative Assembly Hansard, 11 November 1999, p 2800, cited in submission 75, pp 2 – 3.

6.12 The Children's Legal Issues Committee of the Law Society submitted that section 7 should be proclaimed to commence immediately, as it:

> …is pivotal to the operation of the *Evidence (Children) Act 1997*. The [Children's Legal Issues] Committee submits that the failure to commence section 7 must severely impinge on the ability of Part 3 of the Act, which relates to the giving of evidence of children's out of court representations, to operate as intended.[460]

6.13 The other sections of the Act relating to electronic recording of interviews have commenced, and the main provisions are as follows. Child witnesses are given the right for the electronic recording of their interview to form all or part of their evidence-in-chief, where that interview was conducted when the child was under 16 years of age. The child must be available for cross-examination and re-examination, either in person or by CCTV:

> **11 Child entitled to give evidence in chief in form of recording**
>
> (1) A child is entitled to give, and may give, evidence in chief of a previous representation to which this Part applies made by the child wholly or partly in the form of a recording made by an investigating official of the interview in the course of which the previous representation was made and that is viewed or heard, or both, by the court.
>
> (1A) Subject to section 15, a child who is 16 or more but less than 18 years of age at the time evidence is given is entitled to give, and may give, evidence as referred to in subsection (1) of a recording of a previous representation to which this Part applies made by the child when the child was less than 16 years of age. (2) If a child who gives evidence as referred to in subsection (1) is not the accused person in the proceeding, the child must be available for cross-examination and re-examination:
>
> (a) orally in the courtroom, or
>
> (b) if the evidence is given in any proceeding to which Part 4 applies—in accordance with alternative arrangements made under section 13.

6.14 Under Section 10, the child must be consulted about whether he or she wishes to give his or her evidence-in-chief by means of the recording or by other means:

> **10 Wishes of child to be taken into account**
>
> A person must not call a child to give evidence of a previous representation to which this Part applies made by the child by means other than a recording made by an investigating official of the interview in the course of which the previous representation was made unless the person has taken into account the wishes of the child (considered in the light of the child's age and understanding). However, nothing in this section permits a person to require a child to express his or her wishes in relation to the matter.

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460 Submission 75, p 3.

6.15 Section 14 provides that where electronic recordings are admitted, the judge must provide the jury with directions to prevent prejudice arising:

> **14 Warning to jury**
>
> If a child gives evidence of a previous representation wholly or partly in the form of a recording made by an investigating official in accordance with this Part in any proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given in that way.

6.16 Importantly, the trial judge ultimately has the discretion to order that a child **not** give evidence by means of a recording, if the court considers it is not in the interests of justice for the evidence to be given in this way:

> **15 Evidence not to be given in form of recording if contrary to interests of justice**
>
> (1) A child must not give evidence by means of a recording made by an investigating official in accordance with this Part if the court orders that such means not be used.
>
> (2) The court may only make such an order if it is satisfied that it is not in the interests of justice for the child's evidence to be given by a recording.

6.17 The New South Wales Police described the implementation of the electronic recording provisions:

> The first phase of implementation involved the training of police and community services officers in the nine metropolitan Joint Investigation Response Teams, the set-up of interview suites and the undertaking of electronically recorded interviews by these teams. During this time 12 rural locations were conducting audio recordings of children's evidence. Over 3,500 recordings have been made of children's evidence…[461]

6.18 New South Wales Police have recently completed an evaluation of the provisions relating to electronic recording of evidence, which was conducted by Ms Diana McConachy. In evidence, Ms McConachy explained:

> Feedback about the provision has been sought from JIRT officers, prosecutors, defence lawyers, judges, magistrates, witness assistance service officers, child sexual assault counsellors, parents and children. Although more than 300 respondents have provided feedback, the majority have had limited experience of the admission of electronic recordings as children's evidence in chief because of the time lag that occurs between a child's interview and the matter being heard at court. Overall, however, there is widespread support for the provision, with the majority of respondents in favour of the admission of an electronically recorded statement as all or part of the child's evidence in chief.[462]

461 Submission 82, p 6.

462 McConachy, Evidence, 3 May 2002, p 2.

> Certainly, the benefits and limitations of the use of tapes as evidence-in-chief were something I investigated in my evaluation. Both benefits and limitations are identified. The most important benefit is the reduction of the stress and the trauma for the child, and it is useful to consider this both in terms of the child's interview and the use of the recording as evidence in chief because, as Ms Syme correctly said, many interviews are recorded because electronic recording is considered good practice. But of all the matters that come into JIRT, the figure is approximately 20 per cent that actually result in an arrest. Although a lot of recordings are being done, not a lot reach court because… there can be a number of outcomes.[463]

6.19 Ms McConachy flagged several advantages of electronic recording of the child's interview including:

- the accuracy of the recording, made shortly after the report of the alleged assault
- the transparency of the recording, so it is apparent how the interview was conducted
- the child's demeanour and non-verbal actions are recorded, and
- it assists with limiting the number of times the child is interviewed.[464]

6.20 Disadvantages were also identified by Ms McConachy's evaluation, such as:

- some interviews were of a poor standard
- the tape could have a 'distancing effect' in court
- the tapes and transcripts are often lengthy.[465]

6.21 One potential disadvantage in the use of electronic recording was that when a child's evidence-in-chief was provided in the form of an electronic recording, the child would then be cross-examined without having had the opportunity to 'warm up', and become settled through friendly questioning by the prosecutor. Professor Parkinson noted that this could be overcome by allowing the recording to form the principal part of the evidence-in-chief, but following it with further questioning by the Crown:

> The issue of warming up has also been a concern. But I think it was more a concern in England, where the original legislation said that the video recording should replace evidence in chief. Pretty well the first live evidence the child gave was cross-examination. I think the view emerged that the best use of videotaped

463 ibid, p 5.

464 ibid, p 5, p 12.

465 ibid, p 5.

> evidence was as part of examination in chief, but one would still want to have the child say something led by the prosecutor.[466]

6.22 The problem of children being cross-examined 'cold' was also identified as a potential drawback in the Police Service Evaluation.[467]

6.23 Ms McConachy's evaluation revealed that rural and remote areas were less well served by the provisions:

> Electronic recording was perceived to improve the quality and completeness of a child's out of court statement. Many of the identified benefits related to videotaped rather than audio taped records of interview. This has implications for rural NSW where video taping has not yet been introduced and JIRT officers audio tape children's statements using hand held recorders. Although videotaping represents best practice in most situations, different approaches to implementation in rural areas (eg portable video recorders, mobile video 'rooms', JIRT-style interview suites) require consideration.[468]

6.24 The Criminal Law Review Division of the New South Wales Attorney General's Department also considered that there are advantages in recording the child's interview:

> Taping the interview between the child and investigator has many benefits including ensuring that the investigator's questions are recorded. This assists in the event that there is any suggestion at trial that the child complainant's allegations were made as a result of, or are otherwise affected by, leading questions from investigators.[469]

6.25 The Department of Community Services advised that the stress of multiple interviews is also avoided when interviews are electronically recorded:

> The video-taping of children's evidence-in-chief, allowed under the *Evidence (Children) Act 1997*, has been successful in reducing the number of interviews required of children and ensuring that the evidence presented to court is contemporaneous with the alleged assault and/or the child's complaint.[470]

6.26 Dr Cashmore considered the admission of videotaped interviews to be beneficial for the child witness:

> On balance, I would say that it is good to use videotaped interviews. It preserves the child's presentation at that time because if there is some delay between them giving that statement and appearing in court they can look very different. A 12-

466 Parkinson, Evidence 19 April 2002, p 19.

467 McConachy, Evidence, 3 May 2002, p 5.

468 Diana McConachy, "Evaluation of the Electronic Recording of Children's Evidence," Final Report, May 2002, p iv.

469 Submission 66, p 5.

470 Submission 70, p 7.

> year-old can look very different from a 13- or 14-year-old appearing in court. Secondly, I think there is very clear evidence now that trying to interview children and take notes at the same time is a very inaccurate process. That was one of the main reasons that the Children's Evidence Task Force recommended going down this track.[471]

6.27 The Deputy Chief Magistrate of New South Wales observed that video-recording the investigative interview would avert many cross-examination questions:

> To make all participants aware of the details of the interview, a record of the interview process itself must be made. The most obvious way of recording an interview is to video record it. This method eliminates any question with respect to intimidation (where people are sitting/standing), tone or inflection of voice and access to other materials or people. It should be noted ERISP recording facilities are available to all police stations for interviews with defendants. Why not make them available for victims?
>
> It has been a source of constant amazement to me when dealing with matters of a nature that include allegations of child sexual assault, that the first interview (which is the interview most important in the complaint process) is rarely properly recorded and, in my experience, almost never video recorded. The alternative appears to be either that the interview process is recorded by way of a question and answer session which is either taken down in hand or typed direct onto the police computer. The difficulties with this method of recording are obvious. It does not, for example, ensure that a proper record is kept of the interview process, only a record is kept of the questions and answers written down. This frequently leads to lengthy cross-examination of the interviewers and occasionally of the child, of the things that occurred in the interview. If the interviews were subject to proper and accurate recording at the time of the interview then this re-questioning of the process would be unnecessary.[472]

6.28 Some of the advantages of recording children's evidence and admitting the recording into evidence were discussed by Dr Cossins:

> There is certainly a problem that the admission of that initial recording could address, which is the problem that arises as a result of the delay in the case coming to trial. How old was the child when the abuse occurred? How long does it take to get to trial? There is a major problem, I think, particularly with children under the age of 10 being required to give evidence in chief one year or 18 months after the alleged events in question. They are probably likely to forget the type of detail that might be recorded in the initial interview.[473]

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471 Cashmore, Evidence, 19 April 2002, p 7.

472 Submission 36, pp 1- 2.

473 Cossins, Evidence 23 April 2002, p 12.

6.29 However, she also raised the difficulty that children can forget the details by the time they are cross-examined, thus creating discrepancies that may be exploited by the defence:

> There is certainly a problem when it comes to cross-examination. If the child cannot give the same amount of detail [as is in the pre-recorded evidence] that, of course, is an avenue for exploration in cross-examination.[474]

6.30 The Legal Aid Commission observed that benefits flow both to the child and the accused:

> The Act requires the police to electronically record all interviews with children, and enables these electronically recorded interviews to be admitted into evidence as part or all of the child's evidence in chief in any subsequent criminal proceedings. This approach has a number of benefits for the child including: a reduction in the number of interviews for child witnesses; reduced trauma for the child giving evidence; and assistance to the child in refreshing his or her memory prior to giving evidence. There is a benefit to the accused in that there is greater accuracy in recording the child's evidence and a reduced opportunity for the child's evidence to be contaminated. [475]

6.31 Following the implementation of electronic recording of interviews in the United Kingdom, an extensive evaluation was undertaken. This study found that both judges and barristers:

> …perceived the main benefit to be the reduction in stress for the child. Both groups felt the standard of interviews they had seen was mixed; just over half the judges and prosecution barristers felt the interviews complied with the rules of evidence; most defence barristers did not. Although more judges felt the Act served the interests of the child, they also were concerned the child was unprepared for cross-examination. Prosecution barristers felt the videotaped interviews had less impact and defence barristers were still concerned false allegations were undetected.[476]

Closed-circuit television (CCTV)

6.32 The *Evidence (Children) Act 1997* also provides for children to give evidence by closed-circuit television (CCTV). As recommended by the Children's Evidence Taskforce in October 1994, the Act creates a presumption in favour of the child using CCTV:

> **18 Children have a right to give evidence by closed-circuit television** (cf Crimes Act s 405D (2)–(5), (7) and (9))
>
> (1) Subject to this Act, a child who gives evidence in any proceeding to which this Part applies is entitled to give that evidence by means of closed-circuit television

474 Cossins, Evidence 23 April 2002, p 12.

475 Submission 57, p 6.

476 McConachy, "Evaluation", op cit, p 9.

facilities or by means of any other similar technology prescribed for the purposes of this section.

(1A) Subject to subsections (3) and (4), a child who is 16 or more but less than 18 years of age at the time evidence is given in a proceeding to which this Part applies is entitled to give the evidence as referred to in subsection (1) if the child was under 16 years of age when the charge for the personal assault offence to which the proceedings relate was laid.

(2) A child may choose not to give evidence by those means.

(3) A child must not give evidence by means of closed-circuit television facilities or any other prescribed technology if the court orders that such means not be used.

(4) The court may only make such an order if it is satisfied that it is not in the interests of justice for the child's evidence to be given by such means or that the urgency of the matter makes their use inappropriate.

6.33 Section 24 allows a child to give evidence by other means if CCTV is unavailable, including screens or planned seating. Alternatively, the court may adjourn to another location:

24 Children have a right to alternative arrangements for giving evidence when closed-circuit television facilities not available (cf Crimes Act s 405F)

(1) This section applies to any proceeding in which a child is entitled or permitted to give evidence by means of closed-circuit television facilities or other similar technology (by virtue of section 18 or an order made under section 19) but does not do so because:

(a) such facilities and such technology are not available (and the court does not move the proceeding under section 22), or

(b) the child chooses not to give evidence by those means, or

(c) the court orders that the child may not give evidence by those means (or, in the case of a child to whom section 19 applies, the court does not order that the child may give evidence by those means).

(2) In such a proceeding, the court must make alternative arrangements for the giving of evidence by the child, in order to restrict contact (including visual contact) between the child and any other person or persons.

(3) Those alternative arrangements may include any of the following:

(a) the use of screens,

(b) planned seating arrangements for people who have an interest in the proceeding (including the level at which they are seated and the people in the child's line of vision),

(c) the adjournment of the proceeding or any part of the proceeding to other premises.

> (4) A child may choose not to use any such alternative arrangements. In that case, the court must direct that the child be permitted to give evidence orally in the courtroom.
>
> (5) Any premises to which a proceeding is adjourned under this section are taken to be part of the court in which the proceeding is being heard.

6.34 The Committee was advised that there is a mobile CCTV unit that can be taken to courts where there are no CCTV facilities.[477]

6.35 In order to avoid prejudice to the accused arising from a jury drawing conclusions about the implications of the use of CCTV or other special measures, section 25 requires the judicial officer to issue a warning to the jury to the effect that:

> (a) it is standard procedure for children's evidence in such cases to be given by those means, and
>
> (b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of those facilities or that technology.

6.36 CCTV has been broadly supported by law reform committees both in New South Wales and interstate. The Wood Royal Commission on the NSW Police Service advocated the use of CCTV for child witnesses and used it in its own proceedings:

> The experience in other jurisdictions speaks strongly in favour of its adoption, as does the experience of this Royal Commission, which has called evidence from a large number of children utilising close circuit relay from a facility located nearby.[478]

6.37 However, Commissioner Wood stressed that the technology used needed to be of a high standard:

> The Commission does, however, emphasise the need for the use of technology which permits high resolution display on large screens within close proximity of the jury. Poor resolution, defective audio, or reduced images can have an adverse impact on the process and occasion injustice to the prosecution case.[479]

6.38 The Queensland Law Reform Commission (QLRC) considered that, except in special cases where the court considers that the interests of justice preclude the use of CCTV or the child chooses not to, all child complainants should give evidence by way of CCTV.

> The Commission acknowledges that there are some children for whom it will be impossible, because of either the unfamiliar atmosphere of the courtroom or the emotional distress involved in a potential courtroom confrontation with an accused person, or a combination of both, to give evidence in court in the

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477 Purches, Evidence, 26 March 2002, p 4.

478 Royal Commission into the New South Wales Police Service , Volume 5, p 1092.

479 ibid.

> conventional way. In the view of the Commission, any concerns about the effects of the use of closed-circuit television are outweighed by the benefits. There seems to be ample evidence to suggest that, provided the equipment used is of adequate quality and is sufficiently reliable, the use of closed-circuit television to assist a child witness is also to the advantage of the court, and ultimately the administration of justice, because it may enable the court to receive evidence which would otherwise be unavailable to it. A further advantage of the use of closed-circuit television is that it would allow the child's evidence to be recorded on videotape and to be available in subsequent proceedings.[480]

Support persons

6.39 Children are also entitled to have a support person close by while he or she is testifying. As the Committee did not receive any substantial comments on this measure, the Committee has simply reproduced the relevant provisions of the *Evidence (Children) Act 1997* as follows:

> **27 Children have a right to presence of a supportive person while giving evidence** (cf Crimes Act s 405CA)
>
> (1) This section applies to:
>
> (a) a criminal proceeding in any court, and
>
> (b) a civil proceeding arising from the commission of a personal assault offence, and
>
> (c) a proceeding in relation to a complaint for an apprehended violence order, and
>
> (d) a proceeding before the Victims Compensation Tribunal in respect of the hearing of a matter arising from the commission of a personal assault offence that is the subject of an appeal or a reference to it.
>
> (2) A child who gives evidence in a proceeding to which this section applies is entitled to choose a person whom the child would like to have present near him or her when giving evidence.
>
> (3) Without limiting a child's right to choose such a person, that person:
>
> (a) may be a parent, guardian, relative, friend or support person of the child, and
>
> (b) may be with the child as an interpreter, for the purpose of assisting the child with any difficulty in giving evidence associated with a disability, or for the purpose of providing the child with other support.
>
> (4) To the extent that the court or tribunal considers it reasonable to do so, the court or tribunal must make whatever direction is appropriate to give effect to a

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480 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Part 2, Report No 55 December 2000, p 217.

> child's decision to have such a person present near the child, and within the child's sight, when the child is giving evidence.
>
> (5) The court or tribunal may permit more than one support person to be present with the child if the court or tribunal thinks that it is in the interests of justice to do so.
>
> (6) This section extends to a child who is the accused or the defendant in the relevant proceeding.

6.40 A judicial warning is required to be given to the jury:

> 25(3) In any criminal proceeding in which arrangements are made for a person to be with a child giving evidence (by virtue of section 20 or 27), the judge must:
>
> (a) inform the jury that it is standard procedure in such cases for children to choose a person to be with them, and
>
> (b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the presence of that person.

Evaluation of Existing Special Measures

Impact on rights of the accused

6.41 The Committee acknowledges that there are some who hold the view that any attempt to protect complainants through special measures is incompatible with the requirement that trial focus on the rights of the accused as the only person "in jeopardy of punishment in the trial".[481] This perspective was reflected in the evidence of some of the witnesses before the Committee.

6.42 In relation to CCTV and use of screens, the Public Defenders Office noted that prejudice could arise for the accused:

> I think there is an implicit prejudice against the accused when the alleged victim gives evidence either by video or behind a screen. The prejudice arises because it is plain enough that by virtue of use of either of those techniques that the complainant has some concerns about being in eye contact or, worse still, in the same room as the accused. I cannot see exactly how that can be avoided…[482]

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481 Laura C.H. Hoyano, "Striking a Balance between the Rights of Defendants and Vulnerable Witnesses: Will Special Measures Directions Contravene Guarantees of a Fair Trial", *Criminal Law Review*, 2001, p 948.

482 Evidence, 9 July 2002, pp 11 – 12.

6.43 The Legal Aid Commission of New South Wales submitted that **routine** use of CCTV for child witnesses would minimise the prejudice to the accused:

> There is a real concern that the use of closed-circuit television may cause undue prejudice to the accused. However, if their use is standard procedure for children giving evidence in criminal matters, and the jury is warned of this as required by section 25 of the *Evidence (Children) Act 1997*, the prejudicial effect is reduced.[483]

6.44 In evidence, the Legal Aid Commission reiterated that judicial warnings to the jury about the use of special measures are essential to prevent prejudice arising from their use:

> I think the concern is this: somehow the jury may think that the reason she is not coming into court is for the child's own protection. There is a prejudicial spin-off… It probably could be corrected. It probably could be alleviated by careful direction from a trial judge to say, "Look, the evidence here has been given by a young child. In our court system we have a system in place whereby young children give evidence by way of closed-circuit television. You're not to infer anything sinister.[484]

6.45 The Public Defenders Office acknowledged that difficulties could also flow for the **prosecution** when children give evidence by CCTV:

> I agree with Mr Winch that there will be an inevitable prejudice to the accused, but I also agree that it reduces the humanity of the complainant and, in that respect, is detrimental to the prosecution's case. Whenever someone speaks by way of TV it will be less impressive than someone speaking in person. That applies to children, adults, public speakers or whatever. I am not sure what the answer to that is, but I accept that it has a detrimental effect on both parties.[485]

6.46 Similarly, the Legal Aid Commission observed benefits for the accused:

> I do not think we are at issue over the fact that it is probably preferable. From our point of view, I would much prefer to have the situation whereby the evidence of the child is contained in an initial, expertly produced – that is, having experts in there dealing with the matter – record of interview that is taped. It is far preferable for the alleged child victim…[486]

6.47 Other witnesses were not convinced that the accused was prejudiced by the use of CCTV. For example, Dr Cashmore responded to the Chair's question about prejudice to the accused arising from use of CCTV:

> **Chair:** What do you think of the argument that apparently is sometimes raised on behalf of the defence that the very use of CCTV raises a prejudice against the

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483 Submission 57, p 5.

484 Fraser, Evidence, 3 April 2002, p 8.

485 Evidence, 9 July 2002, pp 11 – 12.

486 Evidence, 3 April 2002, p 11.

> accused? Apparently an application is sometimes made to the presiding judge on that basis on some occasions.
>
> **Dr Cashmore:** There is research around to indicate that jurors do not react in that way, seeing it as prejudicial. The other concern about prejudice is that there is a suggestion that it is harder to tell whether children are lying, to judge their demeanour, via a closed-circuit television screen, as opposed to the child being in court. In fact, the research shows that there is no difference in the capacity of jurors to detect deception – in fact, they are not very good either way. I think people mostly overestimate their capacity to tell when someone else is lying.[487]

6.48 The Chair also questioned Deputy Chief Magistrate, Ms Syme, on this issue:

> **Chair:** It has been suggested to the Committee that sometimes the defence will make an application that the use of closed-circuit television will prejudice the accused. Has that occurred in your experience? If so, what is usually the basis of that application?
>
> **Ms Syme:** It has never occurred successfully before me. Applications have been made from time to time but none have had any merit in my view. [488]

6.49 In relation to possible prejudice to the accused, Ms Syme noted further:

> The only prejudice I think that can ever be made out in any form is that the ability of one to judge the reaction of a child in person is more than perhaps the ability to judge the reaction of a child if the child is on a fairly poor quality television screen. That makes the assumption that we are able to define the difference between a child reacting to a particular question in a way that will show that that child is telling the truth or not. In my experience, if the child is fidgeting during the answer to a question, that might mean anything from the child's lying to wishing to go to the toilet. I do not think we can necessarily draw a conclusion on a child's reaction in court.[489]

6.50 Eastwood and Patton's study interviewed both prosecution and defence lawyers as to their views on the impact of the use of CCTV or video on the likelihood of conviction. There was no consensus on whether the use of such facilities favoured the defendant or the Crown, as the following quotations cited in their study reveal:

> I don't really like it. I just don't think there's enough personal rapport built up between the jury and the victim (NSW Prosecutor).
>
> …I prefer a child to be on video. The most damaging thing is for a little girl to get in front of a jury and see flesh and blood and see her cry… The poor old Crown you see, most Crown prosecutors want that, want the child in the courtroom. The jury seeing her cry… I'm in favour of it because I think it will help me get a bloke off (QLD Defence).

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487 Evidence, 19 April 2002, p 8.

488 Evidence, 3 April 2002, p 22.

489 ibid.

> … See – prosecutors are frightened they are going to lose prosecutions, but that's not what happens and also what they have discovered is that they can prosecute when kids are younger and a kid can give a better account of themselves (WA Prosecutor).
>
> … I don't see any disadvantages to the defence. I don't think CCTV has meant there has been more convictions – or more acquittals. I don't think CCTV makes any difference at all to be honest (WA Defence).[490]

Technical and implementation problems

6.51 The Committee heard that technical and resource problems frequently result in children being unable to give evidence by CCTV or previous recordings. The DPP reported a number of problems in the effective implementation of the special measures provided for under the *Evidence (Children) Act 1997*. These included:

- In regional courts there is often competition for use of electronic facilities.
- The inconsistent quality of the CCTV remote witness rooms. Descriptions include: "… cold, no heating, poor environment, unfriendly environment. CCTV facilities can also be inappropriately located, for example in Jury assembly areas and storage rooms".
- Inadequate monitoring of the child's view of the CCTV screens; for example, the accused being visible to the child, or the judicial officer while talking to the child not being visible to the child.
- Quality of interviews or electronic recording can result in a child needing to be re-interviewed by JIRT, or having to give evidence in chief orally.
- The defence in some instances objects to the use of CCTV as being prejudicial to their client.
- Some prosecutors are reluctant to use the CCTV technology citing inadequacy of equipment and difficulties in viewing and hearing the complainant give evidence…
- Use of split screens when playing the video tape to the court – the child's face is indistinguishable for the court because of the size of the child's face on the screen.
- Lack of judicial awareness of the *Evidence (Children) Act 1997*.[491]

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490 Eastwood and Patton, op cit, pp 94 – 96.

491 Submission 27, p 9.

6.52 In evidence, the DPP commented further on the technical obstacles to effective use of special measures:

> The provision of electronic equipment to the courts has always been limited by resources, by the funds available for the provision of equipment, and particularly for the provision of high-class equipment, equipment of a sufficiently high technical standard to enable the objective to be achieved. In a sense, we have done it a bit on the cheap, and if we do not address that issue now we will create more problems for ourselves further down the line.[492]

6.53 A recurrent complaint related to the size of the television screen, as it presents only a very small image of the child witness. The DPP, for example, stated:

> Screen size is something that troubles us … The size of the image of the person is important, because if the person is seen as a very small image in a large court room there are implications involved in that. The ability of the judge, the jury and counsel to see the reaction of the witness is hampered if the image is physically small and difficult to see from a distance in the courtroom… So the provision of adequate technical equipment to enable the child to make a full and proper impact on the proceedings without physically being in the courtroom and without being subject to scrutiny by the accused and unfair pressure by other means is a very difficult issue.[493]

6.54 The Deputy Chief Magistrate, Ms Syme, concurred:

> When a child is giving evidence in a remote witness room, depending on which court we are sitting in, the court television can sometimes be very small and the quality is occasionally poor. I have certainly experienced that. It makes it very difficult for all concerned to view that sort of evidence… When evidence is heard in that way I would agree that from time to time it is unsatisfactory, from time to time the quality is poor and from time the placement of the cameras is not ideal.[494]

6.55 One 13-year-old complainant cited in Eastwood and Patton's study remarked on the difficulties caused by camera placement:

> Because it was only last year, I was a tad small, and there was a seat to sit down, but they couldn't move the camera or the microphone so I had to stand up for like three hours – just standing there.[495]

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492 Cowdery, Evidence, 26 March 2002, p 2.

493 Cowdery, Evidence, 26 March 2002, p 3.

494 Syme, Evidence 3 April 2002, p 21.

495 Eastwood and Patton, p 55.

6.56 The Committee heard evidence that technology exists that could easily overcome the problem of small screen size. Ms Carney, from the Women's Legal Resource Centre, noted that high quality technology is used in other proceedings, and could therefore also be used for child witnesses:

> I think [CCTV] can be very useful if its done properly. I must say that I am puzzled because I always remember very early in my career going to the Supreme Court on a bail application and there was no problem at all with the prisoners being brought up on very big screens to give their evidence and listen. I do not know why it would not be operating on that level and that sophistication if that was over 10 years ago now… I have seen quite big screens and quite a clear picture of the defendant or the prisoner being present. Obviously I am not a technical expert but from my own experience I have seen things that I think would be much better than small screens with a small child's face on it.[496]

6.57 Appropriate technology was also able to be utilised at the Wood Royal Commission, which used CCTV to take evidence from child witnesses:

> The images were displayed to those present in the hearing room via personal computers and a large overhead monitor. Using these facilities there was no loss of impact resulting from the fact that the witness did not give evidence in the immediate presence of those in the hearing room.[497]

6.58 Other difficulties arise where more than one child sexual assault matter is listed at a court with only one CCTV. For example:

> In relation to Penrith court, I am aware of the Witness Assistance Service Officer raising on a number of occasions that several child sexual assault matters with child witnesses have been listed for the same date. There being only one facility (CCTV) there, that means having all those children prepared for giving evidence on the day and for the emotional build-up, and then only one of those matters can be heard on that day. So it does have a lot of impact on the children in terms of uncertainty and not knowing and then some matters going ahead and some not.[498]

6.59 The DPP suggested that this problem should be easily resolved:

> The multiple listing of matters is something that I would assume is self-evident. If there are a number of matters of a similar kind requiring the use of limited equipment, then there is a greater demand than there is supply. Some of the needs of witnesses in the particular cases that are listed are not taken into account at the time of the listing of matters. That is an administrative issue that could be addressed…[499]

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496 Carney, Evidence, 2 May 2002, p 12.

497 Royal Commission into the New South Wales Police Service, Volume 5, p 1092.

498 Evidence, 26 March 2002, p 3.

499 Cowdery, Evidence, 26 March 2002, p 2.

6.60 Dr Cashmore noted multiple problems that impact on the availability of CCTV for child witnesses:

> On behalf of the Australian Law Reform Commission I conducted the initial pilot on the use of closed circuit television in the Australian Capital Territory some time ago, which preceded New South Wales taking this up. I am aware of some of the problems of poor quality screens, small screens, small images, staff not familiar with the operation of the equipment, and also double booking of the equipment. The other issue I think that arises is the discretionary use when it comes to court. Children may be told that they can use it but get to court only to find out that they cannot, either because it has been double booked or has broken down; or because the judge decides that he thinks it would be prejudicial to the accused…[500]

> Yes, I think there does need to be, and I understand there has been, some updating of the equipment in some of the courts. It certainly needs to in order to make it an effective medium for the children's presentation in court. Otherwise you have prosecution lawyers – and I think there is already a self-fulfilling prophecy here – who will not use it because they do not think they can secure a conviction as easily using it as not. Unfortunately, the self-fulfilling part of that is that they may only use closed-circuit television when they have really vulnerable witnesses and a weak case. If the outcome is an acquittal they may then say that closed circuit television does not work. Whereas, it may be the weakness of the case, not the use of the equipment.[501]

6.61 Another identified problem was inadequate training of personnel required to operate the equipment:

> Another matter that you refer to is court staff not knowing how to use the equipment. That is a fairly straightforward training issue in the administration of courts. Where equipment is installed it should be accompanied by appropriate training regimes for the court staff who will be required to use it. There is nothing too difficult about that issue.[502]

6.62 Professor Oates also emphasised the need for proper training of staff:

> … I have always felt that the answer is not buying the video equipment; the answer is training people to do extremely competent videos that will stand up properly – videos that will not be able to be dismissed because they have not done the questioning properly. That seems to me to be far more crucial. Buying the technical equipment is just a matter of dollars, which would not be a very vast amount. Training people to use the equipment properly is the key to this.[503]

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500 Cashmore, Evidence, 19 April 2002, pp 7 – 8.

501 Cashmore, Evidence, 19 April 2002, pp 7 – 8.

502 Cowdery, Evidence, 26 March 2002, p 2.

503 Oates, Evidence, 17 May 2002, p 16.

Non-utilisation of special provisions

6.63 The Committee heard that another problem was the failure by some courts to use the available special measures, even where the technology was installed and available for use. Of particular concern to the Committee were reports that judicial officers were sometimes unaware of the special measures provisions. The DPP advised, for example, of the problem of:

> Inconsistency in the knowledge of judicial officers as to the provisions of the *Evidence (Children) Act 1997* and the use of their discretion in relation to the legislation. Case examples can be cited as follows.
>
> - In one case a judge indicated that he was unaware of the legislation.
> - A magistrate felt there was nothing in the legislation that indicated that the child should be able to refresh her memory by listening to the audiotape in court.
> - Video evidence of a child was ruled inadmissible…[504]

6.64 Similarly, Ms Purches, from the DPP's Witness Assistance Service, gave evidence that:

> We certainly have transcripts that indicate that a lack of knowledge has been acknowledged, that they are not aware of or have very little familiarity with the legislation and, in fact, it being reported that the judge's colleagues were also equally unfamiliar with the legislation, and that is quite concerning for us. The legislation, like any legislation, does not really give procedural information that assists the court. When you have deliberations around whether a child should listen to the audiotape, the legislation does not really spell out those procedural matters.[505]

6.65 The Committee considers that the gap in judicial officers' knowledge of the special measures provisions in the *Evidence (Children) Act 1997* needs to be rectified without delay. That some children have been denied access to CCTV as a result of judicial officers' lack of awareness of the provisions is a matter of great concern to the Committee. The Committee's recommended pilot project (detailed in Chapter Seven) includes training of judicial officers as an important feature and should address this shortcoming. In the meantime, the provision of training through the Judicial Commission is essential.

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504 Submission 27, p 9.

505 Purches, Evidence, 26 March 2002, p 13.

Recommendation 29

The Committee recommends that the Judicial Commission provide training courses to judicial officers regarding the special measures provisions in the *Evidence (Children) Act 1997*.

- ***Closed-circuit television***

6.66 Despite the statutory right for a child to give evidence by CCTV in New South Wales, the use of CCTV in courts is far from consistent. The Committee notes that the court retains the discretion under section 18(3) and 18(4) of the *Evidence (Children) Act 1997* to order that the facilities **not** be provided to a child witness, if it is in the interests of justice.

6.67 Such orders for non-use of CCTV appear to be relatively frequent. One recent study revealed that two-thirds of children who were required to appear at committal hearings in New South Wales were refused permission to give evidence by CCTV.[506] The same study found that the use of CCTV was refused in 43% of cases that went to trial, and those children were also refused the use of a screen as an alternative means of restricting visual contact with the accused.[507]

6.68 Many inquiry participants were critical of the court's discretion to order that CCTV not be used. Most argued for the use of CCTV to be mandatory in all cases. The Northern Sydney Child Protection Service, for example, stated:

> However, with respect to use of remote means such as CCTV, this is at the discretion of the court. It is proposed that the standard procedure for a child victim/witness to give evidence should be via CCTV or remote means, with provision that this not occur where particular circumstances apply. In other words, it should be automatic that the child gives evidence by CCTV or remote means.[508]

6.69 Professor Oates also argued that use of CCTV should be standard:

> I think it is good when it works. The introduction of it was an important move. I guess the disappointment is that it is not available to all children. It is not seen as absolutely essential before the child gives evidence that these things are in place and working. It should be just a basic part of the process.[509]

506 Eastwood and Patton, op cit, pp 54 – 55.

507 ibid, p 55.

508 Submission 60, p 7.

509 Oates, Evidence, 17 May 2002, p 15.

6.70 Some also argued that CCTV should be available to adult complainants of child sexual abuse:

> I believe it should be an available option for complainants of sexual abuse (child or adult) to provide their evidence to the courts by way of closed circuit TV. Speaking from experience, I found it quite unnerving to have to sit in the court room in front of my abuser… It was also difficult to have to face his supporters, church minister and parishioners and other family members. Their looks of contempt added to a particularly hard day.[510]

6.71 The witnesses from the ODPP were asked about the reasons given by courts for declining to make orders for the use of special measures such as CCTV and admission of electronic evidence. Ms Purches responded:

> … it is difficult to tease out, without having the court transcript, whether any consideration was given to the needs of the child. What has been reported anecdotally to me from witness assistance officers is that it is not very often that the well-being of the child is discussed. It is more around legal issues that need to be decided by the court as to arguments around whether those facilities should be utilised.
>
> We have some court transcripts that indicate that on a number of occasions judges have also acknowledged that they have very little knowledge of the legislation so they struggle with knowing what to do with the legislation…They are struggling with the legal aspects of what are being put in terms of legal arguments about those facilities, whether or not equipment is available or malfunctioning or of a particular quality.[511]

6.72 The lack of support for CCTV amongst prosecution and defence lawyers was also identified as an impediment to the more frequent use of the facility. For instance, the Education Centre Against Violence was concerned about:

> Reluctance by some prosecutors to use Closed Circuit Television due to prevailing attitudes that having a child in the courtroom with the offender has greater impact on the jury than a child who is giving their evidence via CCTV, even though this is not supported by research findings.[512]

6.73 Professor Briggs observed that both the Crown and the defence each saw benefits in not using CCTV:

> The defence wants child witnesses to be intimidated by eye-to-eye contact with offenders while prosecutors think that juries are more impressed by a weeping, distressed child than a confident child on a TV monitor. Thus, both defence and

510 Submission 21, p 16.

511 Purches, Evidence, 26 March 2002, p 13.

512 Submission 40, p 12.

> prosecution are prepared to inflict further trauma on child victims for the sake of their case.[513]

6.74 The DPP agreed that prosecutors' reluctance to use CCTV could be a problem:

> Another concern from the point of view of some prosecutors is that juries may be less inclined to put weight on the evidence that is given by closed circuit television because they are removed from the witness and do not have that immediate contact, which may be more persuasive to them. I know that some prosecutors certainly have that view.[514]

6.75 Professor Parkinson acknowledged that CCTV could reduce the effectiveness of the child's testimony, however, he pointed to the benefits for the child in the reduced stress:

> The evidence from the research was that the live testimony had the greatest impact on the jury and that the closed-circuit TV had less of an impact. That research was very well done, and I think it reinforces the impressions one gets from evaluations in Britain and elsewhere. However, the trade-off is how much stress are we going to put the child under in order to get a criminal conviction? While I do not doubt that close-circuit TV might in some cases have reduced the impact of the child's evidence … on the other hand if it is protective of the child it might be a necessary compromise.[515]

- ***Electronically recorded evidence***

6.76 Difficulties were also apparent with the utilisation of provisions relating to the electronic recording of children's statements, and its subsequent admission as evidence-in-chief. Deputy Chief Magistrate, Ms Helen Syme, told the Committee that video evidence appeared to be rarely used in the Local Courts:

> **Ms Syme:** I have done some further investigations and have found out that since 1 August 1999 there have been some 3,500 electronic video or audio recorded evidence statements taken. I do not know what happened to those video/audio recorded evidence statements. My further inquiries reveal that only ten magistrates in the Local Court had ever had such evidence before them…
>
> **Mr Ryan:** Do you mean ten magistrates or ten cases? …
>
> **Ms Syme:** Only ten magistrates had ever seen it, and most of those have only ever seen one. There is one magistrate who has seen two.[516]

513 Submission 2, p 4.

514 Cowdery, Evidence, 26 March 2002, p 5.

515 Parkinson, Evidence 19 April 2002, p 21.

516 Evidence, 3 April 2002, p 18.

6.77 This opinion appears to be borne out by the Police Service's evaluation:

> Case tracking findings revealed that only a small proportion of children's electronically recorded interviews were tendered as evidence in chief. This was also a finding of the UK evaluation (Davies et al 1995). In NSW, this was primarily due to the fact that less than 20% of cases accepted at JIRTS result in arrest and a significant proportion of these cases were not heard at court because the matter was withdrawn or no billed, or a guilty plea was entered.[517]

6.78 The Legal Aid Commission, in noting the advantages of recording children's interviews, expressed strong concern at the infrequency with which the evidence is admitted in court:

> Although the police are required to electronically record the child's statement, they are not required to use the recording as the whole or part of the child's evidence in chief. The child may still be required by the prosecution to give oral evidence, with the only requirement being that the wishes of the child must be taken into account.
>
> The experience of the Commission is that the prosecution does not utilise the provisions that would allow the child's audio or video recorded interview to be admitted into evidence as their evidence in chief. This is in contrast to other states, such as Queensland, where this is common practice.
>
> The Commission is of the view that the use of the electronically recorded statements as the child's evidence in chief would go a significant way to reducing the stress experienced by children giving evidence in child sexual assault matters. If prosecutors continue to require child witnesses to give oral evidence while at the same time arguing in favour of changes to rules of evidence and court procedure which undermine the rights of the accused to a fair trial, the inevitable conclusion is that their views are not motivated by concern for the well being of the child victim or witness, but by the desire to increase the likelihood of obtaining a conviction.[518]

6.79 The Police Service's evaluation reviewed the reasons given for not tendering an electronic statement as evidence-in-chief. Of the 122 cases studied where the interview had been electronically recorded, in 65 cases the defendant pleaded guilty, and in a further 17 cases, the matter did not proceed. Twenty-three of the remaining forty cases involved the tendering of electronically recorded evidence. The reasons given for not tendering the electronic recording in the remaining 17 cases were:

- the ODPP Crown Prosecutor or lawyer believed the case would be stronger if the child gave evidence (6 matters);
- the young person was 16 years or older at the time of the hearing (4 matters);
- the child wanted to testify (3 matters);

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517 McConachy, "Evaluation", op cit, p 62.

518 Submission 57, p 6.

- the ODPP amended charges making parts of tape no longer relevant (2 matters);
- the child's statement changed (1 matter); and
- the tape was of poor quality (1 matter).[519]

6.80 The Committee heard that the length of the recording can also hinder its use in court:

> Some prosecutors preferred not to submit an electronic recording as evidence in chief that was long or confusing, or contained leading questions, inadmissible, or irrelevant information. Although primarily an interviewer training issue, there was general agreement that some tapes would benefit from editing.[520]

6.81 The length of the recording was also identified as a problem by the DPP:

> There is some reluctance to play the electronic statement because of its length and consequently committing magistrates opt for the written transcript as the child's evidence.[521]

6.82 The quality of the recording and the reluctance of prosecutors to use the video were other obstacles, according to Professor Parkinson:

> One reason why there may be a reluctance to use those interviews might be that prosecutors look at them and say they are simply not of sufficient quality, they have inadmissible material, and so on. The second reason, I think, is a reluctance by prosecutors to use them. This was the evidence from England, where, long before New South Wales, they introduced video recording and Graham Davies and his team did an evaluation of that. There were all sorts of reasons why most of them were not using it, and one of them was a reluctance by prosecutors, who thought that a crying child on a witness stand was more impressive than a video recording. That was not the only reason they gave, but I think there is that conservatism amongst some prosecutors, for many reasons, about wanting to have a child giving live evidence.[522]

6.83 As with CCTV, judicial discretion not to admit the evidence in electronic format was criticised by some inquiry participants. For example, the CASAC network suggested:

> Video evidence from children should be allowed as evidence in chief in all cases, not at the judge's discretion.[523]

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519 McConachy, "Evaluation of the Electronic Recording of Children's Evidence," Final Report, May 2002, p 60.

520 ibid, p iv.

521 Submission 27, p 10.

522 Parkinson, Evidence, 19 April 2002, p 19.

523 Submission 47, p 6.

Committee comment on the use of special measures

6.84 The Committee is not convinced that either the accused or the prosecution is unfairly disadvantaged by the use of CCTV or the admission of electronically recorded evidence. It appears to the Committee that any disadvantages that arise for the accused are balanced by disadvantages to the Crown.

6.85 The Committee considers that the standard use of special measures for all child sexual assault complainants, together with the existing mandatory jury warning, would ensure that the use of the special measures do not cause the jury to form adverse conclusions about the accused.

6.86 The Committee is disturbed that the use of existing special measures has not become standard practice for child complainants in sexual assault proceedings. The benefits to the child are quite clear, as children's key fear – that of coming into contact with the accused – can be minimised through the use of the electronic facilities.

6.87 The reasons for the non-utilisation of the provisions are, in the Committee's opinion, unsatisfactory. In particular, it is unacceptable that, some five years after the passage of the legislation, there are still technological and resource impediments to its implementation. If the Committee's recommendation (in Chapter 7) for a specialist court is adopted, it would include the resources to ensure that a high standard of electronic equipment is available for use at a central location in which child sexual assault proceedings are held. If the recommended specialist court is not implemented, the Committee considers that an injection of funding is needed, as a matter of priority, to ensure that:

- all courts are equipped with CCTV facilities, or have access to a mobile CCTV room
- the screen size and image quality are of a high standard
- the CCTV cameras and microphones are fully adjustable to suit the height of children
- the equipment is well maintained
- staff are adequately trained to operate the equipment and
- video equipment is available for recording all interviews with child sexual assault complainants

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Recommendation 30

The Committee recommends that the Attorney General's Department conduct an audit of the numbers, locations and technological standards of existing electronic equipment in New South Wales courts.

Recommendation 31

The Committee recommends that the Treasurer provide funding to address the upgrading needs identified by the audit of electronic equipment suggested in recommendation 30, with a view to ensuring that all courts have access to high standard, well maintained, appropriate electronic facilities. Where it is not feasible for remote or rural courtrooms to be equipped with CCTV and video equipment, access to mobile electronic evidence rooms should be ensured.

Recommendation 32

The Committee recommends that the Attorney General's Department assess the adequacy of the training of court staff in the use of electronic equipment, with a view to ensuring that all relevant staff are able to operate the equipment.

6.88 The **right** for children to give evidence by CCTV, as provided for under the current legislation, has clearly failed to give children uniform access to CCTV. The exercise of judicial discretion has resulted in a significant proportion of child sexual assault complainants being required to give evidence in person and in the presence of the accused. In the Committee's view, this is likely to have caused unnecessary distress to child witnesses, usually without providing any additional protection to the accused.

6.89 It appears to the Committee that, in order to ensure that child witnesses are able to access the special measures such as CCTV, the exercise of judicial discretion will need to be clarified and more tightly construed. The current legislation allows a court to order that CCTV not be used if it is 'in the interests of justice' to so order. The statistics referred to in paragraph 6.67 relating to the proportion of children required to give evidence without the benefit of CCTV suggest to the that courts have been overly restrictive in their interpretation of the interests of justice and have over-emphasised the likely prejudice to the accused.

6.90 It is the Committee's opinion that the use of CCTV would usually not cause sufficient prejudice to the accused to meet the threshold for a court order against its use. The Committee considers that it should only be in **exceptional circumstances** that an order is made requiring a child to appear in person. Where an order is sought, the defence should be required to identify precisely how the use of CCTV would prejudice the accused, with a specificity that goes beyond the general possibility of prejudice arising from the use of CCTV. Moreover, in determining the application, the court should be specifically required to take into account the interests of the child witness. The Committee suggests that the legislation be amended to explicitly state these principles. The Committee envisages that 'exceptional circumstances' would occur only very rarely, and that the overwhelming majority of child witnesses should give evidence by CCTV. The right for a child to choose not to use CCTV should be retained.

6.91 The Committee draws conclusions about matters relating to the admission of previously recorded evidence further below in the context of pre-trial recordings.

Recommendation 33

The Committee recommends that the Attorney General amend the *Evidence (Children) Act 1997* to require that all child witnesses give evidence by closed-circuit television, except where the defence is able to prove that exceptional circumstances exist that render the use of CCTV against the interests of justice.

The Committee further recommends that the amendment make clear that a general possibility of prejudice to the accused caused by the use of CCTV is not to be considered an exceptional circumstance for the purpose of determining whether to make an order that CCTV not be used, and that the interests of the child must be paramount. The right for a child to choose not to use CCTV should be retained.

Additional Special Measures

The need for additional special measures

6.92 The Committee considers that, while the existing special measures go some way towards protecting child complainants, further measures are needed to alleviate the remaining problems encountered by child complainants of sexual assault. The difficulties for child complainants have been identified throughout this report, and include:

- frequent lengthy delays between the charging of the accused and the trial
- the children's fears of seeing the accused in court
- lengthy waiting periods in the court building before the child gives evidence
- the multiple listing of child sexual assault matters that cause competition for electronic facilities or delayed trials as complainants wait for access to facilities
- the lack of judicial and court officer awareness of the needs of children generally and the importance of special measures in reducing the distress felt by child complainants and
- children often still being required to give oral evidence at committal proceedings

6.93 The proposal for a new special measure seeking to address these problems, the pre-trial recording of evidence, is examined below.

Admission of pre-recorded evidence

6.94 In evidence before the Committee, Commissioner Calvert expressed support for admitting a pre-trial recording of a child's **entire** testimony, a process she observed in operation in Western Australia. Pre-trial recording involves video-recording the child's evidence-in-chief (as can already occur in New South Wales), followed immediately by the cross-examination and any re-examination. The hearing for the pre-trial recording takes place prior to the trial, usually within a few months of the accused being charged. The usual court procedures, including special measures such as CCTV and support persons, are followed at the pre-trial hearing. The electronic recording then replaces the child's evidence-in-chief, cross-examination, and re-examination at trial, removing the requirement for the child to appear in person at all.

6.95 The Western Australian *Evidence Act 1906* contains the provisions for the pre-trial recording and admission of a child's evidence. The statute allows for either the entire testimony to be recorded, or just the evidence-in-chief.

> **106I. Video-taping of child's evidence, application for directions**
>
> (1) Where a Schedule 7 proceeding has been commenced in a Court, the prosecutor may apply to a judge of that Court for an order directing —
>
> (a) that the whole or a part of the affected child's evidence in chief be —
>
> (i) taken and recorded on video-tape; and
>
> (ii) presented to the Court in the form of that video-taped recording,
>
> and that the affected child be available at the proceeding to be cross-examined and re-examined; or
>
> (b) that the whole of the affected child's evidence (including cross-examination and re-examination) be —
>
> (i) taken at a special hearing and recorded on video-tape; and
>
> (ii) presented to the Court in the form of that video-taped recording,
>
> and that the affected child not be present at the proceeding.
>
> (2) The defendant is to be served with a copy of, and is entitled to be heard on, an application under subsection (1).
>
> **106J. Child's evidence in chief, recording and presentation of**
>
> (1) A judge who hears an application under section 106I(1)(a) may make such order as the judge thinks fit which may include directions as to —
>
> (a) the procedure to be followed in the taking of the evidence, the presentation of the recording and the excision of matters from it; and

(b) the manner in which any cross-examination and any re-examination of the affected child is to be conducted in the Schedule 7 proceeding.

(1a) An order under subsection (1) —

(a) is to include directions, with or without conditions, as to the persons, or classes of persons, who are authorised to have possession of the video-taped recording of the evidence; and

(b) may include directions and conditions as to the giving up of possession and as to the playing, copying or erasure of the recording.

(2) An order under subsection (1) may be varied or revoked by the judge who made the order or a judge who has jurisdiction co-extensive with that judge.

106K. Child's evidence in full, special hearing to take and record

(1) A judge who hears an application under section 106I(1)(b) may make such order as the judge thinks fit which is to include –

(a) directions, with or without conditions, as to the conduct of the special hearing, including directions as to –

(i) whether the affected child is to be in the courtroom, or in a separate room, when the child's evidence is being taken; and

(ii) the persons who may be present in the same room as the affected child when the child's evidence is being taken;

(b) directions, with or without conditions, as to the persons, or classes of persons, who are authorised to have possession of the video-taped recording of the evidence,

and, without limiting section 106M, may include directions and conditions as to the giving up of possession and as to the playing, copying or erasure of the recording.

(2) An order under subsection (1) may be varied or revoked by the judge who made the order or a judge who has jurisdiction co-extensive with that judge.

(3) At a special hearing ordered under subsection (1) –

(a) the defendant –

(i) is not to be in the same room as the affected child when the child's evidence is being taken; but

(ii) is to be capable of observing the proceedings by means of a closed circuit television system and is at all times to have the means of communicating with his or her counsel;

(b) no person other than a person authorised by the judge under subsection (1) is to be present in the same room as the affected child when the child's evidence is being taken;

(c) subject to the control of the presiding judge, the affected child is to give his or her evidence and be cross-examined and re-examined; and

> (d) except as provided by this section, the usual rules of evidence apply.
>
> *[(4) repealed]*
>
> (5) Where circumstances so require, more than one special hearing may be held under this section for the purpose of taking the evidence of the affected child, and section 106I and this section are to be read with all changes necessary to give effect to any such requirement.

6.96 The QLRC noted that judicial guidelines in Western Australia detail the procedures for pre-trial hearings to pre-record evidence:

> The procedure to be followed when the evidence of a child witness is pre-recorded is set out in the judicial guidelines. Where possible, the hearing at which the child's evidence is recorded is held in a normal courtroom which is equipped for the purpose of giving evidence by closed-circuit television. Otherwise, it takes place in a room specially equipped for the purpose, with the child giving evidence in the room and the accused viewing proceedings by closed-circuit television from another room. The guidelines provide that the former method should be preferred because it avoids the stress of physical proximity to judge and counsel, particularly defence counsel during cross-examination, and because, for the jury, there is very little difference from the situation where the child gives evidence "live" by closed-circuit television. The Commission understands that, in Western Australia, in almost all sexual offence cases involving child complainants the evidence of the child complainant is recorded on video before trial. This is usually in respect not only of examination-in-chief, but also of cross-examination and re-examination. As a matter of practice, the pre-recorded evidence is also used, with the consent of the defence, if it is necessary for a retrial to be held, although the legislation does not at present expressly provide for this. A Bill presently before the Western Australian Parliament will, when enacted, make the pre-recorded evidence of a child witness, which is otherwise admissible, automatically admissible on a retrial.[524]

6.97 Commissioner Calvert explained the advantages of pre-trial recording as it operates in Western Australia:

> [In Western Australia] they pre-record the child's statement by way of video and they then go on to pre-record the child's evidence and cross-examination. The video of the statement, evidence in chief and cross examination is then submitted during the trial. So that has the advantage of having the child give evidence early on or close to the time of disclosure. So the memory of the child certainly around peripheral events is probably going to be fresher. It also has the advantage of being able to have the child give their evidence continuously rather than in an interrupted way, which sometimes happens now through court listing delays and so on. It also has the advantage, from the child's point of view, of getting it over and done with early on so that they can then get on with the process of living their lives and whatever healing and recovery they might need.
>
> I was quite impressed with that system. Everybody I spoke to certainly indicated that they thought it had many benefits for the child. They talked also about the benefits to the prosecutorial process as people who participated in the

524 QLRC, p 163 – 164.

> prosecutorial process felt better because the child's interests had been looked after and they could then get on with the business of conducting the trial. They felt also that the child generally gave better evidence, which is of advantage to both the prosecution and the defence.[525]

6.98 The Commissioner advised the Committee that, in Western Australia, a child's testimony is pre-recorded within approximately three months of the report of sexual assault.[526] This compares with 12 months to two years before a child complainant would normally testify in New South Wales. The Committee understands that it is rare for a child in Western Australia to be recalled to give further evidence at trial.[527]

6.99 Eastwood and Patton's recent study described a number of benefits of the Western Australian approach that combines the use of CCTV and pre-trial recording of evidence:

> There is no doubt that being subject to cross-examination both at committal and trial is damaging for the child. In the current study, children in both Queensland and New South Wales were required to face cross-examination "live" in court at both committal and trial [although] some children in New South Wales were spared cross-examination at committal and allowed to be cross-examined via CCTV [at trial]… In contrast, every child in Western Australia was cross-examined once only, and every child was able to use CCTV…
>
> Children in Western Australia were cross-examined for much shorter periods of time, benefited from knowing with certainty prior to giving evidence that they would not see the accused, and appeared to be less intimidated with the degree of separation offered by CCTV.
>
> This system would enable a child to give evidence in a timeframe that is more suited to the best interests of the child rather than dominated by the progress of the prosecution case through the court system. This option would exist in tandem with the option for children to give evidence by closed circuit television in cases where pre-recording cross-examination is not considered appropriate by the court.[528]

6.100 The Committee suggests that the successful use of pre-trial recording and CCTV in Western Australia is one likely explanation for the following statistics, which show that child complainants in Western Australia were significantly more likely to say they would report future sexual assaults than were their counterparts in NSW and Queensland:[529]

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525 Evidence, 17 May 2002, p 4.

526 Calvert, Evidence, 17 May 2002, p 4.

527 Dr Chris Corns, "Videotaped Evidence of Child complainants in Criminal Proceedings: A Comparison of Alternative Models", *Criminal Law Journal*, Vol 25, April 2001, p 83.

528 Eastwood and Patton, p 123.

529 Eastwood and Patton, p 138.

Jurisdiction	No	Not Sure	Yes
QLD (18)	39% (7)	17% (3)	44% (8)
NSW (9)	56% (5)	11% (1)	33% (3)
WA (36)	17% (6)	19% (7)	64% (23)
TOTAL	29% (18)	17% (11)	54% (34)

Table 5: Child Complainants who would report again

6.101 Several recent law reform inquiries have favoured the pre-trial recording of child witnesses' evidence. The Wood Royal Commission was supportive of pre-trial recording, and related the findings of a West Australian report, which identified the following advantages:

- it enables the recording of the child's evidence while it is still relatively fresh
- the child can, at an early stage, put the events behind him/her and get on with life
- counselling, which may have to be postponed in order to avoid tainting the child's evidence, can begin at an earlier stage
- where a re-trial is ordered, the child's evidence may be presented in the form of the same videotape, avoiding the enormous emotional strain presently occasioned to children where a new trial is ordered on appeal, or because the jury fails to agree, or is discharged as the result of other misadventure during the first trial, and
- inadmissible evidence may be excluded ahead of time by judicially approved editing of a videotape…[530]

6.102 The QLRC outlined the provisions of the *Youth Justice and Criminal Evidence Act 1999* in England, which allows that pre-trial recording may be used for witnesses under the age of 17:

> The Act provides that, where a pre-recorded interview with a child witness is admitted as the child's evidence-in-chief, any cross-examination and re-examination of the witness may be recorded by means of a videorecording and admitted as the evidence of the witness. … If such a recording has been made, the witness may not be subsequently cross-examined or re-examined in respect of any evidence given by the witness in the proceeding, whether in a videotaped interview or otherwise, unless the court orders. An order for further cross-examination or re-examination may be made only if the court considers that a party to the proceeding has become aware, since the original cross-examination took place, of a matter which could not with reasonable diligence have been

530 Royal Commission into the New South Wales Police Service, Vol 5, p 1105.

> ascertained at that time, or that, for any other reason, further cross-examination and re-examination is in the interests of justice.[531]

6.103 The Committee understands that provisions also exist in New Zealand for the admission of children's previously recorded evidence.[532]

6.104 The QLRC report included submissions from judicial officers and counsel involved in cases in which pre-trial recording of evidence took place in Western Australia. A District Court Judge from Western Australia advised the QLRC that pre-recording the evidence:

> … may increase the number of pleas of guilty; both sides know the child's evidence before the trial "proper" begins; it saves the child having to be further available and no exclusion of the public is generally necessary. The pre-recording is made available on appeals and by consent on retrials. It is understood that a bill is presently in preparation to allow the evidence to be used automatically on a retrial.[533]

6.105 Another judge submitted to the QLRC:

> It is far more clinical; it enables everyone to maintain a far greater degree of objectivity; the witnesses are far less likely to break down and need intermission to regather themselves; the family of the complainant tend not to sit in court and glare at the accused, or the judge for that matter…
>
> The other advantages are that we have lost less time in that if the child does not come up to proof in a pre-recording then it is a lot cheaper and quicker to discover that at a pre-recording than after a jury has been sworn in, and it is also a lot less stressful to an accused person. Furthermore, it is possible to edit the tapes to take out any inadmissible material. The pre-trial video-taping, of course, means that if the trial aborts or there is a re-hearing for any reason other than the video, the witness does not have to give evidence again.[534]

6.106 The Committee notes that the New South Wales Children's Evidence Taskforce, in 1997, recommended against the introduction of the pre-trial recording of evidence. The Taskforce's arguments were summarised by the Wood Royal Commission:

- pre-trial hearings would not facilitate…the audiotaping and videotaping of children's out of court statements during the investigative phase
- the pre-trial hearing would not reduce the trauma on the child to any greater degree than giving evidence at trial by closed circuit television; and

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531 QLRC, p 164.

532 ibid.

533 ibid, p 168.

534 ibid, p 169.

- there may be practical difficulties in arranging for the same prosecutor, defence counsel and judge to be available for both pre-trial hearing and trial.[535]

6.107 The Wood Royal Commission rejected the arguments put forward by the Children's Evidence Taskforce, on the following bases:

- recording out of court statements is not excluded by the existence of a pre-trial hearing
- the context in which the evidence is taken is not unimportant – if the child is aware that a trial is underway and that there are observers watching and listening, there is likely to be more stress than in a setting which is known to be a preliminary hearing
- the need for the same personnel at the trial, although desirable, is not critical; any difficulty in this regard might be offset by the increased prospect of an early plea of guilty if an assessment is made by the defence that the child came across as a persuasive witness, or by leave to further examine the child, if satisfactory cause is shown.[536]

6.108 Eastwood and Patton were also critical of the Taskforce's conclusions regarding pre-trial recording, arguing:

> The New South Wales Taskforce seems to have missed two crucial concerns commonly raised by the children: repeating evidence and seeing the accused. If a child gives evidence by CCTV but without pre-recording, the child may still need to give the evidence twice (at committal and trial). Further even when CCTV is used, the children are still at risk of seeing the defendant at court.[537]

6.109 The Committee also notes that CCTV fails to overcome the many problems associated with the delay between charging and trial.

6.110 Commissioner Calvert noted that the current New South Wales provisions, which allow for the pre-recording of evidence-in-chief only, do not alleviate the acute difficulties caused by cross-examination:

> … [It] is generally recognised that cross-examination is the most rigorous aspect of the court process for any witness. As stated by McLachlin J in the Canadian Supreme Court: *Where trauma to the child is at issue, there is little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination.* As such the Commission recommends that the option of video-taping a child's evidence is extended to cross-examination. This way, examination in chief, cross examination and re-examination could all take place within a special pre-recorded hearing. In

535 Royal Commission into the New South Wales Police Service, Vol 5, p 1105.

536 ibid.

537 Eastwood and Patton, p 21.

> Western Australia, a videotaped preliminary hearing can be used as a substitute for the child's entire at trial testimony so that the child need not attend the trial.[538]

6.111 The Committee notes that there are also some benefits for the **accused** in pre-recording children's evidence, in that any inadmissible material can be edited out by order of the court, and therefore not be seen by the jury.

6.112 General benefits for the court system also arise from pre-recording the child's evidence. As noted above, knowledge of the strength of the child's evidence provides greater potential for early guilty verdicts, or for no-billing to occur sooner if the child 'does not come up to proof' in his or her testimony. This in turn can save court time and costs.

6.113 The Committee considers that it is essential to the interests of justice that child complainants are able to testify in circumstances that allow their evidence to be given accurately and without intimidation. The Committee believes that the admission of pre-recorded testimony as a standard practice would minimise or eliminate many of the key stressors for child complainants that cause trauma and inhibit effective evidence-giving. Particular benefits are:

- The long delays between charging and giving evidence would be avoided, and evidence is given while the details of the assaults are clearer in the complainant's memory. The strains caused by delay would be minimised, allowing the complainant and his or her family to move on and obtain necessary therapeutic counselling.

- The need to give evidence on more than one occasion would be removed as the video tape could be played at committal, at trial and at any subsequent trials.

- The child would not be required to come into contact with the accused and his or her family in the courtroom, overcoming a significant source of fear.

- There would be no need for the child to spend hours or days in the court waiting room waiting to appear to give evidence.

6.114 The QLRC noted arguments that some disadvantages to the accused could arise from the pre-recording of evidence.[539] Specifically, in cross-examining the complainant ahead of the trial, part of the accused's case is revealed by the defence by the type of questions put to the witness. This may allow the prosecution to better prepare its case, so as to meet the arguments put forward by the defence during cross-examination of the complainant.

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538 Submission 80, pp 9 – 10, footnotes omitted.

539 QLRC, p 174.

6.115 However, the QLRC also noted that the general right of non-disclosure for the defence is not absolute, and that there are instances – such as where there is an intention to call expert witness, or to rely on an alibi – which must be given notice of prior to trial. The QLRC observed in this regard:

> The notion that an accused person's right of non-disclosure may be affected by the overall interests of justice is therefore not new… [and] there may be other imperatives which equally justify some degree of disclosure by the accused person.[540]

6.116 Apart from this possible disadvantage identified by the QLRC, the Committee is not aware of any difficulties that would arise for the defence if pre-recording of children's evidence were to be implemented. In practice, pre-recorded evidence would be no different to the jury to hearing evidence by CCTV. As discussed above, the Committee does not believe that the use of CCTV evidence unfairly disadvantages the accused.

6.117 The Committee agrees with the QLRC's conclusion that the overall benefits of admitting pre-recorded evidence outweigh the disadvantages to the accused. The Committee therefore recommends that the pre-trial recording of children's entire evidence (examination-in-chief, cross-examination and re-examination) be adopted in New South Wales. To enable the full benefit of pre-trial recording to flow to child complainants, the recording should be able to be admitted at trial, in committal proceedings and in any re-trial. This would avoid the extremely stressful situation that arises when a child is required to give evidence on multiple occasions.

Recommendation 34

The Committee recommends that the Attorney General amend the *Evidence (Children) Act 1997* to provide for child witnesses' evidence to be recorded in full prior to the trial and to enable the electronic-recording to be admitted into evidence at trial to replace the child's evidence-in-chief, cross-examination and any re-examination.

Recommendation 35

The Committee also recommends that the Attorney General amend the *Evidence (Children) Act 1997* to enable the video-recording of a child's evidence to be admitted into evidence at any committal proceedings, re-trials or appeals.

Recommendation 36

The Committee recommends that the Attorney General ensure that pre-trial recording provisions allow for the court to order the editing of the video recording in order to omit irrelevant or prejudicial material prior to the trial.

[540] QLRC, op cit, p 175.

6.118 The Committee is of the view that it is vital that the conditions under which the pre-trial evidence is given and recorded minimise the stress on the child complainants. All special measures that are available at trial therefore also should be available for the pre-trial hearing. Removing the child from the court room, and allowing him or her to testify via CCTV from the remote witness room would be an appropriate approach. This would also enable the defendant to remain in the court room, view the proceedings and communicate with his or her defence counsel.

6.119 The Committee considers that the environment for the hearing should have the following features:

- judges and counsel should not wear robes and wigs
- evidence should be given from a specially selected, informal room, with appropriate furniture and in the absence of unnecessary personnel
- the accused should not come into the presence or sight of the complainant
- the children should be entitled to the presence of support persons

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Recommendation 37

The Committee recommends that the pre-trial recording provisions proposed in recommendations 34 and 35 include provision for the creation of guidelines for pre-recording evidence. The guidelines should that ensure that children's evidence is recorded from a remote CCTV room, in a child-friendly and non-intimidatory environment, with access to a support person. The guidelines should also ensure that the child complainant does not come into contact or view of the accused.

6.120 The Committee has considered whether the proposed legislative amendment should **require** a child's evidence to be pre-recorded, or whether it would be preferable for the court to retain the discretion to order that it not be used. The Committee is of the view that it should be standard practice for the child's pre-recorded evidence to be admitted in child sexual assault trials. The Committee's concern about incorporating a judicial discretion focuses on the possibility that the discretion would be exercised in such a way as to undermine this stated intention, resulting in a failure to use the provision in many instances, as appears to be the case with the utilisation of the CCTV provisions.

6.121 The Wood Royal Commission did not favour mandatory use of pre-trial hearings, noting that in some instances it may in fact be quicker to proceed with the trial. The Commission concluded that:

> …[In] cases where it is apparent that the suggested time frame (six months from date of charging to trial) will not be met or where the nature of the case suggests that a child under the age of 12 years would be at particular risk of trauma or

> prejudice through delay, the Commission considers that a mechanism should be available to take his or her evidence in advance of the trial.[541]

6.122 Additionally, the Wood Royal Commission recommended that the court should be given the discretion not to admit the pre-recorded evidence if the interests of justice require it and that a judicial warning should be given where pre-recorded evidence is admitted to prevent the jury drawing prejudicial conclusions about the accused on the basis of the use of pre-recorded evidence.[542]

6.123 In the Committee's opinion, a limited judicial discretion should be allowed. The legislative amendments should create a presumption that a child will have his or her entire evidence pre-recorded and admitted at trial. Judicial discretion to order that the pre-trial recording and/or admission not occur should be permitted only in specific circumstances. The Committee suggests that the discretion could be exercised in the following circumstances:

- when it is in the child's best interest for the evidence not to be pre-recorded or
- when the child prefers that the evidence not be pre-recorded, or
- when particular circumstances exist that render it contrary to the interests of justice for the evidence to be pre-recorded or admitted in electronic format.

6.124 In relation to the final point, it should be made clear that specific disadvantages for the accused would be needed for prejudice to be established: the possibility of generalised prejudice should not be considered sufficient for an order against pre-recording to be made.

Recommendation 38

The Committee recommends that the legislative amendments to provide for pre-trial recording suggested in Recommendations 34 and 35 should **create a presumption** that a child witness will have his or her entire evidence pre-recorded and admitted into trial.

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541 Royal Commission into the New South Wales Police Service, Vol 5, p 1106.

542 ibid, p 1107.

Recommendation 39

The Committee further recommends that the provisions for pre-trial recording suggested in Recommendations 34 and 35 should enable courts to order that a child's evidence not be pre-recorded or admitted into trial if, in the specific circumstances of the trial, it is not in the child's best interests, or the child prefers not to have the evidence pre-recorded or admitted electronically, or particular circumstances render it contrary to the interests of justice for the evidence to be pre-recorded or admitted electronically. The possibility of generalised prejudice should not be considered sufficient for an order against pre-recording to be made.

6.125 One further question that arises about pre-trial recording of evidence is whether a child whose evidence is pre-recorded should be required to be available at the trial for any further examination. This possibility would normally arise if further evidence came to light after the pre-trial hearing. The Committee notes that in Western Australia, the trial judge can order that a child not be required to be present at trial, and that any further examination can take place by way of additional pre-trial hearings.[543]

6.126 The QLRC preferred that there be provision for the child to be recalled if necessary. The QLRC gave an example of 'a new development close to the trial date' as a situation where it may be more efficient for the child to be recalled to give evidence on that issue only.[544] The Wood Royal Commission recommended that the child should be subject to recall if ordered by the judge.[545]

6.127 The Committee is wary of the possibility that the advantages of pre-trial recording would be undermined by a subsequent requirement to attend at the trial to give further evidence. The Committee suggests that it would be preferable that the child not attend the trial itself and that child complainants should be required to give evidence only where a further examination is required in circumstances that make an additional pre-trial recording unfeasible. In such circumstances, the usual special measures such as CCTV should be available.

Recommendation 40

The Committee recommends that the provisions for pre-trial recording suggested in Recommendations 34 and 35 should specify that a child witness is not required to attend the trial for further examination, unless further examination is required in circumstances that make an additional pre-trial recording unfeasible.

543 s.106I(1)(b) and 106K(5) *Evidence Act 1906* (WA).

544 QLRC, op cit, p 176.

545 ibid, p 1107.

6.128 The Committee is particularly mindful of the need for the special measures to be available for rural and remote children. In recommendation 30, the Committee suggested that the Attorney General audit the existing electronic equipment in courts in New South Wales to identify if there are any shortfalls. This recommended audit should ascertain whether rural and remote court rooms are adequately equipped to enable children's evidence to be pre-recorded and admitted in trial. If court rooms lack the facilities for pre-trial recording, the Committee suggests that mobile witness rooms, perhaps in appropriately fitted-out caravans, should be established to serve the needs of children who do not have easy access to a court with the necessary facilities. The mobile CCTV room referred to by the DPP could serve as a model.

Recommendation 41

The Committee recommends that the Attorney General establish mobile witness rooms, to be used by child witnesses in rural and remote areas that lack the necessary facilities for pre-trial recording of evidence.

Chapter 7 Proposed Specialist Court

The Director of Public Prosecutions submitted a proposal to trial a designated Children's District and Local Court for matters involving children who are victims of physical or sexual assault (referred to variously as 'the pilot project' or 'specialist court').[546] The specialist court seeks to address many of the problems experienced by child complainants who give evidence in a criminal trial. This chapter reviews the details of the DPP's proposal and considers the comments provided by other inquiry participants.

Features of the Proposed Specialist Court

7.1 The DPP's proposed specialist court has the following features:

- The court would retain the criminal standard of proof and all provisions of the *Evidence Act 1995*
- Trials would "probably" [547] be tried by a judge sitting alone (that is, there will be no jury)
- Mobile units would bring the specialist court to rural and remote areas
- Judicial officers and court staff would receive specialist training in the dynamics of child sexual assault, child development (including linguistics) and children's particular needs. Training relating to the relevant legislative provisions would also be included.
- Prosecutors would be specifically trained in child sexual assault issues and children's development issues and would meet with the child and carer at an early stage of the pre-trial period. There would be a focus on maintaining continuity of prosecutors.
- An independent expert interviewer would conduct the investigative interview and assess child protection issues and the child's special needs at court. The expert interviewer would provide the electronic copy of the interview to the police, and advise DoCS of child protection needs [This aspect is discussed separately below]
- The judge and counsel would hold a pre-trial hearing to ensure all parties are ready to proceed and the child's needs are being catered for in terms of court preparation and special measures before the trial date is fixed
- There would be a presumption that the special measures provided by the *Evidence (Children) Act 1997* would be used by the child if the child chooses

546 Submission 27, pp 13 – 17.

547 ibid, p 13.

- The courtrooms would be fully equipped with high standard electronic facilities
- Court staff would be trained in the operation of CCTV and audio and video recording technology
- The child would not be called to give evidence at committal hearings
- There would be a clarification of the role support persons. Two support persons would be permitted: one a professional counsellor or witness support officer, and one an adult friend or family member of the child.
- Disrobing of counsel would be required.
- Proceedings would have scheduled breaks consistent with the child's needs.
- There would be a child-friendly waiting area separate from areas where the accused and his or her supporters would be.[548]

7.2 The DPP explained the rationale for his proposal at some length, noting the following benefits:

- designated judicial officers having expertise in hearing child sexual assault matters, having a thorough knowledge of the legislative provisions relating to children and the eradication of superfluous legal argument in relation to the utilisation of the provisions and effective control of the questioning and cross-examination of the child witness. This would lead to a reduction in delays for child sexual assault trials and avoid Local Court matters adjourning part-heard;
- avoidance of misdirections being given to the jury during the summing up and subsequent successful appeals to the Court of Criminal Appeal on this point;
- cost effective use of electronic equipment and avoidance of delays and change of venues (particularly in country courts) due to equipment malfunction and lack of expertise of court staff;
- the fast tracking of matters involving children. This would ensure that the child's memory is not affected by delays and that the matter is dealt with swiftly to allow the child to be able to move on from the abuse and the court system;
- children have every opportunity to give their testimony and ensures that re-traumatisation by the legal process is minimised. [549]

548 Cowdery, Submission 27, pp 13 – 16.

549 Submission 28, p 14.

7.3 The DPP further argued that

> …the uniqueness of child sexual assault prosecutions with their legal requirements and legislated rights for special provisions for children increasingly requires adequate time, expertise, knowledge and facilities that would best be managed by having designated courts and judiciary.[550]

7.4 No drawbacks were identified by the DPP and he did not consider that the proposed pilot project would create unfair disadvantages to the accused.[551] The DPP noted that precedents for specialist courts already exist in New South Wales in the Children's Courts and the pilot Drug Court.[552]

7.5 The DPP emphasised that his proposal is for a **pilot**, or trial, of a designated court. The objective would be to examine the success of the model in improving the experience of child complainants without jeopardising the fairness of the trial:

> For that reason this proposal is put forward as a trial, as a pilot, as an experiment of a way in which we might be able to reduce some of the present difficulties and disadvantages that we face by running these cases through the ordinary court system.[553]

Expert interviewer

7.6 One aspect of the DPP's proposal that attracted particular attention was the suggested 'expert interviewer' role. The DPP proposed that an independent expert interviewer be involved in the interviewing of child sexual assault complainants as part of a specialist local and district court. The objective would be to maximise the quality of the interview of the child and allow for child protection needs to be assessed at the same time. The Manager of the WAS explained the proposal as follows:

> We have suggested that [the expert interviewer] would be involved in the initial interviewing of the child, would be an expert in forensic interviewing of children and would conduct the initial interview. They would not be involved in conducting the actual investigation after that interview had taken place but they would be in a prime position to also assist in assessing the child's needs for when they then are required to go to court as a witness and would be able to provide the court with an assessment of those needs so that information is available so that a plan can be put in place for that child's ongoing well-being and referral to appropriate services, and then for the court to be assisted in adjusting the process to meet the needs of the child… [The expert interviewer] would be needing to

550 ibid.

551 Cowdery, Evidence, 26 March 2002, p 9.

552 ibid.

553 ibid.

> provide information to the child protection agency about the child protection needs of the child.[554]

7.7 The DPP envisaged that the independent expert interviewer would not replace the Joint Investigation Response Teams, but would work closely with them:

> We should not abandon good ideas and structures that are in place, but we are probably adding another layer to that and that would increase the resources that are available.[555]

7.8 The views of inquiry participants concerning the pilot specialist court, including the expert interviewer, are detailed below.

Stakeholder Views on the Proposed Specialist Court

7.9 The Committee discussed the DPP's proposal with a number of other inquiry participants during the public hearings. Most participants considered that a specialist jurisdiction could address many of the ongoing problems facing child sexual assault complainants that have been identified in this report, such as the lack of understanding among court and judicial officers of child development and children's reactions to sexual assault. The specialist training of prosecutors and judicial officers and the increased use of special measures were seen as advantages of the proposed model. Detailed comments are canvassed below.

Support for a specialist court

7.10 The Department of Community Services noted the following advantages of a specialist court:

> The benefit of a specialist court is that the judiciary and regular practitioners gain an understanding of the complex issues that surround child sexual assault, and develop expertise and know-how in dealing with child witnesses and their evidence. A specialist court would be better able to understand common offender and victim behaviours as "grooming" and "accommodation syndrome".[556]

7.11 The Police Service was enthusiastic about the potential for a designated court to improve the expertise of court professionals:

> **Mr Heslop:** I would support that wholeheartedly. I think if we look at the investigation and management of child abuse cases, we have people at the front end – police officers and DOCS officers who are trained in the development stages of children, including cognitive development and a whole lot of other

554 Purches, Evidence, 26 March 2002, p 10.

555 ibid, p 11.

556 Submission 70, p 14.

> things dealing with children – but you get to a certain point and the people thereafter do not have similar training…[557]

> Improved training for judges and magistrates about the dynamics of sexual assault and the impact of intra-familial sexual abuse would assist in court practices. There are sound arguments for Courts to establish a specialist unit to deal with matters relating to the sexual abuse of children and reasons for a different approach when dealing with child sexual assault matters. Less traditional ways of testing evidence for example may be considered. Also in these court matters, disrobing (no wigs or gowns) by the judge and counsel may also be possible…[558]

7.12 Dr Cashmore also saw the potential for the pilot court to enhance the understanding of child development amongst judicial officers and counsel:

> My view is that there is value in trying this out, taking on board the caution I referred to before, to the effect that you often get the best results out of a new model with the best selected people operating it. I think there is value in having specialist judges and prosecutors who understand the dynamics and nature of child sexual assault matters; children's strengths and vulnerabilities; and the legislation and the purpose of that legislation to allow children's evidence to be heard. One comment that we have heard from some judges is that this whole process has gone too far. I would assume that judges with those sorts of views may not elect to work in that particular area.[559]

7.13 Professor Parkinson expressed support for the proposal and suggested that selection of the 'right' personnel would be essential to the success of the pilot:

> I read the Director of Public Prosecutions' submission and I was very impressed by it; I think it is an excellent idea. May I suggest it is not just the issue of training that is helpful, but also selection. This is not an area which is easy to work in; nobody pretends that it is. And I am sure that dealing with child witnesses is not easy. There will be some judges in each court who are more temperamentally suited than others to be specialists in such a program. If one can, as part of this whole model, have some sensitivity to who might be most appropriate to act as judicial officers in the pilots and who might be most suitable to have other official roles, I think that would be most beneficial.[560]

7.14 Dr Cossins provided extensive comments on the DPP's proposed pilot project, with her starting point being general support for the proposal:

> Broadly, I am in agreement with the DPP's proposal for a designated court for hearing child sexual assault matters, since I think that a specialist court is the only answer for dealing with the unique problems associated with prosecuting child sex offences. Since specialist courts do exist in some overseas jurisdictions (notably,

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557 Evidence, 3 May 2002, p 7.

558 Submission 82, p 7.

559 Cashmore, Evidence, 19 April 2002, p 9.

560 Evidence, 19 April 2002, p 17.

> Manitoba, Ontario, San Diego, and South Africa) I think it would be important to learn from the evaluations that have been made of such courts…[561]

7.15 Dr Cossins identified the following advantages of various elements of the DPP's proposed pilot project:

> *Specially trained staff including designated judges*: would be essential to combating the misunderstandings and misconceptions about the developmental and intellectual capacities of children; would assist in minimising secondary trauma to complainants.
>
> *Judge only trials*: would address the prejudicial effect of judicial warnings on juries, and, as the DPP's submission states, avoid misdirections to juries and appeals on that basis; judges who receive training about the effects of CSA on children's behaviour are less likely to be influenced by defence counsel attempts to misconstrue children's behaviour/ delays in complaint; might meet the aim of increasing conviction rates.
>
> *Pre-trial hearings:* would reduce delays as a result of ill-prepared parties; would assist in minimising secondary trauma to complainants if contact is established between the prosecutor and child at this early stage.
>
> *Presumption in favour of use of CCTV:* I consider that the mandatory use of CCTV to enable a complainant to give [evidence in chief and be cross examined] from a "remote room" is essential for reducing secondary trauma to the complainant…
>
> *Non-appearance of child complainant at committals:* this achieves the aim of minimising secondary trauma to complainants…
>
> *Specialist prosecutors:* would be essential for minimising secondary trauma by establishing contact with the child prior to the trial and may increase prosecution rates due to specialist expertise…[562]

7.16 Dr Cossins also suggested that a specialist court could be useful in better regulating the type of cross-examination that a child victim was subjected to.[563] She argued that a judge trained in children's development, who is aware of the difficulties caused for children when they are questioned in a repetitive or confusing manner, may be more likely to intervene to prevent unfair questioning:

> I think if we had designated judges who were appropriately trained – I think that appropriately trained staff are essential to combating the misunderstandings and misconceptions to do with the developmental and intellectual capacities of children. I think that having type of staff in a designated court would assist in minimising secondary trauma to victims.[564]

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561 "Answers to proposed questions", document tendered by Dr Cossins, 23 April 2002, p 16.

562 "Answers to proposed questions", document tendered by Dr Cossins, 23 April 2002, pp 16 - 17.

563 Evidence, 23 April 2002, p 11.

564 Evidence, 23 April 2002, p 12.

7.17 The Women's Legal Resource Centre also expressed support for the pilot project:

> From the feedback we get from community workers and our clients, the trialling of something like that could be useful on many levels, including the training given to all the professionals involved.[565]

Concerns raised by stakeholders

7.18 While noting the potential advantages of the proposed model, the Commissioner for Children and Young People expressed general scepticism about the ability of the pilot project to achieve a broader solution to the trauma experienced by child sexual assault complainants in the criminal justice system:

> I think there are a number of positive aspects of the proposed pilot project. In particular, the DPP … stated that the purpose of the pilot or a specialised court would be to minimise the trauma to children in sexual assault hearings and to maximise the opportunity for achieving the best possible outcomes. However, I do not think that it is necessary to establish a specialist court in order to achieve those aims. The weakness, from my point of view, of the proposal is the flawed assumption on which it is based, which is if we just load up more and more expertise and specialists into the court process or into the prosecutorial process that we will provide a complete solution to children's involvement in child sexual assault prosecutions. I do not think it will.[566]

7.19 Some participants had concerns about specific aspects of the proposed specialist court. The representatives of the Legal Aid Commission of New South Wales commented on the potential risk of specialist judicial officers losing their objectivity, but conceded that it is already the case that for most judges, up to fifty per cent of trials are child sexual assault matters.[567]

7.20 Another potential disadvantage of specialist courts is that personnel can become very narrowly focussed and isolated from general trends in the law. The DPP addressed this concern:

> I understand those concerns and if these initiatives are not properly managed there is a risk of people becoming indoctrinated in their own little patch and losing sight of the wider picture. But a proposal like this could be managed in such a way that once the systems are in place the personnel can be rotated through it. So the magistrates, judges and prosecutors could do a stint in the special court, acquire the necessary skills and expertise to conduct that court and put that into practice for a time at all levels and then be rotated out of it and somebody else rotated in. That would have the side benefit that people who have done this period of time in this special court would then take with them the skills, knowledge and expertise that they have developed in the special court and then

565 Carney, Evidence, 2 May 2002, p 11.

566 Calvert, Evidence, 17 May 2002, p 7.

567 Humphreys, Evidence, 3 April 2002, p 7.

> would be in a position to apply them more generally to similar circumstances in the wider system.[568]

7.21 Professor Parkinson also noted that 'burnout' could occur:

> I would suggest that the biggest problem could be burnout. I would not like to be sitting day after day hearing these cases. All criminal matters are distressing, I am sure, where there offences against the person, but these must be especially so, and, of course, in many cases they are especially complex.
>
> So I think there is a need to combine this sort of work with other work. I do not think necessarily that judges need to sit full time and do only matters related to this specialist children's jurisdiction, but I think it is a good idea to have specialist judicial officers, rather than rotating.[569]

7.22 Dr Cossins observed that as the pilot project preserves the adversarial approach, certain problems faced by child sexual assault complainants would continue:

> *Adversarial trials:* unlikely to minimise the secondary trauma experienced by complainants during cross-examination; unlikely to assist the fact finding process and deal with obstacles associated with various exclusionary rules of evidence. Unlikely to encourage increased reporting of CSA; may continue to be a barrier to increased conviction rates…[570]

7.23 Ms Syme identified a difficulty if defence counsel were required to undergo training in child development and sexual assault issues before representing defendants in the specialist court:

> I read in Mr Cowdery's submission about training staff, prosecutors and defence counsel. That is an interesting concept, but the issue surely is that someone who is accused of a sexual assault on a child has the right to choose whatever counsel he or she wishes. If that particular counsel is not specially trained in child sexual assault matters I would be surprised if any court would not give that counsel leave to appear for the defendant. That would be quite a departure from the way that we currently do things.[571]

7.24 The Women's Legal Resource Centre considered that the pilot project could go further, and enable a **victim's advocate** to be involved:

> If you had expert interviewers, this is where you may be able to broaden it to include people who may be seen to assist the victim in court as a victim's advocate or the model that they were proposing that the professional person be with the

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568 Cowdery, Evidence, 26 March 2002, p 9.

569 Parkinson, Evidence, 19 April 2002, p 18.

570 "Answers to proposed questions", document tendered by Dr Cossins, 23 April 2002, pp 16 - 17.

571 Evidence, 3 April 2002, p 21.

> child in the other room when they are giving the evidence and be able to tell the judge that the child did not understand the question.[572]

7.25 In commenting on the DPP's proposal for a specialist jurisdiction, the Legal Aid Commission cautioned against any suggestion that judge-alone trials should replace trials by jury for child sexual assault prosecutions:

> …[The] right to trial by jury is one of the fundamentals we have in the justice system. To suggest that somehow we would remove child sexual assault allegations from the normal criminal justice system has great difficulties in my view…[573]
>
> The suggestion in relation to the concept of judge alone and mandatory judge alone is what strikes me as being the most difficult aspect of the proposal… I would be prepared to countenance, perhaps, a trial where a specialised judge perhaps or a number of judges received specialised training. It strikes at the very heart of what we regard as being the rights of the accused in the criminal justice system. I am speaking here as a representative of accused people, which is the role I perform in the Legal Aid Commission…
>
> I am suggesting to you I am not necessarily opposed to the idea of putting matters into a list, having judicial officers with specialised training and dealing with those matters with specialised officers familiar with closed-circuit TV and the other.[574]

7.26 The Department of Community Services' key concern related to the proposed expert interviewer. In particular, DoCS identified as a disadvantage the risk that child complainants could face an increased number of interviews, which would be contrary to best practice.[575]

7.27 Additional problems with the DPP's proposal for an expert interviewer were identified by DoCS, including:

> - The issues surrounding the possibility of the 'independent expert interviewer' contaminating evidence in the process of trying to jointly conduct both a therapeutic and a forensic interview…
> - Possible role confusion between the 'independent expert interviewer' and JIRT/DOCS workers
> - The potential to increase the number of interviews the child will undergo and number of people interviewing the child…[576]

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572 Carney, Evidence, 2 May 2002, p 11.

573 Humphreys, Evidence, 3 April 2002, p 5.

574 ibid, p 7.

575 Supplementary submission 70, 5 July 2002, p 1.

576 ibid, p 2.

7.28 DoCS referred the Committee to the Queensland Law Reform Commission QLRC report of December 2000, which examined a similar "child communicator" approach and concluded that rather than involving an additional professional in the investigation and prosecution, the existing professionals should improve their interaction with children:

> It was the Commission's view that an increased awareness on the part of the court and members of the legal profession of appropriate strategies for communicating effectively with children is preferable to the 'child communicator' technique.[577]

Committee's View on the Proposed Specialist Court

7.29 Having considered the various opinions about trialling a specialist court for cases involving personal assaults on children, the Committee is of the view that there is significant merit in the proposal. Throughout this report, the Committee has identified obstacles to the successful prosecution of child sexual assault offences and features of the current system which cause distress and hardship to child sexual assault complainants. A specialist jurisdiction could address many of these identified problems, as detailed in the following paragraphs.

7.30 In the Committee's opinion, a specialist jurisdiction could, without impinging on the rights of the accused, provide the following benefits to address shortcomings in the current system for prosecuting child sexual assault:

- specialist training of judicial officers would enable magistrates and judges to recognise that children can make reliable witnesses and would increase their awareness of current knowledge about how to maximise the detail, accuracy and reliability of children's evidence (discussed in paragraphs 4.202 - 4.203 and 1.43 -1.49). This would include an understanding of the limits of fair cross-examination and encourage an appropriate level of judicial intervention in unfair cross-examinations of children (see paragraphs 3.39-3.57).

- judicial and court officer training would ensure that the particular needs of child complainants are understood and catered for, such as scheduled breaks in hearings.

- judicial officers would be aware of, and supportive of the use of, all available special measures to minimise the distress of child witnesses (as identified in paragraph 6.65).

- court officers would be trained in relevant child development issues as well as the operation and maintenance of special equipment (paragraph 6.61).

- increased judicial expertise in the interpretation and application of rules of evidence such as tendency evidence would help reduce the incidence of successful appeals about the admission of evidence.

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[577] Supplementary submission 70, 5 July 2002, p 2.

- increased judicial expertise in the appropriate warnings to be directed to juries would help reduce the incidence both of inappropriate warnings based on misconceptions about reactions to child sexual assault, and of successful appeals arising from an incorrect or absent warnings (paragraphs 4.204-4.208).

- an appropriate child-friendly court environment would be established, including remote witness rooms and waiting areas (paragraph 5.24 – 5.32).

- the expertise of prosecutors would be enhanced by specialist training in child development and child sexual assault issues. Development of trust and rapport between the prosecutors and the child complainant would be encouraged through meeting with child complainants early in the process and a focus on maintaining continuity of representation (paragraphs 2.78 and 2.46).

7.31 For all of these reasons, the Committee favours trialling a specialist jurisdiction. The Committee proposes a specialist jurisdiction that would largely reflect the model suggested by the Director of Public Prosecutions, with two exceptions: judge-alone trials and the independent expert interviewer.

7.32 In proposing the pilot project, the DPP suggested that the specialist court would "probably" involve judge-alone trials.[578] The Committee acknowledges that there are a number of merits to this proposal. The absence of a jury would remove the need for jury directions, and therefore would be likely to limit the number of appeals based on misdirections of juries that is a common feature of child sexual assault cases. It would also be likely to result in cross-examinations being 'toned down', as counsel will not be seeking to use dramatic techniques to convince the jury, and that would undoubtedly be of benefit to child witnesses.

7.33 There appeared to be some support amongst witnesses for judge-alone trials. For instance, Commander Heslop, of the Child Protection Enforcement Agency, observed:

> I think that is an interesting proposition. As you say, you can train everybody else but you might have 12 members of a jury who are drawn from all walks of life.[579]

7.34 Ms Freckleton, from the Child and Adolescent Sexual Assault Counsellor's network, was also asked for her opinion on this matter:

> **Mr Hatzistergos**: What do you think about a proposal that would involve child sexual assault matters being prosecuted without juries? Does that have some attraction? What about specialist tribunals, for that matter?
>
> **Ms Freckelton:** That is quite a good proposal. The education and understanding of what is required in those circumstances is the first issue and that piece is often missing.[580]

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578 Submission 27, p 13.

579 Heslop, Evidence, 3 May 2002, p 8.

7.35 However, the proposal for child sexual assault trials to be tried without a jury would be likely to face significant opposition as it would result in the abolition of a key civil liberty – trial by jury. In evidence before the Committee, the Legal Aid Commission cautioned against any suggestion that judge-alone trials should replace trials by jury for child sexual assault prosecutions:

> …[The] right to trial by jury is one of the fundamentals we have in the justice system. To suggest that somehow we would remove child sexual assault allegations from the normal criminal justice system has great difficulties in my view…[581]
>
> The suggestion in relation to the concept of judge alone and mandatory judge alone is what strikes me as being the most difficult aspect of the proposal… I would be prepared to countenance, perhaps, a trial where a specialised judge perhaps or a number of judges received specialised training. It strikes at the very heart of what we regard as being the rights of the accused in the criminal justice system. I am speaking here as a representative of accused people, which is the role I perform in the Legal Aid Commission…
>
> I am suggesting to you I am not necessarily opposed to the idea of putting matters into a list, having judicial officers with specialised training and dealing with those matters with specialised officers familiar with closed-circuit TV and the other.[582]

7.36 The Committee did not receive a great deal of evidence in regard to the proposal for judge-alone child sexual assault trials and is therefore unable to form a conclusion on this matter. However, the Committee believes that there would be value in the proposal being the subject of a fuller level of examination and debate. The Committee therefore recommends that the Attorney General convene an appropriate forum, such as a Working Group, to assess the merits of the proposal for the pilot project to incorporate a provision for judge-alone trials.

Recommendation 42

The Committee recommends that the Attorney General convene an appropriate forum, such as a Working Group, to assess the merits of the proposal for the pilot project to incorporate a provision for judge-alone trials.

7.37 In relation to the independent expert interviewer, the Committee has carefully considered the DPP's proposal but is unable to support the suggestion. The Committee is concerned that if the expert interviewer were to operate in addition to the JIRTs, as is suggested by the DPP, there would be a potential for duplication of activities at the interview and child protection stages of the complaint. The JIRTs are already responsible for interviewing child complainants, investigating complaints, and instigating child protection measures. The

580 Evidence, 23 April 2002, p 20.

581 Humphreys, Evidence, 3 April 2002, p 5.

582 ibid, p 7.

Committee therefore considers that having an expert interviewer also interview the complainant and develop child protection options would be unnecessary. The Committee considers that any specialist knowledge and expertise proposed to be held by an expert interviewer should also be held by JIRT officers. Where there are inadequacies in JIRTs, the Committee believes that resources should be directed at rectifying the training and experience shortfalls in JIRTs rather than creating an additional role.

Committee's proposed model

7.38 The pilot specialist court recommended by the Committee would have the following characteristics:

- retention of existing criminal standard of proof and application of the *Evidence Act 1995*
- trial by jury, unless both parties agree to trial by judge alone
- selection of interested judicial officers, prosecutors and court staff, with relevant specialised training in child development and child sexual assault issues
- pre-trial hearings between judges and counsel to determine the special needs of the child and readiness to proceed
- presumption in favour of using special measures, including admission of pre-recorded evidence and support persons
- the equipping of the court/s with high standard electronic facilities for the use of special measures and proper training of staff in the use of the equipment
- mobile units to ensure that rural and remote child witnesses have access to electronic facilities
- specially trained prosecutors with a focus on continuity of representation and early contact with the complainant
- presumption that children will not be required to give evidence at committal hearings
- appropriate, child-friendly facilities, furnishings and schedules, including disrobing of judicial officers and counsel
- to guard against burn-out of judicial officers and staff, a rotation system could be employed, or specialist judges and officers could serve part-time in the specialist court, and part-time in general duties, following their training and induction. For example, they could sit for several weeks or months in the specialist court, followed by a similar period outside it.

Recommendation 43

The Committee recommends that a pilot project be established to trial a specialist child assault jurisdiction with the following characteristics:

- retention of existing criminal standard of proof and application of the *Evidence Act 1995*
- trial by jury, unless both parties agree to trial by judge alone
- selection of interested judicial officers, prosecutors and court staff, with relevant specialised training in child development and child sexual assault issues
- pre-trial hearings between judges and counsel to determine the special needs of the child and readiness to proceed
- presumption in favour of using special measures, including admission of pre-recorded evidence and support persons
- the equipping of the court/s with high standard electronic facilities for the use of special measures and proper training of staff in the use of the equipment
- mobile units to ensure that rural and remote child witnesses have access to electronic facilities
- specially trained prosecutors with a focus on continuity of representation and early contact with the complainant
- presumption that children will not be required to give evidence at committal hearings
- appropriate, child-friendly facilities, furnishings and schedules, including disrobing of judicial officers and counsel
- to guard against burn-out of judicial officers and staff, a rotation system could be employed, or specialist judges and officers could serve part-time in the specialist court, and part-time in general duties, following their training and induction. For example, they could sit for several weeks or months in the specialist court, followed by a similar period outside it.

7.39 The Committee emphasises that the proposed specialist court is intended to be a **pilot project** only. The purpose of the pilot project would be to examine whether the measures suggested would improve the experience of child sexual assault complainants and/or the success rates of prosecutions. The Committee considers it critical that the specialist jurisdiction be closely evaluated before a decision about its permanent implementation is made. Ultimately, if the pilot specialist court is unsuccessful in meeting its objectives, or if unanticipated drawbacks become evident, then it is open to the Government to alter particular features of the model or even decide against its implementation on a permanent basis.

Recommendation 44

The Committee recommends that an extensive evaluation be conducted, after an appropriate trial period, of the success of the pilot project to inform the decision about whether to establish the specialist court on a permanent basis.

Implementation of a pilot specialist court

7.40 The Committee notes that the DPP's proposed pilot project relates to prosecutions of both child sexual and physical assault. The Committee is unable to comment on the proposal as it relates to child physical assault as this falls outside of the Committee's terms of reference. However, the Committee imagines that child victims of physical assault would face many of the same issues that arise for child sexual assault complainants, particularly in instances of intra-familial assault. The Attorney General may therefore wish to consider the appropriateness of including physical assault cases.

7.41 In relation to the resources required for the pilot project, the DPP advised the Committee that he anticipated the costs would be minimal:

> If it is organised properly, I think it could be virtually cost-neutral apart from training because it would take existing personnel, existing resources, the existing system and just adapt one portion of that.[583]

7.42 The Committee believes that implementation of the pilot specialist court would involve some establishment costs. Funding would be required for the fit-out of an appropriate space with child-friendly furniture and high grade technology, as well as specialist training of personnel. However, the Committee agrees that the pilot project would be unlikely to require a high level of expenditure.

7.43 On the question of which cases should be dealt with in the specialist court, Professor Parkinson made the following observation:

> In a sense, it may not matter very much. If one assumes that these cases are going to go to trial anyway, there is not a resource issue about whether they are heard in the specialist court or a general court. I would suggest that the policy which might lead one towards this reform is concern about children as victims of personal violence offences. That might be the obvious cut-off. One could instead take a view that if the child was the primary witness to an offence and the child was under 16, that would be a candidate for such a court. I am thinking here of the child who witnesses an armed robbery or is not a victim. But I guess the same issues apply: one needs to deal sensitively with children as witnesses. I think one would want to deal with cases where the child is the primary witness or their evidence is crucial to the prosecution…
>
> I always like simple rules if they will work, and I see no reason why the simple rule of under 16 should not work. Sixteen becomes the age at which we begin to think

583 Evidence, 26 March 2002, p 9.

> of young people as almost adults, but under 16 I think there is room for saying that special protection should apply.[584]

7.44 The Committee notes that Professor Parkinson's suggestion that all assault cases involving child victims under the age of sixteen should be dealt with in the specialist court reflects the existing provisions for special measures under the *Evidence (Children) Act 1997*. That Act provides that giving evidence by CCTV is available to all children under the age of 16 years, plus children between the ages of 16 years and 18 years if the offence to which the evidence relates was committed before the child reached 16 years.[585] The Committee considers this to be an appropriate approach.

Recommendation 45

The Committee recommends that the pilot specialist court deal with all child sexual assault cases involving witnesses who are under the age of 16, plus child witnesses between the ages of 16 years and 18 years if the offence to which the evidence relates was committed before the child reached 16 years.

7.45 **The Committee observes that a specialist court on its own would not address the full range of problems identified by the Committee in this report. The Committee emphasises that many of its recommendations relating to special measures and evidentiary law reform should be implemented in addition to the proposed specialist jurisdiction.**

7.46 The Committee has summarised its recommended approach to child sexual assault prosecutions in the final chapter.

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584 Parkinson, Evidence, 19 April 2002.

585 See s 18(1A) of the *Evidence (Children) Act 1997*.

Chapter 8 Alternative Methods of Prosecuting and Punishing Child Sexual Assault Offences

This chapter examines alternatives to the current approach to prosecuting and punishing child sexual assault offences, as required by Terms of Reference 4 (alternative procedures for the prosecution of child sexual assault matters including alternative models for the punishment of offenders) and 5 (possible civil responses to perpetrators and victims of child sexual assault). Alternatives such as reducing the standard of proof, introducing an inquisitorial system and civil litigation are measures proposed as means of circumventing the poor prosecution and conviction rates for child sexual assault. Unfortunately, few of the submissions received and evidence provided contained information relating to these terms of reference. The Committee's analysis is therefore less comprehensive than it would have liked.

Alternative Approaches to Prosecutions

Proposals for reducing the standard of proof

8.1 A small number of submissions suggested that the standard of proof for prosecutions, which is 'beyond reasonable doubt', should be altered. This is proposed as a way to overcome the difficulties in meeting the criminal standard. Instead, they suggest that the civil standard, 'on the balance of probabilities', should be used for child sexual assault trials.

8.2 Despite being conscious that 'beyond reasonable doubt' is a hard test to meet, the Committee cannot agree with this proposal. The threshold for a finding of guilt is an important pillar of the legal system in New South Wales, providing vital protection against wrongful conviction. The difficulty in meeting this standard for child sexual assault prosecutions is obvious: the absence of corroboration and witnesses and the age of the complainant can easily combine to create reasonable doubt, thus thwarting the prosecution. However, the Committee considers that it would be anomalous and undesirable for the standard of proof to be reduced for a single type of offence.

Proposals for an inquisitorial system

8.3 Other participants advocated that the adversarial system is inappropriate and ineffective for child sexual assault prosecutions, and that an inquisitorial system should replace it. Proponents of this approach suggest that it would be less traumatic for the child, and more likely to achieve a just outcome than the current system.

8.4 The Women's Legal Resource Centre favoured the following model:

> WLRC would support the trial of an inquisitorial model for prosecuting child sexual assault offences involving child witnesses. The model would involve the judge acting as a neutral investigator and intensively case managing the prosecution process in a similar way to a coronial inquiry. In this way the balance

> of power would be neutralised and the jury and evidentiary issues relating to juries would be removed.[586]

8.5 Opposition to this model was voiced by the Legal Aid Commission of New South Wales:

> It has been suggested that the adversarial system is not appropriate in cases involving child abuse, and that an informal tribunal conducting proceedings similar to a coronial inquiry should be used instead. However, any such tribunal must inevitably restrict the right of the accused to test the case against him. As the implications for an accused of a finding of guilt are of such significance, any restriction on his or her right to cross-examine prosecutions witnesses would violate his or her right to a fair trial.[587]

8.6 The Committee understands the perceived attractions of the inquisitorial model for child sexual assault prosecutions. However, the Committee considers that the practical and philosophical difficulties in applying such a model to a single category of offence are insurmountable.

Civil Remedies

8.7 A number of civil responses are currently available to victims of child sexual assault, including applications for victims compensation and civil claims for damages for assault. These can be pursued in addition to criminal prosecutions.

8.8 One attraction in seeking civil redress for child sexual offences is that the standard of proof is lower than that required for criminal prosecutions: the complainant's case must be proven 'on the balance of probabilities' rather than 'beyond reasonable doubt'. This can improve the chances of successful action against an offender.

8.9 However, among participants in the Inquiry, there was substantial opposition to **relying on** civil responses to child sexual assault. Some witnesses argued that focusing on civil remedies would require the victim to take responsibility for dealing with the perpetrator, and would effectively decriminalise the offence. For example, the Education Centre Against Violence submitted:

> As sexual assault is a crime it is important to maintain a criminal justice approach and for sexual assault to remain a community concern and not a private and individual concern.[588]

8.10 The Department of Juvenile Justice held a similar view:

> Pursuing a civil remedy places the onus on the victim to redress the wrong perpetrated against them, in contrast to the State censoring such behaviour by pursuing criminal sanctions.[589]

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586 Submission 67, p 9.

587 Submission 57, pp 6 – 7.

588 Submission 40, p 15.

8.11 The DPP also noted that criminal prosecutions were a means of reflecting community attitudes about criminal behaviour:

> The criminal justice system must continue to be a central element in the community's response to child sexual assault. Although it is somewhat limited in preventing criminal behaviour, its educative function and its role in the development and maintenance of community attitudes is vital.[590]

8.12 A civil response was considered by some to be incommensurate with the seriousness of the crime of child sexual assault. In this respect, the Department of Juvenile Justice stated:

> It is the view of the department that sexual assault is one of the most serious offences in the criminal calendar, and therefore it would never be appropriate to seek to deal with such offending by recourse to methods other than those available within the criminal justice system.[591]

8.13 The Northern Sydney Child Protection Service also held this view:

> Child sexual assault is a criminal offence. Due to the nature and impact of child sexual assault on the victim and their families, a criminal justice approach must be maintained. The fact that the current criminal justice approach does not necessarily result in successful prosecution of perpetrators should result in a review of the adversarial approach to hearing child sexual assault matters, and not in a consideration of decriminalising the approach.[592]

8.14 Participants identified the benefits that flow to the community and to the victim from criminal prosecutions of child sexual assault that are not achieved through civil remedies. For example, the DPP cited a number of advantages of the criminal justice approach:

- potential conviction
- 'Working with Children Check' for offenders
- Paedophile Offender Registration
- stopping the abuse for the victim(s)
- ongoing protection of the child
- protection of other children in the community
- assisting in the recovery process of the victim
- meeting community expectations

589 Submission 45, p 2.

590 Submission 27, p 4.

591 Submission 45, p 1.

592 Submission 60, p 8.

- public interest
- community education
- rehabilitation of the offender
- reducing recidivism
- acting as a deterrent
- punishment for the crime committed.[593]

8.15 The submission from the Department of Community Services quoted the *NSW Interagency Guidelines for Child Protection Intervention 2000*, which outlines the flow-on effects of criminal charges for child sexual assault:

> While child protection intervention can protect a child and their family, often it is only the successful criminal prosecution or appropriate disciplinary action that protects other children from offenders. Access to mandated treatment and community supervision is dependent on successful outcomes in the criminal justice system. When an offender is charged with an offence, even if it does not proceed to court, this action may increase the ability of agencies to put in place other protective processes such as disciplinary proceedings and the Working with Children Check.[594]

8.16 The Committee has examined several particular civil remedies below, although it again notes that the information provided was very limited.

Civil litigation

8.17 One option for victims of child sexual assault is civil litigation against the perpetrator. A victim of sexual assault can take civil action against the offender for damages or compensation. In the case of children, a court can agree to someone else taking action on a child's behalf. Civil actions such as the tort of trespass to the person (that is, assault and battery) are remedies afforded by law to private persons when their private rights have been infringed. With a tort, the aggrieved person can seek damages or compensation for harm suffered, but the person responsible is not prosecuted and punished as for a criminal offence. Civil proceedings are commenced in the civil jurisdiction of a court of law by private individuals (or corporations) as distinct from criminal proceedings that are commenced by the State in the criminal jurisdiction of a court.

8.18 A number of participants considered civil action to be prohibitively expensive. The author of Submission 21, for example, stated:

> My concern would be that the cost of lawyers &/or barristers would in some, if not the majority of cases, mean that Justice for a complainant would come at a

[593] Submission 27, pp 3 – 4.

[594] Submission 70, p 2.

> hefty price. For those who could not afford such solicitors/barristers who specialise in the criminal arena, where would their justice be?[595]

8.19 The Education Centre Against Violence also considered expense to be an obstacle to civil litigation:

> Civil responses … are limited to those who can pay for legal representation and are thus not an option available to most victims of child sexual assault. Expanding civil responses to sexual assault potentially increases power imbalances. [596]

8.20 It was reported to the Committee that clients of the Women's Legal Resource Centre have in the past experienced difficulties in making civil claims due to the costs involved and the offenders' lack of assets:

> We also regularly advise clients about civil claims for damages against the offender or the offender's employer. There are many difficulties with these claims. It is very difficult to access solicitors to assist clients making these claims and the legal costs of making claims and the risk of a costs award against the victim, operate to make this avenue prohibitive for many clients. Further, these claims are only worth pursuing if the offender has substantial assets, which is not the reality for most offenders, or if the offences were committed in an institution which owed a clear duty of care to the victims. In reality, it is the experience of WRLC that only wealthy clients are able to make a civil claim for damages for child sexual assault perpetrated by wealthy offenders.[597]

8.21 The barrier created by the expense of civil action is seldom overcome by legal aid funding. The Legal Aid Commission explained that legal aid is usually not provided for civil assault proceedings, except in certain circumstances:

> … legal aid is not generally available for civil assault proceedings, except when questions of civil liberties arise, which includes assault by a person in a special position of authority. Legal aid may be available when wrongdoing on the part of some person or persons in authority has allow child abuse to occur or continue.[598]

Victims Compensation

8.22 Victims compensation is available to victims of crime, including child sexual assault, following a successful application to the Victims Compensation Tribunal (VCT). Administered by the Victims Services Unit of the Attorney General's Department, the VCT is responsible for making determinations and awards for victims compensation and counselling under the *Victims Support and Rehabilitation Act 1996*.

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595 Submission 21, p 20.

596 Submission 40, p 15.

597 Submission 67, p 11.

598 Submission 57, p 7.

8.23 The Director of Victims Services, Ms Claire Vernon, explained the amount of compensation that can be awarded to child sexual assault victims:

> Statutory compensation is available for victims of sexual assault. The award ranges from $7,500 for category 1 sexual assault to a maximum of $50,000 for category 3 sexual assault. Child sexual assault victims will often be eligible for category 3 sexual assault if a pattern of sexual abuse is established.[599]

8.24 Ms Vernon advised the Committee that a criminal conviction was not necessary for victims compensation to be obtained, as long as the offence was proved on the balance of probabilities.[600]

8.25 The Combined Community Legal Centres (CCLC) expressed their support for the Victims Compensation Scheme:

> It has been the experience of Community Legal Centres that the Victim's Compensation scheme provides a helpful alternative to civil proceedings for compensation for many victims of child sexual assault. The scheme recognises that perpetrators rarely have the assets to make civil proceedings for compensation feasible, and instead provides a limited form of government funded compensation to redress some of the disadvantage suffered by the victim. One significant feature of the scheme is that the assessment of the application is conducted on written evidence and submissions, and does not require the victim to give evidence in person (and thus face further trauma).[601]

8.26 However, the CCLC also identified obstacles that prevent some victims accessing compensation:

> … [In] our experience a large number of victims of child sexual assault are not informed of their right to apply for victims compensation by the police or the agencies who initially receive their complaint.[602]

8.27 In addition, the CCLC considered the 2 year limitation deadline for filing applications to the VCT to discriminate against child sexual assault victims, as it is a crime characterised by delayed disclosure:[603]

> Although the Victims Support and Rehabilitation Act states that the limitation should be extended for victims of sexual assault and child abuse unless there is no good reason to do so, in practice the Tribunal has not always interpreted these provisions liberally and has refused to grant extensions for deserving cases (cf *Harvey v Victims Compensation Tribunal* 2000).

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599 Submission 22, p 5.

600 ibid, p 4.

601 Submission 64, p 14.

602 ibid, p 12.

603 ibid, p 14.

> We consider that **in addition to** the current provisions regarding the grant of extensions of time, the limitation date for all child victims should be suspended until the child turns 18, to accord with the civil standard of limitations.[604]

8.28 The Women's Legal Resources Centre also criticised the statutory time limit for claims:

> The reforms to the *Victims Support and Rehabilitation Act 1996* over the last 6 years have left many victims of child sexual assault unable to access compensation for their injuries. It is the experience of WLRC, that the Victims Compensation Tribunal strictly enforce the two year time limit in which to apply for victims compensation despite there being a presumption in s.26(3)(b) of the Act that leave be given to victims of sexual assault out of time.[605]

8.29 Some Inquiry participants were concerned about reduced eligibility for victims compensation for child sexual assault victims for psychological injury. The Legal Aid Commission submitted that sexual assault victims' access to compensation for non-permanent psychological injury had been curtailed by recent amendments to the *Victims Compensation Act 1996*:

> Under these amendments compensation for non-permanent psychological injury is only available to victims of armed robbery, abduction or kidnapping. This is despite the recommendation of the Joint Select Committee on Victims Compensation that compensation be retained for non-permanent psychological or psychiatric disorders in cases of sexual assault and domestic violence.[606]

8.30 Other witnesses were opposed to victims compensation for delayed complaints of child sexual assault. Dr Lucire commented:

> I would suggest that all financial rewards for delayed reports of under-age sexual contacts be removed. Compensation for violence and for proved incest could be left in. The huge payouts from victims' compensation can be a powerful motive for the personality disordered and greedy.[607]

Disciplinary proceedings

8.31 Disciplinary proceedings apply generally to New South Wales public servants by virtue of the *Public Sector Management Act 1988* and the *Public Sector Management (General) Regulation 1996*. A breach of discipline involves such things as: misconduct; consuming alcohol or drugs to excess; intentionally disobeying or disregarding a lawful order made or given by a person having authority to make or give the order; negligent, careless, inefficient or incompetent discharging of duties; or engaging in any disgraceful or improper conduct.

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604 ibid, p 15.

605 Submission 67, p 11.

606 Submission 57, p 7.

607 Submission 24, p 10.

8.32 Child sexual assault and many of the antecedents to child sexual assault perpetrated by a public servant in the course of employment would generally fall with the categories of misconduct or engaging in disgraceful or improper conduct. Outcomes available for breaches include a caution, reprimand, fine, reduction of salary, demotion, directed resignation or dismissal. Disciplinary action can commence after conviction for an offence, as well as where the prosecution was unsuccessful or unable to proceed due to insufficient evidence. As with other civil proceedings, disciplinary matters are judged on the civil standard, that is, the 'balance of probabilities'.

8.33 The Ombudsman has a statutory responsibility under the *Ombudsman Act 1974* to scrutinise disciplinary investigations that can be taken in regard to alleged perpetrators of child abuse who are employed by designated government and non-government agencies or other public authorities. 'Designated government agencies' include: the Department of Education and Training (including government schools), DoCS, the Department of Health, the Department of Sport and Recreation, the Department of Juvenile Justice, the Department of Corrective Services and area health services. 'Designated non-government agencies' include: non-government schools, child care centres, or residential child care centres.

8.34 The Ombudsman's submission to the Committee focused on the problems that have arisen as a result of court decisions to the effect that assessing the balance of probabilities requires consideration of impact on the employee if the conduct is proven.[608] The Ombudsman considers that, as a result of these decisions, the civil standard is becoming "more stringent, even to the point of approaching that for criminal matters".[609]

8.35 The court's approach, according the Ombudsman, gives insufficient consideration to the outcomes that could arise from **not** taking disciplinary action against the employee:

> This concentration upon the "gravity of the consequences" for the employee that would flow from a finding that the employee had committed the alleged conduct overlooks the possible serious consequences of exonerating an employee who had actually committed the conduct alleged, because the evidence available did not reach the increased stringency of the standard.[610]

8.36 The Ombudsman has recommended a risk management approach to performance management and misconduct, similar to that used in the Police Service. This would enable an employer to investigate an allegation, note the disciplinary breach on the employee's personal file, warn the staff member, and maintain supervision of the employee for an appropriate period. The Ombudsman suggested that this could be used for more minor breaches of discipline related to inappropriate conduct with children:

> While it is certainly the case that warning and supervision would not be adequate responses to cases of sexual assault, it should be noted that in cases where the alleged offence is not proved in criminal proceedings it may also be difficult to

608 Submission 26, p 2.

609 ibid.

610 ibid.

> prove in disciplinary proceedings. However, behaviour that is antecedent and preparatory to more serious offences, such as being alone with a child in a location that is not easily accessed or open to observation, can be dealt with as misconduct and some degree of risk minimisation can be achieved by prohibiting the staff member regarding such conduct and monitoring compliance with the prohibition.[611]

8.37 The Ombudsman pointed out that the *Public Sector Management Act 1988* and its regulations do not currently allow for warning and supervision as disciplinary actions, so legislative amendment would be required for provisions of this kind to be implemented.

Committee comment on civil remedies

8.38 The Committee understands that frustration about the failure of prosecutions can make civil responses seem appealing. However, the Committee considers that mechanisms such as victims compensation, civil litigation and disciplinary proceedings should be utilised only as a corollary to criminal prosecution, or where criminal prosecution is not feasible.

8.39 A civil remedy focus would carry with it serious drawbacks. Decriminalising child sexual assault would create a perception that the community does not consider such actions to be sufficiently serious to merit a community response. The expense of civil action would prevent many victims from accessing justice and the lack of assets of many perpetrators would often render the exercise unprofitable.

8.40 The Committee has noted the concerns of the Ombudsman concerning disciplinary action and his recommendation that the *Public Sector Management Act 1988* be amended to enable the public sector to incorporate a risk management approach in its disciplinary processes. In the absence of comments from other participants, the Committee is unable to fully assess the Ombudsman's recommendation, but considers his suggestion may have merit as a means of dealing with less serious inappropriate conduct with children. The Committee therefore proposes that the Premier consider the benefits of the approach suggested by Ombudsman, with a view to amending the *Public Sector Management Act 1988* if appropriate.

Recommendation 46

The Committee recommends that the Premier consider the recommendation of the Ombudsman that the *Public Sector Management Act 1988* be amended to enable the public sector to incorporate a risk management approach to disciplinary proceedings.

Alternative Models for Punishment and Treatment

8.41 The conventional penalty for child sexual assault is a prison term, a reflection of community attitudes regarding the seriousness of the crime and the danger posed by offenders. Maximum penalties range from two years for an act of indecency on a person under 16 years, to 25 years for persistent sexual abuse of a child.

611 ibid, p 3.

8.42 The role of imprisonment as a deterrent to criminals is a complex debate that is beyond the scope of this Inquiry. What is clear, however, is that the vast majority of convicted child sex offenders are released back into the community at the end of their sentence of imprisonment. The community interest therefore is in treating offenders to minimise, or if possible eliminate, their re-offending upon release.

8.43 The importance of therapeutic intervention for child sexual assault offenders was emphasised by Professor Briggs:

> British and American research shows that the average male offender commits about 558 offences before he is arrested at the age of 38 years. Between one in four and one in five boy victims becomes an offender. Given the social, health and economic costs of sexual abuse, it is in society's interests to provide treatment for victims and both young and adult offenders to try to prevent a life-long behavioural pattern from developing.
>
> Unfortunately, Australia-wide, there is a lack of treatment facilities, especially for young offenders, country dwellers and those outside the prison system.[612]

8.44 The DPP also saw the need for treatment of offenders:

> It does seem to be conduct that calls out for treatment as well as an expression of the community's … disapproval through the criminal justice process. There are some diversion schemes in operation but they are very limited and, as you have commented, they are not usually selected by the offenders unless there is some compulsion for them to do so. There are some benefits in dealing with these people through the criminal justice system and imposing punishment under law but one of the other things that we should be considering, and considering very strongly, is how to prevent these people from offending again in the future and how to extend the services that are available to potential offenders.[613]

8.45 According to a forensic psychiatrist, Dr Lucire, the effectiveness of treating sex offenders is doubtful:

> Some people believe that paedophiles can be treated but … there is precious little evidence that their preference can be changed. The desires of sexually different individuals can be decreased and they can be discouraged from believing that their behaviour is acceptable and they now know that their careers are at an end if they are convicted.
>
> Research coming in from Western Australia and Canada before that on large samples of imprisoned sexual offenders tend to suggest that talking therapies are not particularly successful. There is however a role for psychiatry and psychology.[614]

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612 Submission 2, p 5.

613 Cowdery, Evidence, 26 March 2002, p 11.

614 Submission 24, p 9.

8.46 However, SafeCare Inc, a community organisation in Western Australia providing treatment to child sex offenders, disagrees with this view. It offers two year treatment programs to intra-familial child sex abuse offenders, victims and their families, and submitted that treatment programs can be successful:

> It is a widely held view that child sexual abuse offenders are untreatable and therefore all the emphasis in dealing with child sexual abuse must be in protective and punitive measures rather than treatment. SafeCare has 12 years experience of successfully treating offenders to greatly reduce their re-offending as well as treatment of victims and their families to break the cycle of intra-familial child sexual abuse.[615]

8.47 Some victims rejected the notion of non-custodial programs. For example, the author of Submission 21 stated:

> The minimum punishment should be custodial… Once we start looking for alternative modes of punishment for these offenders we run the risk of minimising the offence that has occurred. As a society we should not be allowing that risk to even raise its head. The offence needs to be punishable by Law, to lead to a custodial sentence and be impressed upon all in society that this is a most heinous criminal offence. They do not change their spots. Counselling sessions did not change my Uncle, nor did his good behaviour terms after indecent exposure. He didn't change after his so-called apology to me as he ran off and continued to abuse his 4 granddaughters.[616]

8.48 She further argued that the current criminal approach should be enhanced, rather than abandoned:

> I do not like the inference that if the present system is not supposed to be working, "we'll just scrap it and go for something a little easier". As stated above, as a Society we cannot afford to allow the possibility of Child Sexual Assault becoming anything less than a serious and immoral crime. As such the way in which it is prosecuted and the sentences applied should be treated as serious and analogous to the crime.[617]

8.49 The two existing non-custodial treatment programs are examined below. Submissions and evidence received by the Committee did not address the treatment programs offered in prisons, so the Committee has been unable to comment on that aspect of existing services. The comments below therefore are not intended to relate to programs offered by the Department of Corrective Services. A small amount of information was received relating to treatment programs for children detained in Juvenile Justice Centres, and this has been incorporated into the section on treatment programs for adolescent offenders.

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615 Submission 85, p 6.

616 Submission 21, p 19.

617 ibid, p 20.

Pre-Trial Diversion of Offenders Program

8.50 The Pre-Trial Diversion of Offenders Program, also known as Cedar Cottage, is operated by the Department of Health. Cedar Cottage is a non-custodial, non-residential treatment service for adults who have sexually offended against their children or step-children.

8.51 There are strict entry conditions for the Pre-Trial Diversion Program, as detailed by NSW Health:

> The NSW Pre-Trial Diversion of Offenders Program, Western Sydney Area Health Service is a specialised statewide program, which provides treatment to adults who have sexually assaulted their own or their partner's children. Entry into the program is contingent on pleading guilty to the offence, being assessed as suitable, and entering an undertaking to participate in the program subject to its conditions. The goals of the Program are the protection of children and young people and the prevention of further child sexual assault in families where this has occurred. The program was established in recognition of the particular difficulties experienced by children and young people involved in the prosecution of their own parent/step parent following sexual abuse.[618]

8.52 The Committee was fortunate in obtaining detailed evidence and submissions from the Programs Director for Cedar Cottage, Mr Dale Tolliday. Mr Tolliday provided the following information about the Program:

> It is a specialised treatment and management service for parental child sexual offenders… The notion of the scheme is to provide an incentive for offenders of a designated category or class to plead guilty, to be diverted to a community-based treatment program instead of other sentencing options. Diversion for assessment occurs in the pre-trial phase but the diversion for treatment itself occurs after conviction and after the person has entered an undertaking in the District Court. In that way the Program is supervised by the District Court.[619]

8.53 The advantages of the therapeutic approach were detailed by Mr Tolliday:

> The perceived benefits of this scheme are: First that there is early acknowledgement and validation of a complaint made by a child. That child is not required to give evidence in court and be subject to cross-examination. As a result of the validation of the complaint appropriate supports can be put in place for the child. The conduct of the offender can be assessed and reviewed and, where appropriate, restricted in relation to all children, not just the complainant. The offending parent is given an opportunity to substantially address his offending behaviour, including its impact on all family members, including the child victim.[620]

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618 Submission 81, p 2.

619 Tolliday, Evidence, 10 May 2002, p 17.

620 ibid, pp 17 – 18.

8.54 Mr Tolliday explained the goals of the Program as being:

- child protection
- preventing future harm
- promoting community safety
- providing incentive for the offender to accept responsibility.[621]

8.55 He advised that family reunification is **not** a goal of the Program, as this was often not in the child's best interest, which always takes precedence over the needs of the offender. However, reunification is not prohibited at the end of treatment.[622]

8.56 Mr Tolliday explained that each offender referred to the Program is assessed for suitability, a process that occurs over eight weeks:

> That assessment essentially looks at whether the person is committed to participate, to address his sexually abusive behaviour and to do things to assist the child victim in the early stages. Essentially we are looking to see that he can validate the complaint and show us he is beginning addressing matters relevant to that; such as acknowledging how he has gone about offending and acknowledging that to his partner. Typically men who have come to the service have had a range of explanations and range of minimisations they have presented. We want to see in that assessment they are prepared to identify and start addressing those.[623]

8.57 The assessment period involves the offender describing the crimes committed on the victim, the context of the abuse, and his[624] sexual thoughts, beliefs and practices. The offender must identify means of practically and immediately assisting the victim, 'face up' to his spouse or partner and the siblings of the child victim, and develop a general plan for matters to address in the first three months of therapy.[625]

8.58 The treatment seeks to assist the offender in recognising his full responsibility for the sexual assaults committed by him, and the impact of those assaults on the victim. In individual therapy, the offender "deconstructs the patterns of cognition, beliefs, meaning and practices that he has utilised to protect himself, to avoid responsibility and to distance himself from others' experience of his actions".[626] The treatment aims to encourage

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621 Tolliday, Evidence 10 May 2002, p 18.

622 ibid.

623 ibid, p 19.

624 While the program is open to male and female offenders, all participants to date have been male.

625 Beatriz Reid and Dale Tolliday, "Unravelling Responsibility: From Excuses to Self-Respect through Re-Attribution", 1994, p 15, tendered by Mr Tolliday, 10 May 2002.

626 Reid and Tolliday, 1994, p 25.

accountability, to counter secrecy and to establish and respect appropriate boundaries, as well as developing empathy for others.[627] The offender, in conjunction with the therapist, must also develop and implement a 'relapse prevention plan', to prevent further abusive behaviours, and this must include external supervision.[628]

8.59 The number of participants at Cedar House since 1998 is relatively small, with the following figures provided by Mr Tolliday:[629]

Referrals:	193
Assessed as suitable:	83
Completed program:	40
Breached undertaking and returned to court:	31
Re-offended after completing program:	2
Families reunified:	14

8.60 In relation to these statistics, Mr Tolliday further advised:

> Those two people who reoffended have been people who completed at a very early stage in the Program and we have adjusted how we address things accordingly…[630]

8.61 In terms of empirically assessing the overall success of the treatment program at Cedar Cottage, Mr Tolliday advised that a detailed evaluation of the success of the Program is underway. A previous evaluation examined the outcomes for the children of the offender following his completion of the Program, and found a significant improvement for both the children and the partners.[631]

8.62 Other inquiry participants indicated their support for Pre-Trial Diversion of offenders. For example, the Commissioner for Children and Young People stated:

> I think the pre-trial diversion programs have a very important role to play in relation to child sexual assault matters. They are an alternative to prosecution. They make children's experiences of the court and prosecutorial process much less onerous because children do not have to go to court and give evidence. I also like these programs because they divert people into treatment programs, which can help them to manage their sexual offending behaviour. I think it is important

627 Reid and Tolliday, "Therapeutic Application of Procedures", 1999, p 3, tendered by Mr Tolliday, 10 May 2002.

628 "Cedar Cottage", document tendered by Mr Tolliday, 10 May 2002, p 4.

629 Tolliday, Evidence, 10 May 2002, p 20.

630 ibid, p 20.

631 ibid, p 24.

> not to lose sight of one of the primary functions of why we are here: to put in place things that stop people sexually offending… Pre-trial diversion programs do that in a much more systematic way than the usual prosecutorial process.[632]

8.63 The representatives from the Department of Community Services, suggested in evidence that, following a positive evaluation of the Pre-Trial Diversion Program, they would support its expansion.[633]

Possible areas for improvement

8.64 The DPP had several suggestions for enhancement of treatment options for child sex offenders generally:

- **Review protocols for informing offenders of the Pre-trial diversion program option.** It is unclear whether all eligible offenders for the existing program are being informed of the option.
- **Expand the existing Pre-trial Diversion option** to include some non-familial matters where there is a strong likelihood that the victim will have contact with the offender in the future and where the victim and the family agree to that option.
- **Introduce mandatory court ordered sex offender programs**, which are to be completed while in custody in order for the prisoner to be able to be released on parole. A report from the Coordinator of the program would be submitted to the Parole Board for consideration at the time of review.
- **Introduce mandatory court ordered sex offender programs as part of non-custodial sentences.**
- **Create a Victims Register with Probation and Parole** for registering victims in CSA matters where the offender receives a non-custodial sentence or is on parole.
- **Supervision by Probation and Parole for good behaviour bonds** should be in place for the duration of the sentence.
- **Explore avenues for a specialist sentencing process for some indigenous matters** where the matter is dealt with criminally; however, the process enables community input to ensure ongoing support for the victim and indigenous specific rehabilitation for the offender.[634]

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632 Calvert, Evidence, 17 May 2002, p 11.

633 Tizard, Evidence, 3 May 2002, p 28.

634 Submission 27, p 17.

8.65 Further refinement of the Program has also been suggested. In this regard NSW Health advised that the Interagency Advisory Board overseeing the Pre-Trial Diversion Program has proposed several amendments to enhance the operation of the Program:

> The proposed amendments aim to remove disincentives to offenders entering the program for assessment; extend the treatment available to offenders; improve the accountability of offenders to the program; reduce additional cost hearings; and ultimately enhance the safety of victims.[635]

8.66 Specifically, the amendments seek to:

- create a limited privilege on statements made by offenders while being assessed for entry into the Program, so that any admissions they make about offences for which they have been charged cannot be used against them should they not be accepted into the Program
- allow for a fourth year of treatment where necessary
- revise the requirements so that undertakings by offenders can be amended during the course of their treatment.[636]

8.67 While the Program offers services for only 20 to 22 offenders and their families at any one time, Mr Tolliday advised that this has generally been adequate to meet the demand. Mr Tolliday suggested that many people who are eligible for the Program are not being referred to it:

> The rate of referral is a very interesting matter, because it is very small compared to the number of people who may be eligible for the scheme; and we have struggled with the issue of trying to work out what it is that people in this situation who have other outcomes, including perhaps significant periods of time in prison in front of them, that they don't seek an assessment with us.
>
> We have found that at earlier times there was quite a variation about whether people were informed about the program and we are now satisfied that police have adopted a procedure that is consistently applied. It is part of the matters that must be signed off at the time of charging, that people are informed of this.[637]

8.68 One obstacle appears to be that offenders must make admissions about their guilt as part of the assessment process before the trial. If they are found to be unsuitable for the Program, these admissions can be used against them in the prosecution.

> What we are aware of at the moment is that many people are being advised by their legal advocates to not apply for assessments because it involves making admissions of guilt… Again, in the amendments that are with the Attorney General at the moment … there is a proposal that the assessments of the

635 Submission 81, p 5.

636 Submission 81, p 6.

637 Tolliday, Evidence, 10 May 2002, p 20.

> programme be privileged on the basis that a prosecution case should be completed before the people walk through our door and our association should not be gathering information to bolster a prosecution. That privilege would be conditional or limited if it were to be enacted, in that if a person tells us about other sexual offences against the same or different people, that we would report those matters and they would be separately investigated.[638]

8.69 The submission from Centacare also commented on the impact of the requirement to make admissions about guilt:

> Current alternative procedures are not successful. The current pre-trial diversion model has limitations. It requires the perpetrator to voluntarily admit guilt and enter an alternative program. Defence solicitors have been known to advise those accused of child sexual assault not to enter into the scheme but to stand trial. The reason this advice is given is the fact that it is very difficult to prove guilt in cases of child sexual assault.[639]

8.70 SafeCare suggested other means of expanding treatment options, arguing:

> Current public opinion obviously demands harsh penalties be exacted against people found guilty of child sexual abuse, however, prison should always be a method of last resort. There is little evidence of it acting as a deterrent against offending and does nothing to treat the offending.
>
> This is not to say that offenders should not be punished. We need to look for penalties that are appropriate and fit the individual circumstances of the offending rather than community expectations. They should lead the offender to seeking treatment to cease offending.
>
> Some methods worth exploring are:
>
> - Court diversion programs
> - Voluntary treatment programs
> - Other early intervention models such as adolescent offender programs.[640]

Treatment programs for adolescent offenders

8.71 The Committee received evidence of a growing awareness of child sexual offences being perpetrated by adolescents. The Department of Community Services advised:

> Sexualised behaviour between children may be sexual experimentation or sexual assault. The latter is usually characterised by force, coercion, control and secrecy.

638 ibid.

639 Submission 32, p 3.

640 Submission 85, p 5.

> Many referrals to JIRT involve offences by siblings, and intervention in these matters raises many issues for agencies, families and the children concerned. [641]

8.72 Mr Tolliday told the Committee that in 1994-1998, between 16.2% and 17.5% of child sexual assault victims presenting to child sexual assault services had been assaulted by a person under the age of 16. This compares to a figure of 19.3% to 22.3% where fathers or step fathers were identified as the perpetrator.[642] According to Mr Tolliday, studies indicate that most adult perpetrators of child sexual assault had commenced offending against children when they were teenagers.[643] He further advised that 40% of referrals to the New Street Adolescent Program were for sex offences against siblings.[644]

8.73 On this subject, Mr Ian Nisbet, Manager of the Griffith Adolescent Forensic Assessment and Treatment Centre, submitted:

> A surprising, but consistent, finding from studies in the United States is that juveniles are responsible for between 30% - 50% of all sexual offences involving a child victim.
>
> Recent figures from NSW Health on initial presentations to Sexual Assault Services indicated that in 1995-96, a male child under the age of 16 was the assailant in 16.2% of cases of child sexual assault.[645]

8.74 The Northern Sydney Child Protection Service commented that therapeutic treatment of adolescent offenders is vital, particularly as most are not charged or prosecuted:

> Intervention with adolescents who sexually abuse is crucial to prevent the escalation of offending behaviour and the continuing victimisation of children. Sexual offences involving adolescents as perpetrators frequently do not result in charges being laid, due to a range of factors. These include insufficient evidence, reluctance of families of victims to proceed and the young age of victims. For the vast majority of adolescents who have sexually abused and who are not charged, there are extremely limited alternatives.[646]

8.75 This was also a concern of the counsellors at Dympna House:

> Children are also being left unprotected due to a failure to act in cases where the perpetrator is under 16. There seems to be reluctance and at times a belief that nothing can legally be done to protect children from other children who are perpetrating. In light of the research on the development of offender behaviour it is important to intervene at this stage, in order to protect children now and in the

641 Submission 70, p 10.

642 Submission 88, p 1.

643 ibid, p 2.

644 ibid, p 3.

645 Submission 46, p 1.

646 Submission 60, p 8.

> future. It is necessary that these perpetrators and their families attend counselling and that the appropriate programs be available for them to attend.[647]

8.76 Mr Tolliday provided the Committee with information about the few studies have been performed relating to the success of treatment programs for adolescent offenders. He noted that ten studies had been undertaken overseas in the years up to 2000. These have revealed that juvenile sex offenders had significantly lower recidivism rates if they had successfully completed a treatment program for sex offences. For example, a study in Canada found that 18% of **untreated** juveniles had later been charged with new sexual offences, compared to 5% of those who had been treated.[648]

8.77 New South Wales has two principal adolescent treatment programs: the Sex Offender Program (SOP), which is operated by the Department of Juvenile Justice; and the New Street Adolescent Service, managed by the Department of Health.

8.78 In addition, children under ten years who are "exhibiting inappropriately sexualised or sexually abusive behaviours" are treated by Sexual Assault Services if they have been abused themselves, or by Child and Family Health or Child and Adolescent Mental Health if they have not been a victim of abuse.[649] These are each administered by the Department of Health.

8.79 The Department of Juvenile Justice summarised its approach to treating young offenders who are in custody:

> … In order to minimise recidivism, proper therapy and counselling is crucial, and to that end the Department provides a comprehensive individual, family and group counselling service both to clients in custody and in the community. Indeed, in the Department's view, one of the most proactive ways to protect the community against further sexual assault is to treat those who have been prosecuted so as to attempt to minimise repeat offending. Arguably, such treatment is all the more significant with young offenders, who have not had the opportunity to allow their behaviour to become entrenched and habitual. This is why the Department instituted its specialist Sex Offender Program in which trained counsellors assess sex offenders referred by Court and provide individual management programs to them.[650]

8.80 The Department of Health described the New Street Program, which is aimed at adolescent offenders who are not in custody:

> The New Street Adolescent Service, in Western Sydney Area Health Service provides services to children and young people aged 10 – 17 years who have

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647 Submission 65, p 8.

648 Submission 88, p 3.

649 Submission 81, p 2.

650 Submission 45, p 2.

> committed sexual offences and who are not eligible for programs provided by the Department of Juvenile Justice.[651]

8.81 Mr Tolliday, who is Director of the New Street Adolescent Service (as well as Cedar Cottage), recalled the rationale for the establishment of the treatment program for young people:

> It became very clear in the early days of the adult program that many of the men began their offending as adolescents. It also became evident in literature that a significant prevention strategy is to provide treatment as early in a person's life as possible that we can detect that they are behaving in a sexually abusive way.[652]

8.82 The Program initially had four phases: referral, appraisal, assessment and intensive. The latter entails six to nine months of individual, family and group counselling, in which the participant is "directed toward … acknowledging and taking full responsibility for his or her abuse actions and the setting up of sexual abuse. This also includes addressing the harm caused by the abuse perpetrated."[653] Less intensive therapy occurs in the final 15 – 18 months of the Program.[654] A post-intensive phase was subsequently added, and the appraisal and assessment phases were consolidated.[655]

8.83 Admission into the Program is possible, space permitting, for any young person with sexually abusive behaviour, even if the young person denies the abusive behaviour. Acknowledgement of the behaviour is developed in the course of treatment. Mr Tolliday explained the treatment program:

> Over time the young persons are encouraged to address their conduct, to look at it. Frequently those young people themselves have been subjected to various injustice or abuse and we need to be mindful of providing a space to look at that…
>
> At the very beginning there is a combined process of protection planning, to look at the needs of that young person, of the person they have abused and of potential victims. With such a significant proportion of young people who have sexually abused siblings, we have significant and very traumatic issues for families to address, because as a principle of our service we will insist that the young person be living in a safe placement. We do not proceed on a basis of removal, we find that a very negative concept. We look at promoting safe placement [in the extended family].[656]

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651 Submission 81, p 2.

652 Tolliday, Evidence, 10 May 2002, p 25.

653 New Street Adolescent Service Annual Report 1998/9, p 10, tendered by Mr Tolliday, 10 May 2002.

654 ibid, p 10.

655 New Street Adolescent Service Annual Report 2000/2001, p 10, tendered by Mr Tolliday, 10 May 2002

656 Tolliday, Evidence, 10 May 2002, p 28.

8.84 Of the 47 young people who have entered the assessment phase to date since 1998, 11 have completed the program, with another 11 due to finish at the end of 2002. Eighteen young people ceased participation without completing the program, and eighteen are currently in the program. The average age of participants is 13 years.[657]

8.85 The Committee heard that there are insufficient places in treatment programs for adolescent offenders. For example, New Street's Annual Report for 2000/2001 commented on the need for additional services across the state:

> Again there has been an overwhelming demand for services which NSAS has been unable to meet… The withdrawal of TREK service on the Central Coast has added to the workload of NSAS. No young people or their carers from the Central Coast have yet opted to participate in direct services. Time and distance are the significant impediment to this…. NSAS now stands alone as the only service in NSW for young people who have sexually assaulted and are not being managed in the criminal justice system.[658]

8.86 The need for additional therapeutic places is highlighted by the fact that, since 1998, the New Street Program has had 261 referrals for service of which 104 were not able to gain a place in the Program. **None** of the 104 young people turned away were able to obtain treatment elsewhere.[659] The 2000/2001 Annual Report notes that of the 64 young people referred in the reporting period, 17 did not proceed due to there being no vacancies on the Program, and 11 lived too far away from the treatment facility to attend.[660]

8.87 In evidence, Mr Tolliday identified the need for **residential** services for adolescent sex offenders:

> There is no residential service or residential treatment program in New South Wales. In fact there is no residential service I am aware of in Australia… Around the world most jurisdictions have a combination of out-patient and residential treatment. We do not have that in New South Wales.[661]

8.88 Since Mr Tolliday appeared before the Committee, a new residential service on the Southern Highlands, called Mirvac House, as been established with private sector sponsorship.[662] The Committee welcomes this development.

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657 "New Street Adolescent Service", document tendered by Mr Tolliday, 10 May 2002, pp 1 – 2.

658 New Street Adolescent Service, Annual Report 2000/2001, p 1.

659 Tolliday, Evidence, 10 May 2002, p 27.

660 New Street Adolescent Service Annual Report 2000/2001, p 11.

661 Tolliday, Evidence, 10 May 2002, p 32.

662 Personal communication with Mr Tolliday, 19 September 2002.

8.89 The call for additional resources and services was echoed by other participants in the Inquiry. The Police Service submitted:

> Referrals to this non-residential program [New Street] are made after the police investigations in matters where no charges are made. At any one time there are sufficient places statewide for 20 young people although New Street is located at Parramatta…
>
> It is recommended that … resources to services in rural and remote NSW be increased and that a network of services for adolescent sex offenders in rural NSW be provided along the lines of New Street…[663]

8.90 Mr Nisbet commented that adolescent sexual offender services in New South Wales are scarce, both in the community and within the juvenile justice system:

> Despite the obvious merits of early intervention in cases where adolescents have sexually offended, there are relatively few people working in this area. New Street, situated at Westmead, has only three counsellor positions and one co-ordinator position. As such, this vital service can only serve a limited number of clients and is only accessible to the public of metropolitan Sydney. A sister service, Trek, situated on the Central Coast at Wyong, was recently disbanded.
>
> The SOP has ten counsellor positions and a part-time co-ordinator. The position of Clinical Co-ordinator was deleted in a department restructure in 1996 and the SOP co-ordinator now does this task in addition to other duties. Although there are a number of counsellor positions across the state, they are rarely all filled, and at the time of writing the counsellor position in Grafton had been vacant for eleven months.
>
> Despite the most serious juvenile sex offenders being placed in custody, there is only one counsellor position to cover both the maximum-security centre of Kariong JJC, as well as the largest detention centre, Frank Baxter JJC. Consequently, group therapy (the treatment of choice with adolescents who have committed sexual offences) has not occurred at either facility since June 1999.[664]

8.91 Mr Nisbet concluded that an expansion of adolescent treatment services was necessary:

> In view of the potential that early intervention programs have to dramatically reduce the rate of child sexual assault, it seems sensible that money spent in prevention is likely to result in much larger savings in the long run. One of my recommendations is that the committee examines the possibilities for increasing funding to existing services in this area. This funding should be specifically for the recruitment, training, supervision and professional development of staff working in existing programs aimed at providing treatment for adolescents who have sexually offended against children.

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663 Submission 82, p 5.

664 Submission 46, pp 2 – 3.

> I would also recommend that the committee consider the substantial expansion of the New Street program so that the people in rural and regional NSW also have access to a service of this sort.[665]

8.92 DoCS also recommended the establishment of additional adolescent sex offender treatment services based on the New Street model.[666]

8.93 In noting the importance of treatment of offenders, the Commission for Children and Young People also highlighted the need for an expansion of services:

> The Commission is aware there is a trend against prosecuting juveniles in instances of intra-familial sexual assault between siblings. The Commission is concerned that this trend is creating a gap in responding to young people, who if not charged with a sex offence are not included within the ambit of the Department of Juvenile Justice, but may in fact pose a risk to themselves and to other children.
>
> The Commission supports providing treatment for those children and young people who have demonstrated sexually abusive behaviours and who are not dealt with in the criminal justice system. In this context, it is relevant to note research that a majority of adult sex offenders can trace the origins of their sexual difficulties to their adolescence, and that treatment of adolescent sex offenders has a positive effect on reducing their future offending behaviour. Research has also demonstrated the power of treating young offenders, in achieving positive outcomes in terms of re-offending behaviour, in comparison with results achieved in treating adult offenders.
>
> This is a solid basis on which to increase funding to appropriate agencies offering treatment programs for children and young people who demonstrate sexually abusive behaviours. The provision of such therapeutic care would include formulating treatment plans and focusing on long term relapse prevention planning. In order to be equitable and effective however, intensive care and support for such young people must be provided by well trained, skilled staff in appropriate and responsive facilities and therefore must be adequately resourced.[667]

Committee comment on treatment of sex offenders

8.94 It is clear to the Committee that the community can only benefit from an increase in the numbers of child sex offenders who receive treatment for their sexually abusive behaviour. In terms of **preventing** child sexual assault there can be no doubt that therapeutic intervention is vital.

8.95 For adults who are convicted of child sexual assault, a prison term on its own is unlikely to overturn a pattern of habitual abuse that has been entrenched for many years. Treatment of

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665 ibid, p 3.

666 ibid.

667 Submission 80, p 11.

the offender – whether within a custodial setting, a residential setting, or as an outpatient – should be a public policy priority as a preventative measure.

8.96 In relation to adolescent offenders, the benefits of, and need for, treatment services are even more stark. Treatment of adolescent sex offenders provides a unique opportunity to prevent the abusive behaviours from becoming ingrained, which would be enormously valuable as a preventative measure. Unfortunately, the availability of treatment services for adolescent offenders is severely restricted in New South Wales.

8.97 While the Committee lacks sufficient information to provide detailed recommendations relating to treatment options available for child sex offenders in New South Wales, some general observations are possible. The Committee considers that there is an urgent need for increased treatment places for child sex offenders across the board: for adult and adolescent offenders, in custodial and non-custodial settings, residential and non-residential settings, in metropolitan and rural areas, whether court mandated or voluntary.

8.98 The Committee therefore suggests that the Departments of Juvenile Justice, Health, Corrective Services and Community Services should review their sex offender treatment services, with a view to ensuring that the full continuum of services are available. It would appear that an inter-departmental approach would be beneficial in avoiding both duplication and gaps in service delivery.

Recommendation 47

The Committee recommends that the Department of Juvenile Justice, the Department of Health, the Department of Corrective Services, and the Department of Community Services jointly review their child sex offender treatment services, with a view to ensuring that the full range of treatment services are available. These should include programs for adults and adolescents, in custodial and non-custodial settings, residential and non-residential settings, in metropolitan and rural areas, whether court mandated or voluntary.

8.99 The Committee notes that innovative means of addressing these needs have recently been developed. The private sector involvement at Mirvac House, previously mentioned, is one such example. The Committee was also interested to hear of the approach taken in Queensland, where the Department of Families has provided a grant to Griffith University to "provide specialised pre-sentence reports and therapy to young people in Queensland who have been found guilty of sexual offences".[668] Each of these may provide models for therapeutic service provision in New South Wales, although the Committee notes the need for stringent evaluation of performance outcomes.

668 Nisbet, Submission 46, p 3.

Chapter 9 Community Consultation

This chapter addresses Term of Reference number 6: 'appropriate methods of sustaining ongoing dialogue between the community, government and non-government agencies about issues of common concern with respect to child sexual assault'. This was not a topic that attracted many comments from inquiry participants, but the matters that were raised are outlined below.

The Committee believes that communication between the community, government and non-government agencies can serve an important role in refining the criminal justice system's approach to child sexual assault. For this to occur, it is crucial that a two-way flow of information is established, enabling government agencies to hear from the community, non-government organisations, and other government service providers, as well as assisting the government agencies in conveying information about their activities.

Existing Consultation Mechanisms

9.1 The Committee heard that a number of inter-agency consultation mechanisms exist that deal with child sexual assault issues. One mechanism is the Interagency Forum operated by the Victims of Crime Bureau to encourage ongoing dialogue between agencies and non-government organisations that provide services to victims of crime. The Forum has representatives from:

- Aboriginal Justice Advisory Council
- Department of Ageing, Disability and Homecare
- Child and Adolescent Sexual Assault Counsellors Inc. Network
- Department of Community Services
- Department of Corrective Services
- Department of Education and Training, Student Services and Equity Programs
- Department of Juvenile Justice
- Department of Health
- District Court of New South Wales
- Office of the Director of Public Prosecutions, Witness Assistance Service
- Enough is Enough
- Ethnic Affairs Commission

- Homicide Victims Support Group
- Lesbian and Gay Anti-Violence Project
- Local Courts, Downing Centre
- Manly/Warringah Women's Resource Centre
- Mission Australia – Victims Support Service
- NSW Police Service
- Supreme Court
- Victims of Crime Bureau
- Victims Services
- VOCAL – Sydney
- Victims of Crime Assistance League – Hunter
- Women's Incest Survivors Network (WISN).[669]

9.2 The Manager of Victims Services, Ms Claire Vernon, advised the Committee of the role of the Interagency Forum:

> The Interagency members bring issues to the Forum and if appropriate, a sub-committee of the Interagency is established for further action. The Victims of Crime Bureau has found that this is an effective way to identify emerging problems and to develop an efficient and comprehensive solution.[670]

9.3 The Child Protection Chief Executive Officers forms another inter-agency consultative approach. It involves the Chief Executives Officers (CEOs) of departments and agencies dealing with child protection issues meeting several times each year to share common concerns about child protection. Membership includes the CEOs of the Cabinet Office, DoCS, the Department of Health, New South Wales Police, the Department of Juvenile Justice, Department of Education, Department of Aboriginal Affairs, Premiers and the Commissioner for Children and Young People. There are no formal terms of reference.[671]

669 Submission 22, pp 4 – 5.

670 ibid.

671 Correspondence with A. Taylor, Commission for Children and Young People, 1 October 2002.

9.4 Another inter-agency committee, the Sexual Assault Review Committee (SARC), chaired by the DPP, has a focus on sexual assault prosecution procedures and issues. The DPP explained:

> My Office chairs the Sexual Assault Review Committee (SARC) which has been established to assist the ODPP and other agencies to deal with the difficult area of sexual assault prosecutions. The Committee enables agencies, community members and lawyers within the ODPP to refer any problems associated with the conduct of these prosecutions, whether the matter is one of DPP concern or whether it involves other agencies.[672]

9.5 Membership of the SARC is broad, and includes representatives from NSW Health, the Judicial Commission of NSW, NSW Police, DoCS, the Violence Against Women Specialist Unit, and the Department for Women, in addition to a Research Psychologist and representatives from the Office of the DPP.[673]

9.6 The DPP advised that the SARC meets every second month, and matters can be referred for discussion and appropriate action at meetings by contacting the Sexual Assault Liaison Officer.[674] Regular reports by 'Managing Lawyers' are a feature of the meetings, which aim to "review practices and procedures of the ODPP as well as assessing interagency cooperation". [675]

9.7 The terms of reference for the SARC were provided by the DPP:

> (a) to recommend improvements to minimise trauma for victims of sexual assault and ensure the recognition of their concerns are reflected in the preparation and conduct of Court proceedings;
>
> (b) to recommend and monitor training for ODPP lawyers;
>
> (c) to make recommendations and to liaise with other agencies and assist in attaining a more co-ordinated approach to sexual assault prosecutions;
>
> (d) to monitor investigations/ proceedings relating to sexual assault allegations and review individual sexual assault prosecutions;
>
> (e) to identify and recommend legislative reform relevant to sexual assault prosecutions.[676]

672 Submission 27, p 17.

673 Submission 27, p 18.

674 The phone number is 9285 2574.

675 Submission 27, p 18.

676 Submission 27, p 18.

9.8 The author of a confidential submission to the Inquiry expressed disappointment at not appearing before the Sexual Assault Review Committee:

> Shortly after my Uncles' case was completed, I was informed of the existence of a Sexual Assault Review Committee within the DPP. I was able to make contact with this committee and was invited to talk at one of their meetings. It was minuted at the time that the Committee would regularly call upon survivor groups/ individuals to join their meetings so as to keep up the liaison between the Department and those interested in the community. I had agreed to be included in such a panel and made it clear I would be available for such future meetings… Unfortunately after 4 years there has been no other contact made between myself and the Department…The advantage to the DPP would be to see the complainants outside the actual court case, and provide a medium of continual self assessment in the manner in which the Department treats survivors.[677]

9.9 The DPP also advised that Regional Sexual Assault Services Forums are held between his office and sexual assault counsellors, which aim to "enhance communication between counsellors, WAS officers and prosecutors".[678] The Forums are facilitated by the WAS, and take place twice a year.[679]

9.10 Other currently existing mechanisms are the Joint Investigation Response Team State Management Group and the Child Protection Chief Executive Officers Group.[680]

Adequacy of Existing Consultation Mechanisms

9.11 The Combined Community Legal Centres (CCLC) argued that consultation with community groups had declined since the subsumption of the Child Protection Council by the Commission for Children and Young People:

> Community Legal Centre workers feel that inter-agency, and government/non-government dialogue has almost disappeared since the demise of the NSW Child Protection Council.
>
> As an inter-agency forum the NSW Child Protection Council provided the impetus for advertising campaigns, reviews of procedures and practices, independent research programs etc.[681]

677 Submission 21, pp 23 – 24.

678 Submission 27, p 18.

679 ibid, p 19.

680 Submission 81, p 7.

681 Submission 64, p 12.

9.12 Representatives of the CCLC expanded on this in evidence:

> **Ms McKinnon**: … I suppose from our experience at this point perhaps the Commission is not being as active in that role as the former Council was – certainly in terms of involving community legal centres as partners in the decision making. That is not currently happening. We are not aware of the Commission taking that role…
>
> **Ms Martin**: I would agree. Once upon a time you would always get information from the New South Wales Child Protection Council about what they were doing and what was happening and meetings that they were having, as well as information that they were producing in terms of resources but we do not get anything from the Children's Commissioner at all. We seem to be very much out of the loop.[682]

9.13 The Commissioner for Children and Young People, Ms Calvert detailed her involvement in liaising with government and non-government organisations on child protection matters, including:

- representation on the Ministerial Reference Group for Sex Offenders and the National Child Sexual Assault Reform Committee
- membership of the Child Protection Chief Executive Officers Group
- reviewing and rewriting the Interagency Guidelines for Child Protection Intervention
- trialling new child protection mechanisms, and operating the 'Working with Children' Check
- organising seminars
- co-ordination and oversight of the voluntary Child Sex Offender Counselling Accreditation Scheme.[683]

9.14 Of the participants who commented on this term of reference, there was some support for an enhancement of the consultation processes. For example, the NSW Rape Crisis Centre proposed that the Attorney General's Department take a central role in establishing forums with participants from a range of agencies and stakeholders, which would focus on "information sharing, developing best practice standards, monitoring accountability for maintaining standards, monitoring the maintenance of children's rights, [and] communication about gaps in between systems or clashes that can result in systems abuse".[684] Policy development would also be a function of this proposed forum.

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682 Evidence, 2 May 2002, p 6.

683 Evidence, 17 May 2002, p 11.

684 Submission 30, pp 8 – 9.

9.15 The Commissioner for Children and Young People suggested expanding the role of the Child Protection Chief Executive Officers group:

> The Commission considers that sustaining effective communication between key agencies is important in meeting on-going community, government and non-government expectations and concerns with respect to child sexual assault.
>
> It is important to bring Government, non-government and community organisations together to discuss issues of particular concern as they arise. As such the Commission proposes that an appropriate method of sustaining on-going dialogue is to provide a mechanism whereby Child Protection Chief Executive Officers can convene meetings with representatives from concerned non-government and community agencies to liaise, discuss and respond to particular issues as they occur.[685]

9.16 In contrast, the Legal Aid Commission submitted that there was **no need** for community dialogue as, in its view, the criminal justice system is functioning well in relation to child sexual assault matters:

> The Commission does not believe that it is necessary or desirable to provide a forum for ongoing discussion of issues around child sexual assault. The current system for prosecuting these offences is satisfactory, and this issue has been reviewed a number of times in recent years. The Commission does not see any benefit in establishing a formal mechanism for further discussion of these issues.[686]

9.17 The Committee notes that the existing consultation mechanisms provide a useful means for community members, non-government agencies, government service providers and policy makers to meet and discuss issues of common concern with regard to child sexual assault and its prosecution. However, the Committee considers that further enhancement is possible, particularly in the area of allowing victims of child sexual assault to share with service providers and policy makers their experience of the criminal justice system.

9.18 The Education Centre Against Violence made the point that victims of sexual assault need to be enabled to have more input into consultation forums:

> Victims of other crimes such as homicide have strong input and representation on Committees and other relevant forums that are established in relation to their issues. This enables them to have a voice and provide feedback about their needs to decision makers, policy and funding bodies. This also ensures accountability to victims of crime.
>
> It is important that victims of child sexual assault have similar representation and that consumer input is sought when any changes are introduced by government departments and the criminal justice system in relation to child sexual assault laws, policy or services.[687]

---

685 Submission 80, pp 12 – 13.

686 Submission 57, p 7.

687 Submission 40, p 15.

9.19 The Legal Aid Commission, however, expressed concern about increasing the role of victims and victims representatives in policy development forums:

> The Commission is particularly concerned that in any forum for debating issues of reform of the criminal justice system, the view of organisations representing the interests of victims of crime may be given excessive weight, while the views of those representing the interests of accused persons may be discounted.[688]

9.20 The Committee does not agree that allowing victims to describe their experiences with the court process and to identify perceived failings of the system would be inappropriate. The Committee considers that there would be value in enabling child sexual assault victims to explain to policy makers and service providers the impact that the offence and the court process has had on them as victims.

9.21 The Committee notes that the SARC already allows victim input in this way. The Committee is unaware of how frequently the SARC hears from victims, but would encourage the SARC to issue invitations regularly to victims or victims' groups to appear, particularly in light of the comments set out in paragraph 9.8.

9.22 The Committee also notes the suggestion by Commissioner Calvert that the functions of the Child Protection Chief Executive Officers Group be expanded to allow for meetings with non-government associations and community groups to discuss issues of concern as they arise. The Committee endorses this suggestion, and adds that participation of victims should ideally be included as well.

Recommendation 48

The Committee recommends that the functions of the Child Protection Chief Executive Officers Group be expanded to allow for meetings with non-government associations, community groups and victims of child sexual assault to discuss issues of concern as they arise.

688 Submission 57, p 7.

Chapter 10 Overview of Key Committee Recommendations

The previous chapters have identified a number of significant problems in the current system for prosecuting child sexual assault offences. These are problems that create or increase the distress and anguish for child sexual assault complainants who participate in the criminal justice system or which reduce the success rate for prosecutions. As the Committee described, this has implications not only for the individual complainants, but also raises broader public policy concerns.

In this chapter the Committee provides an overview of the key recommendations contained in this report, so that 'the big picture' is evident. The following table identifies the main reforms suggested by the Committee and the problems that the proposals seek to overcome.

Recommendation	Features of Proposal	Objective
Pre-trial recording of children's evidence	Child's entire testimony (evidence-in-chief, cross-examination and re-examination) is recorded prior to trial and admitted in evidence at the trial, the committal (if necessary) and any re-trial.	Child is not required to appear in court at the trial. Chance of seeing or coming in contact with accused (a source of great anxiety) is removed. Need for child to give evidence on more than one occasion removed. Long delays between making a complaint and giving evidence are reduced as recording takes place before the trial. This reduces stress on the child and enables evidence to be given while details of the incident are still clear in the child's memory. Avoids the long waiting periods during the trial (while child is waiting to give evidence) often in uncomfortable, inappropriate rooms, or in view of the accused and family.
Specialist Local and District Court for Child Sexual Assault	Designated judicial officers would hear child sexual assault matters. Selection based on interest and skills. Rotation of staff to prevent burn-out.	Development of expertise in applying rules of evidence specific to child sexual assault, especially jury warnings, which would reduce successful appeals based on misdirections to juries.

Recommendation	Features of Proposal	Objective
Specialist Local and District Court for Child Sexual Assault (continued)	Specialist training in child development and child sexual assault issues for judicial officers in the specialist court, prosecutors and court staff.	Increases judicial awareness of credibility of child witnesses to prevent rules of evidence being applied based on misconceptions about children's abilities as witnesses. Increases intervention in harsh and unfair cross-examination of child witnesses. Increase in prosecutors objecting to unfair questioning. Increases judicial officers' awareness of, and support for, special measures for giving evidence by children. Child-friendly approach within the court generally.
	Pre-trial hearings between judges and counsel to determine child's special needs and readiness to proceed.	Ensures the needs of the child witnesses are addressed, including special measures. Reduction in adjournments.
	Presumption in favour of using special measures, including pre-recorded evidence.	Increases use of special measures, and avoids need for child to come into contact with the accused in court.
	High standard of electronic facilities and proper training of staff in their use.	Overcomes technological obstacles to use and effectiveness of special measures
	Mobile units to bring facilities to rural and remote areas.	Overcomes technological obstacles in rural and remote areas, equity of access issues addressed.
	Continuity of representation of prosecutors and early contact with the complainant.	Assists in building relationship of trust between prosecutor and complainant, reducing fear
	Presumption that children will not give oral evidence at committal proceedings.	Avoids need for child complainants to give evidence on more than one occasion.
	Child-friendly furnishings, facilities and schedules, including disrobing of judicial officers and counsel	Reduces the fears caused by unfamiliar, excessively formal environment.

Recommendation	Features of Proposal	Objective
Modification of rules of evidence relating to admission of tendency evidence in child sexual assault proceedings.	Tendency evidence to be prima facie admissible. Section 137 discretion to exclude evidence unfairly prejudicial to the defendant remains. Guidelines for matters to take into account when considering s137 are provided, including the public interest in admitting all relevant evidence, the other available evidence, and the likelihood of harm caused by not admitting the evidence. The previous relationship between the complainant and other witnesses is not a relevant consideration.	Broadens the scope for admission of evidence of relevant prior conduct of the defendant, including other uncharged assaults on the complainant, while ensuring that the right of the defendant to a fair trial is upheld. Ensures that the jury is presented with relevant information in determining the guilt or innocence of the defendant and is able to consider the evidence of the assault in context. Removes the distress and the difficulties for memory that arise when a child complainant is prohibited from referring to assaults that are not the subject of charges. Broadens the scope for other alleged victims of the defendant to give evidence in support of the complainant's story. Brings broader community interests into consideration when weighing up whether to admit the evidence. Prevents the evidence from being excluded on the grounds that the evidence lacks probative value because of a prior relationship between the complainant and other witnesses and the resultant chance of joint concoction.
Modification of the rules of evidence relating to admission of relationship evidence in child sexual assault proceedings.	Relationship evidence in Child Sexual Assault trials to be prima facie admissible. Section 137 discretion to exclude the evidence if it is unfairly prejudicial to the defendant remains. Guidelines for matters to take into account when considering s137 are provided, including the public interest in admitting all relevant evidence, the other available evidence, and the likelihood of harm caused by not admitting the evidence.	Essential relevant contextual information is more broadly admitted as long as there is no unfair prejudice to the accused. Relevant background information of this kind can prevent the complainant's story appearing incredible. Brings broader community interests into consideration when weighing up whether to admit the evidence.

Recommendation	Features of Proposal	Objective
Modification of rules for trial joinders in child sexual assault proceedings.	Presumption that multiple counts of an indictment will be tried together. Prior relationship of complainants not to be considered when considering severance of trials.	Allows full picture of allegations against the accused to be known to the jury. Prevents the evidence from being excluded on the grounds that the evidence lacks probative value because of a prior relationship between the complainant and other witnesses and the resultant chance of joint concoction. Reduces need for child complainants to give evidence on multiple occasions (that is, for each separate trial)
Recent complaint evidence	Evidence of complaint of child sexual assault to be admitted into evidence regardless of time elapsing between the assault and the complaint.	Prevents evidence of complaint being excluded on the grounds of delay between alleged assault and complaint.
Expert witnesses	Expert evidence to be admitted to explain child development, memory development and behaviour of child victims of sexual assault.	Overcomes the misconceptions held by jurors about children's reactions to child sexual assault which assists in forming an accurate assessment of the complainant's credibility.
Judicial warnings	Abolition of *Crofts* judicial warning about credibility of complainants who delay reporting sexual assault Restrictions on *Longman* warning on difficulties for defence arising from delayed, uncorroborated complaints Reformulation of *Murray* warning on the need to scrutinize uncorroborated evidence with great care. Abolition of s.165B(2)(a) warning on reliability of children's evidence. Retention of general s.165 warnings on unreliable evidence.	Prevents the jury being directed in a way that creates doubt about the credibility of a complainant in the common situation of a delayed complaint about child sexual assault Prevents the jury being directed in a way that suggests the defence has been disadvantaged unless there is good reason to suspect that difficulties have been caused to the defence. Emphasis of direction changed so that jury is advised that they must scrutinize all evidence with care but that the evidence of one witness, if believed, is sufficient to prove a fact in issue. Prevents the jury being advised that a child is an unreliable witness merely on account of his or her age.

Table 6: Overview of key recommendations

Appendix 1

Submissions Received

Submissions Received

No	Author
1	**CONFIDENTIAL**
2	Professor Freda **BRIGGS** (University of South Australia)
3	Mr Jim **SHEEDY**
4	Professor Kim **OATES** (The Children's Hospital at Westmead)
5	Mr Peter **HENNESSEY** (Law Reform Commission)
6	**NAME SUPPRESSED AND PARTIALLY CONFIDENTIAL**
7	**CONFIDENTIAL**
8	Dr K E **LE PAGE**
9	**NAME SUPPRESSED AND PARTIALLY CONFIDENTIAL**
10	**NAME SUPPRESSED**
11	**NAME SUPPRESSED**
12	**NAME SUPPRESSED**
13	**CONFIDENTIAL**
14	**NAME SUPPRESSED**
15	**CONFIDENTIAL**
16	**NAME SUPPRESSED**
17	**CONFIDENTIAL**
18	**NAME SUPPRESSED**
19	**NAME SUPPRESSED**
20	**NAME SUPPRESSED**
21	**NAME SUPPRESSED**
22	Ms Claire **VERNON** (Attorney General's Department)
23	Professor Patrick **PARKINSON** (University of Sydney)
24	Dr Yolande **LUCIRE, PARTIALLY CONFIDENTIAL**
25	**NAME SUPPRESSED**
26	Mr Bruce **BARBOUR** (NSW Ombudsman)
27	Mr Nicholas **COWDERY** QC (Director of Public Prosecutions), **PARTIALLY CONFIDENTIAL**
28	Ms Raisa **MILLER** (Child and Youth Health Network)
29	Ms Lee **PURCHES** (Office of the Department of Public Prosecutions), **PARTIALLY CONFIDENTIAL**
30	Ms Meaghan **VOSZ** (Rape Crisis Centre)
31	**CONFIDENTIAL**
32	Mr W J **JOHNSTON** (Centacare)

33	Catherine Ms **VINES** & Ms Gaye **ELLIS** (Coffs Harbour Child and Adolescent Sexual Assault Service)
34	Ms Wendy **POTTER** (People with Disabilities)
35	**NAME SUPPRESSED**
36	Ms Helen **SYME** (Deputy Chief Magistrate of NSW)
37	Dr Jean **LENNANE**
38	Ms Robyn **HENDERSON** (Department of Women)
39	Ms Ingrid **THORVALDSON**
40	Education Centre Against Violence
41	**NAME SUPPRESSED**
42	Colonel Ivan **LANG** (The Salvation Army)
43	Ms Hetty **JOHNSTON** (Peoples Alliance Against Child Sexual Abuse)
44	**NAME SUPPRESSED**
45	Mr David **SHERLOCK** (Department of Juvenile Justice)
46	Mr Ian **NISBET** (Griffith Adolescent Forensic Assessment & Treatment Centre)
47	Ms Trudi **PETERS** (Rosebank Child Sexual Abuse Service Inc)
48	Mr Andrew **PATTERSON**
49	**NAME SUPPRESSED**
50	Dr Clarrie **GLUSKIE**
51	**NAME SUPPRESSED AND PARTIALLY CONFIDENTIAL**
52	**NAME SUPPRESSED AND PARTIALLY CONFIDENTIAL**
53	**NAME SUPPRESSED**
54	**NAME SUPPRESSED**
55	Dr Brian **POTTER**
56	**NAME SUPPRESSED**
57	Mr Doug **HUMPHREYS** (Legal Aid New South Wales)
58	**CONFIDENTIAL**
59	Mr P M **WINCH** (Public Defenders Office)
60	Ms Margaret **RUANE** (Northern Sydney Child Protection Service)
61	**NAME SUPPRESSED**, Sexual Assault Service
62	Ms M **LAWSON** (Women Incest Survivors Network Inc)
63	**CONFIDENTIAL**
64	Ms Elaine **FISHWICK** (Combined Community Legal Centres Group of NSW)
65	Ms Julie **FRECKELTON** (Dympna House)
66	Mr Mark **MARIEN** (Criminal Law Review Division)
67	Ms Catherine **CARNEY** (Women's Legal Resources Centre)
68	**CONFIDENTIAL**

69	Dr Anne **COSSINS** (University of NSW)
70	Department of Community Services, Ageing, Disability Services and Women
71	**CONFIDENTIAL**
72	**CONFIDENTIAL**
73	Ms Kim **CULL** (Law Society of NSW)
74	Ms Amber **SHUHYTA** (Wayside Chapel and The Station Ltd)
75	Ms Kim **CULL** (Law Society of NSW – Children's Legal Issues)
76	**NAME SUPPRESSED**
77	Victims of Crime Assistance League Inc NSW, **PARTIALLY CONFIDENTIAL**
78	Ms Melissa **WIGHTMAN** (Rosies Place Inc)
79	Mr D & Mrs D **WOODSIDE**; Mr R & Mrs L **WOODSIDE**; Mrs D **FIELD**
80	Ms Gillian **CALVERT** (NSW Commission for Children and Young People)
81	NSW Health
82	NSW Police Service
83	Dr Jerome **GELB**
84	Ms Louise **SAMWAYS** (Louise Samways & Associates), **PARTIALLY CONFIDENTIAL**
85	Mr Cathcart **WEATHERLY** (Safecare Inc)
86	**CONFIDENTIAL**
87	**NAME SUPPRESSED**
88	Mr Dale **TOLLIDAY** (Cedar Cottage)

Appendix 2

Witnesses at Hearings

Witnesses at Hearings

Friday, 26 March 2002	
Mr Nicholas Cowdery QC	Director
	Office of the Director of Public Prosecutions
Ms Lee Purches	Manager, Witness Assistance Service
	Office of the Director of Public Prosecutions

Wednesday, 3 April 2002	
Mr Douglas Humphreys	Director, Criminal Law Branch
	Legal Aid Commission of NSW
Mr John Fraser	Senior Trial Advocate
	Legal Aid Commission of NSW

Friday, 19 April 2002	
Dr Judith Cashmore	Honorary Research Associate
	University of NSW
Professor Patrick Parkinson	Professor of Law
	University of Sydney

Tuesday, 23 April 2002	
Dr Anne Cossins	Senior Lecturer, Faulty of Law
	Centre for Gender Related Violence Studies, University of NSW
Ms Trudi Peters	Child Sexual Assault Counsellor
	Rosebank Child Sexual Assault Services Inc.
Ms Melissa Wightman	Sexual Assault Counsellor
	Rosies Place Inc
Ms Julianne Freckelton	Co-ordinator, Dympna House
	Child Sexual Assault Counselling and Resource Centre
Ms Nicole Hinchcliff	Child and Adolescent Sexual Assault Counsellor
	Dympna House Child Sexual Assault Counselling and Resource Centre

Wednesday, 24 April 2002	
Ms Claire Vernon	Director, Victims Services
	Attorney General's Department
Mr Andrew Baron	Executive Officer, Victim's Services
	Attorney General's Department
CONFIDENTIAL	

Thursday, 2 May 2002	
Ms Catherine Carney	Principal Solicitor
	Women's Legal Resource Centre
Ms Pia van de Zandt	Solicitor
	Women's Resource Centre
Ms Rachael Martin	Principal Solicitor and co-representative
	Combined Community Legal Centres Group of New South Wales
	Wirringa Baiya Aboriginal Women's Legal Centre
Ms Gabrielle McKinnon	Children's Solicitor and co-representative
	Combined Community Legal Centres Group of New South Wales
	Marrickville Legal Centre
CONFIDENTIAL	

Friday, 3 May 2002	
Mr John Heslop	Commander, Child Protection Enforcement Agency
	New South Wales Police Service
Ms Diana McConachy	Senior Program Officer, Youth and Child Protection Team
	New South Wales Police Service
Ms Julie Gray	Statewide Co-ordinator, Joint Investigation Unit
	Department of Community Services
Mr Michael Tizard	Acting Area Director, Metropolitan South East Sydney Area
	Department of Community Services

Friday, 10 May 2002	
Dr Yolande Lucire	Forensic Psychiatrist
Mr Grahame Forrest	Australian False Memory Association
Ms Gloria Bradley	Australian False Memory Association
Mr Dale Tolliday	Programs Director
	NSW Pre-Trial Diversion Offenders Program and New Street Adolescent Service

Friday, 17 May 2002	
Ms Gillian Calvert	Commissioner
	Commission for Children and Young People
Professor Ronald (Kim) Oates	Paediatrician and Chief Executive
	The Children's Hospital, Westmead

Tuesday, 9 July 2002	
Mr Robert Lake	Manager, Systemic Advocacy
	People with Disabilities New South Wales

Ms Therese Sands	Senior Policy Officer,
	People with Disabilities New South Wales
Mr Paul Winch	Public Defender
	Office of the Public Defender
Mr Richard Button	Public Defender
	Office of the Public Defender

Appendix 3

Minutes of Proceedings

Minutes

Meeting No 57
10:00am Tuesday 26 March 2002
Room 1108, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Breen
Mr Hatzistergos
Mr Ryan
Ms Saffin

Also in attendance: Director, Ms Tanya Bosch

2. PUBLIC HEARING

The Committee began the first hearing of the Inquiry into Child Sexual Assault Matters.

The public was admitted.

Mr Nick Cowdery and Ms Lee Purches were affirmed and examined.

Mr Cowdery tendered the DPP's submission.
Ms Purches tendered the submission of the Witness Assistance Service.
Mr Cowdery tendered a document entitled "Answers to proposed witness questions", dated 25 March 2002.
Mr Cowdery tendered a document entitled "NSW Response to Draft Recommendations Paper" by the NSW Attorney General's Department, dated 4 September 1997.

Evidence concluded and the witnesses withdrew.

3. MINUTES

The minutes of meeting number 56 were adopted on the motion of Mr Ryan.

4. PUBLICATION OF PROCEEDINGS

The Committee resolved, on the motion of Mr Ryan, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish transcripts and tabled documents tendered at the public hearing held on 26 March 2002.

5. SUB-COMMITTEE

Resolved, on the motion of Ms Saffin, that for future hearings to be held in pursuance of the Inquiry into Child Sexual Assault Matters, the Committee be enabled, if necessary, to sit as a sub-Committee.

6. PUBLICATION OF SUBMISSIONS

Resolved, on the motion of Mr Ryan, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish submissions received from:

Submission 2 - BRIGGS Professor Freda (University of South Australia);
Submission 3 -SHEEDY Mr Jim;
Submission 4 - OATES Professor Kim (The Children's Hospital);
Submission 5 - HENNESSY Mr Peter (Law Reform Commission);
Submission 8 - LE PAGE Dr K E;
Submission 22 - VERNON Ms Claire (Attorney Generals Department);
Submission 23 - PARKINSON Professor Patrick (University of Sydney);
Submission 24 - LUCIRE Dr Yolande;
Submission 26 - BARBOUR Mr Bruce (NSW Ombudsman);
Submission 27 - COWDERY Mr Nick (DPP);
Submission 28 - MILLER Ms Raisa (Child and Youth Health Network);
Submission 29 - PURCHES Ms Lee (Office of Director of Public Prosecutions);
Submission 30 - VOSZ Ms Meaghan (Rape Crisis Centre);
Submission 32 - JOHNSTON Mr W J (Centacare);
Submission 33 - VINES & ELLIS Ms Catherine & Gaye (Coffs Harbour Child Protection Service);
Submission 34 - POTTER Ms Wendy (People with Disabilities)
Submission 36 - SYME Ms H (Attorney Generals Department - Local Courts);
Submission 37 - LENNANE Dr Jean;
Submission 38 - HENDERSON Ms Robyn (Department of Women);
Submission 39 - THORVALDSON Ms Ingrid;
Submission 42 - LANG Colonel Ivan (The Salvation Army);
Submission 43 - JOHNSTON Ms Hetty (Peoples Alliance Against Child Sexual Abuse);
Submission 45 - SHERLOCK Mr David (Department of Juvenile Justice);
Submission 46 - NISBET Mr Ian (Adolescent Forensic Assessment & Treatment;
Submission 47 - PETERS Ms Trudi (Rosebank Child Sexual Abuse Service);
Submission 48 - PATTERSON Mr Andrew;
Submission 50 - GLUSKIE Dr Clarrie;
Submission 57 - HUMPHREYS Mr Doug (Legal Aid New South Wales);
Submission 59 - WINCH P M (Public Defenders Office);
Submission 60 - RUANE Ms Margaret (Northern Sydney Child Protection Service);
Submission 62 - LAWSON Ms M (Women Incest Survivors Network Inc);
Submission 64 - FISHWICK Ms Elaine (Combined Community Legal Centres);
Submission 65 - FRECKELTON Ms Julie (Dympna House);
Submission 66 - MARIEN Mr Mark (Criminal Law Review Division);
Submission 67 - CARNEY Ms Catherine (Women's Legal Resources Centre);
Submission 69 - COSSINS Dr Anne (University of NSW);
Submission 70 - TEBBUTT MLC The Hon Carmel (Acting Minister for Community Services);

Resolved, on the motion of Ms Saffin, that the Committee publish the following submissions, whilst suppressing the names:

> No. 6, No. 9, No. 10, No. 11, No. 12, No. 14, No. 18, No. 19, No.20, No. 21, No. 25, No. 35, No. 40, No. 41, No. 44, No. 49, No. 51, No. 52, No. 53, No. 54, No. 55, No. 56, No 61

Resolved, on the motion of Mr Hatzistergos, that that the following submissions and parts of submissions remain confidential:

> No. 1, No. 7, No. 13, No. 15, No. 16, No. 17, No. 24 (video appendices confidential) No.27 (Appendices B and C confidential), No 29 (Appendices E, G, H, I confidential) No. 31, No.51 (appendices only confidential) No.52 (first 2 paragraphs confidential), No. 58, No 63.

7. WITNESS SCHEDULE

The Committee considered the draft witness schedule for the Inquiry into Child Sexual Assault Matters. The Committee agreed to defer until 3 April 2002 the decision about whether to invite the author of Submission 58 to give evidence.

8. ADJOURNMENT

The Committee adjourned at 12.15pm, to reconvene at 10.00am, 3 April 2002.

Tanya Bosch
Director

Meeting No 58
10:00am Wednesday 3 April 2002
Room 814/815, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Breen
Mr Hatzistergos
Mr Ryan

Also in attendance: Director, Ms Tanya Bosch

2. APOLOGIES

Ms Saffin

3. PUBLIC HEARING

The Committee began the second hearing of the Inquiry into Child Sexual Assault Matters.

The public was admitted.

Mr Doug Humphreys and Mr John Fraser were sworn and examined.
Mr Humphreys tendered the Legal Aid Commission's submission.

Ms Helen Syme was affirmed and examined
Ms Syme tendered her submission

Evidence concluded and the witnesses withdrew.

4. MINUTES

The minutes of meeting number 57 were adopted on the motion of Mr Breen

5. PUBLICATION OF PROCEEDINGS

The Committee resolved, on the motion of Mr Ryan, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish transcripts and tabled documents tendered at the public hearing held on 3 April 2002.

6. PUBLICATION OF SUBMISSIONS

Resolved, on the motion of Mr Ryan, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish submissions received from:

Submission 73 – Law Society of NSW
Submission 74 – Wayside Chapel

Resolved, on the motion of Mr Ryan, that the Committee publish the submission 71, whilst suppressing the names.

Resolved, on the motion of Mr Ryan, that that the following submissions remain confidential:
Submission 68
Submission 72

7. ***

8. ***

9. ADJOURNMENT

The Committee adjourned at 1.10pm, to reconvene at 10.00am, 19 April 2002.

Tanya Bosch
Director

Meeting No 59
10:00am Friday 19 April 2002
Room 814/815, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Hatzistergos
Mr Ryan
Ms Saffin

Also in attendance: Director, Ms Tanya Bosch

2. APOLOGIES

Mr Breen

3. PUBLIC HEARING

The Committee began the third hearing of the Inquiry into Child Sexual Assault Matters.

The public was admitted.

Dr Judy Cashmore was affirmed and examined.
Dr Cashmore tendered statistics on prosecution success rates

Professor Patrick Parkinson was affirmed and examined
Professor Parkinson tendered an article by Justice T H Smith and O P Holdenson, entitled *Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions*, from the Australian Law Journal, Vol 73, June 1999.

Evidence concluded and the witnesses withdrew.

4. ADJOURNMENT

The Committee adjourned at 1.00pm, to reconvene at 10.00am, 23 April 2002.

Tanya Bosch
Director

Meeting No 60
10:00am Tuesday 23 April 2002
Room 814/815, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Hatzistergos
Mr Ryan

Also in attendance: Director, Ms Tanya Bosch; Project Officer, Mr Bayne McKissock

2. APOLOGIES

Mr Breen
Ms Saffin

3. PUBLIC HEARING

The Committee began the fourth hearing of the Inquiry into Child Sexual Assault Matters.

The public was admitted.

Dr Anne Cossins was affirmed and examined.

Dr Cossins tendered her submission to the Inquiry and written answers to questions previously provided to her.

Ms Nicole Hinchcliff was affirmed and examined.
Ms Julie Freckelton was affirmed and examined.
Ms Melissa Wightman was affirmed and examined.
Ms Trudi Peters was affirmed and examined.

Ms Wightman tendered an additional submission from Rosie's Place Inc.

Evidence concluded and the witnesses withdrew.

4. MINUTES

Minutes of meeting 58 were adopted on the motion of Mr Ryan.

5. CORRESPONDENCE RECEIVED

Item 1, a letter from the Hon Rev Fred Nile MLC, dated 5 April 2002, requesting permission to circulate his submission to the Committee's Inquiry into Regulating the Coat of Arms.

Resolved, on the motion of Mr Ryan, that the Committee authorise Reverend Nile to circulate his submission.

Item 2, supplementary submission by Ms Lee Purches, Manager, Witness Assistance Service, Office of the DPP.

Resolved, on the motion of Mr Hatzistergos, that the Committee table the supplementary submission from Ms Purches and publish it as an addendum to her submission.

***

6. PUBLICATION OF PROCEEDINGS

The Committee resolved, on the motion of Mr Hatzistergos, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish transcripts and tabled documents tendered at the public hearings held on 19 April 2002 and 23 April 2002.

7. ADJOURNMENT

The Committee adjourned at 1.00pm, to reconvene at 10.00am, 24 April 2002.

Tanya Bosch
Director

Meeting No 61
10:00am Wednesday 24 April 2002
Room 1153, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Breen
Mr Hatzistergos
Mr Ryan

Also in attendance: Director, Ms Tanya Bosch; Project Officer, Mr Bayne McKissock; Committee Officer, Ms Christine Lloyd

2. APOLOGIES

Ms Saffin

3. PUBLIC HEARING

The Committee began the fifth hearing of the Inquiry into Child Sexual Assault Matters.

The public was admitted.

Ms Claire Vernon was affirmed and examined.
Mr Andrew Baron was affirmed and examined.

Ms Vernon tendered a video "Your Day in Court", and booklets and information from the Victims of Crime Bureau.

The witnesses and the public withdrew.

4. PUBLICATION OF PROCEEDINGS

The Committee resolved, on the motion of Mr Hatzistergos, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish transcripts and tabled documents tendered at the public hearing held on 24 April 2002.

5. IN CAMERA HEARING

(Confidential) was affirmed and examined.

The witness withdrew.

(Confidential) was sworn and examined.

The witness withdrew.

6. ADJOURNMENT

The Committee adjourned at 12.30pm, to reconvene at 10.00am, 2 May 2002.

Tanya Bosch
Director

Meeting No 62
10:20am 2 May 2002
Room 814/815, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Hatzistergos (from 12.20 pm)
Mr Ryan

Also in attendance: Director, Ms Tanya Bosch; Committee Officer, Ms Christine Lloyd

2. APOLOGIES

Mr Breen
Ms Saffin

3. PUBLIC HEARING

The sub-committee began the sixth hearing of the Inquiry into Child Sexual Assault Matters.

The public was admitted.

Ms Catherine Carney was sworn and examined.
Ms Pia Van De Zandt was affirmed and examined.
Ms Rachael Martin was affirmed and examined.
Ms Gabrielle McKinnon was affirmed and examined.

Ms Carney tendered three documents relating to the United States National Children's Advocacy Center.

The witnesses and the public withdrew.

4. IN CAMERA HEARING

The sub-committee resolved, on the motion of Mr Ryan, that the Committee hear the next witnesses in-camera

(Confidential) was sworn and examined.
(Confidential) was sworn and examined

The witnesses withdrew.

5. PUBLICATION OF PROCEEDINGS

The sub-committee resolved, on the motion of Mr Ryan, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish transcripts and tabled documents tendered at the public hearing held on 2 May 2002.

6. ADJOURNMENT

The Committee adjourned at 12.45pm, to reconvene at 10.00am, 3 May 2002.

Tanya Bosch
Director

Meeting No 63
10:00am 3 May 2002
Room 814/815, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Breen
Mr Hatzistergos
Mr Ryan

Also in attendance: Director, Ms Tanya Bosch; Committee Officer, Ms Christine Lloyd

2. APOLOGIES

Ms Saffin

3. PUBLIC HEARING

The committee began the seventh hearing of the Inquiry into Child Sexual Assault Matters.

The public was admitted.

Detective Superintendent Heslop was sworn and examined
Ms Diana McConachy was sworn and examined.

Mr Heslop tendered the JIRT policy and procedure manual.
Ms McConachy tendered 2 pamphlets about giving evidence.

The witnesses withdrew.

Ms Julie Gray was sworn and examined.
Mr Michael Tizard was sworn and examined.

Ms Gray tendered answers to written questions, and the JIRT policy and procedure manual.

The witnesses and the public withdrew.

4. PUBLICATION OF PROCEEDINGS

The committee resolved, on the motion of Mr Breen, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish transcripts and tabled documents tendered at the public hearing held on 3 May 2002.

5. MINUTES

The Committee resolved, on the motion of Mr Breen, that the minutes for meetings 59, 60 and 61 be confirmed.

6. ***

7. ADJOURNMENT

The Committee adjourned at 12.50pm, to reconvene at 10.00am, 10 May 2002.

Tanya Bosch
Director

Meeting No 64
10:00am 10 May 2002
Room 814/815, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Breen
Mr Hatzistergos

Also in attendance: Director, Ms Tanya Bosch; Committee Officer, Ms Christine Lloyd

2. APOLOGIES

Mr Ryan

3. PUBLIC HEARING

The committee began the eighth hearing of the Inquiry into Child Sexual Assault Matters.

The public was admitted.

Dr Yolande Lucire was affirmed and examined.
Mr Grahame Forrest was sworn and examined.
Ms Gloria Bradley was sworn and examined.

Dr Lucire tendered a police statement by a victim and written answers to the Committee's questions

The witnesses and the public withdrew.

4. ***

5. PUBLIC HEARING

The public was readmitted.

Mr Dale Tolliday was sworn and examined.

Mr Tolliday tendered a package of documents relating to the New Street Adolescent Service and the Cedar Cottage Pre-Trial Diversion of Offenders Program.

The witnesses and the public withdrew.

6. PUBLICATION OF PROCEEDINGS

The committee resolved, on the motion of Mr Hatzistergos, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary

Provisions) Act 1975, to publish transcripts and tabled documents tendered at the public hearing held on 10 May 2002.

7. ADJOURNMENT

The Committee adjourned at 12.45pm, to reconvene at 10.00am, 17 May 2002.

Tanya Bosch
Director

Meeting No 65
10:00am 17 May 2002
Room 814/815, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Hatzistergos
Mr Ryan

Also in attendance: Director, Ms Tanya Bosch; Committee Officer, Ms Christine Lloyd

2. APOLOGIES

Mr Breen

3. PUBLIC HEARING

The committee began the ninth hearing of the Inquiry into Child Sexual Assault Matters.
The public was admitted.
Ms Gillian Calvert was affirmed and examined.
Ms Calvert tendered the submission of the Commission for Children and Young People.
The witnesses and the public withdrew.

4. DELIBERATIVE MEETING

Resolved, on the motion of Mr Ryan, that the minutes of meetings number 62, 63, and 64 be adopted.

***

5. PUBLIC HEARING

The public was readmitted.

Professor Kim Oates was sworn and examined, and tendered his submission.

The witnesses and the public withdrew.

6. PUBLICATION OF PROCEEDINGS

The committee resolved, on the motion of Mr Hatzistergos, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish transcripts and tabled documents tendered at the public hearing held on 17 May 2002.

7. ADJOURNMENT

The Committee adjourned at 12.30pm, *sine die*.

Tanya Bosch
Director

Meeting No 66
10:00am 9 July 2002
Room 814/815, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)
Mr Hatzistergos
Mr Ryan

Also in attendance: Director, Ms Tanya Bosch; Committee Officer, Ms Heather Crichton

2. APOLOGIES

Mr Breen

3. PUBLIC HEARING

The committee began the tenth hearing of the Inquiry into Child Sexual Assault Matters.

The public was admitted.

Ms Therese Sands was sworn and examined.
Mr Rob Lake was sworn and examined.

The witnesses and the public withdrew.

4. DELIBERATIVE MEETING

4.1 Minutes

Resolved, on the motion of Mr Ryan, that the minutes of meeting number 65 be adopted.

4.2 ***

4.3 ***

4.4 ***

4.5 Child Sexual Assault Inquiry

Resolved, on the motion of Mr Ryan, that the Committee publish the following submissions to the Child Sexual Assault Inquiry:

No 75, Law Society Children's Legal Issues Committee
No 78, Rosie's Place Inc Sexual Assault Service
No 79, Mr and Mrs D and D Woodside
No 80, Ms Calvert, Commission for Children and Young People
No 81, Mr Knowles, Minister for Health
No 82, Mr Costa, Minister for Police

No 83, Dr J Gelb
No 84, Ms L Samways
No 85, Mr C Weatherly, SafeCare Inc
No 88, Mr Dale Tolliday

Resolved, on the motion of Mr Ryan, that submissions 76 and 77 be published with all names suppressed.

Resolved, on the motion of Mr Ryan, that submission 86 remain confidential.

Resolved, on the motion of Mr Ryan, that submission 71, previously name suppressed, be considered a confidential submission.

5. PUBLIC HEARING

The public was readmitted.

Mr Paul Winch was affirmed and examined.
Mr Richard Button was sworn and examined.

The witnesses and the public withdrew.

6. PUBLICATION OF PROCEEDINGS

The committee resolved, on the motion of Mr Ryan, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 25 of the resolutions establishing the Standing Committees, and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975, to publish transcripts and tabled documents tendered at the public hearing held on 9 July 2002.

7. ADJOURNMENT

The Committee adjourned at 12:50, to reconvene 10:00am 11 July 2002.

Tanya Bosch
Director

Meeting No 77
10:00am, 7 November 2002
Room 1136, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)

Mr Breen
Mr Hatzistergos
Mr Primrose
Mr Ryan

Also in attendance: Director, Ms Tanya Bosch; and Senior Project Officer, Ms Rachel Callinan

2. MINUTES

Resolved, on the motion of Mr Primrose, that the minutes of meeting number 76 be adopted.

3. ***

4. ***

5. INQUIRY INTO CHILD SEXUAL ASSAULT PROSECUTIONS

The Chair submitted his draft Report on Child Sexual Assault Prosecutions, which having been circulated to Members of the Committee, was accepted as being read.

The Committee considered the draft report.

Chapter One read.

Resolved, on the motion of Mr Breen, that the words "on an ad hoc basis" be omitted from paragraph 1.1, and that the words "ad hoc" be omitted from paragraph 1.2.

Chapter One, as amended, agreed to.

Chapter Two read.

Resolved, on the motion of Mr Ryan, that Recommendation 3 be amended by inserting "Joint Investigative Response Teams" before the acronym "JIRT" the first time it appears.

Chapter Two, as amended, agreed to.

Chapter Three read and agreed to.

Chapter Four read. Resolved, on the motion of Mr Hatzistergos, that Recommendation 14 be amended so that subsection (1) reads "In relation to the prosecution of a child sexual assault offence, and subject to (2) and (3),

tendency evidence relevant to the facts in issue is admissible and is not affected by the operation of ss 97, 98 and 101."

Resolved, on the motion of Mr Hatzistergos, that paragraph 4.192 be omitted.

Resolved, on the motion of Mr Hatzistergos, that Recommendation 24 be amended to replace the words "jury direction" with the words "judicial warning" in lines two and three.

Chapter Four, as amended, agreed to.

Chapter Five read and agreed to.

Chapter Six read.

Resolved, on the motion of Mr Ryan, that Recommendations 30, 31, and 32 be amended to remove the words "If the pilot specialist court suggested in recommendation XX is not implemented", and that the Secretariat ensure that any necessary consequential changes are made to the rest of the report.

Resolved, on the motion of Mr Hatzistergos, that Recommendation 33 be amended to insert the sentence "The right for a child to choose not to use CCTV should be retained" at the end of the recommendation.

Resolved, on the motion of Mr Hatzistergos, that paragraph 6.122 be amended by inserting at the end of the final sentence, "to prevent the jury drawing prejudicial conclusions about the accused on the basis of the use of pre-recorded evidence".

Chapter Six, as amended, agreed to.

Chapter Seven read.

Resolved, on the motion of Mr Ryan that paragraph 7.31 be replaced with the following:

For all of these reasons, the Committee favours trialling a specialist jurisdiction. The Committee proposes a specialist jurisdiction that would largely reflect the model suggested by the Director of Public Prosecutions, with two exceptions.

First, in proposing the pilot project, the DPP suggested that the specialist court would "probably" involve judge-alone trials.[689] The Committee acknowledges that there are a number of merits to this proposal. The absence of a jury would remove the need for jury directions, and therefore would be likely to limit the number of appeals based on misdirections of juries that is a common feature of child sexual assault cases. It would also be likely to result in cross-examinations being 'toned down', as counsel will not be seeking to use dramatic techniques to convince the jury, and that would undoubtedly be of benefit to child witnesses.

There appeared to be some support amongst witnesses for judge-alone trials. For instance, Commander Heslop, of the Child Protection Enforcement Agency, observed:

> I think that is an interesting proposition. As you say, you can train everybody else but you might have 12 members of a jury who are drawn from all walks of life.[690]

[689] Submission 27, p 13.

[690] Heslop, Evidence, 3 May 2002, p 8.

Ms Freckleton, from the Child and Adolescent Sexual Assault Counsellor's network, was also asked for her opinion on this matter:

> **Mr Hatzistergos**: What do you think about a proposal that would involve child sexual assault matters being prosecuted without juries? Does that have some attraction? What about specialist tribunals, for that matter?
>
> **Ms Freckelton:** That is quite a good proposal. The education and understanding of what is required in those circumstances is the first issue and that piece is often missing.[691]

However, the proposal for child sexual assault trials to be tried without a jury would be likely to face significant opposition as it would result in the abolition of a key civil liberty – trial by jury. In evidence before the Committee, the Legal Aid Commission cautioned against any suggestion that judge-alone trials should replace trials by jury for child sexual assault prosecutions:

> …[The] right to trial by jury is one of the fundamentals we have in the justice system. To suggest that somehow we would remove child sexual assault allegations from the normal criminal justice system has great difficulties in my view…[692]
>
> The suggestion in relation to the concept of judge alone and mandatory judge alone is what strikes me as being the most difficult aspect of the proposal… I would be prepared to countenance, perhaps, a trial where a specialised judge perhaps or a number of judges received specialised training. It strikes at the very heart of what we regard as being the rights of the accused in the criminal justice system. I am speaking here as a representative of accused people, which is the role I perform in the Legal Aid Commission…
>
> I am suggesting to you I am not necessarily opposed to the idea of putting matters into a list, having judicial officers with specialised training and dealing with those matters with specialised officers familiar with closed-circuit TV and the other.[693]

The Committee did not receive a great deal of evidence in regard to the proposal for judge-alone child sexual assault trials and is therefore unable to form a conclusion on this matter. However, the Committee believes that there would be value in the proposal being the subject of a fuller level of examination and debate. The Committee therefore recommends that the Attorney General convene an appropriate forum, such as a Working Group, to assess the merits of the proposal for the pilot project to incorporate a provision for judge-alone trials.

Recommendation: The Committee recommends that the Attorney General convene an appropriate forum, such as a Working Group, to assess the merits of the proposal for the pilot project to incorporate a provision for judge-alone trials.

Chapter Seven, as amended, agreed to.

Chapter Eight read and agreed to.

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691 Evidence, 23 April 2002, p 20.

692 Humphreys, Evidence, 3 April 2002, p 5.

693 ibid, p 7.

Chapter Nine read and agreed to.

Chapter Ten read and agreed to

Executive Summary read.

Resolved, on the motion of Mr Ryan, that paragraph 5 on page 3 be amended by inserting the words "The Committee has heard that" at the beginning of the second sentence.

Resolved, on the motion of Mr Hatzistergos, that the first sentence of paragraph 2 be amended to read "Rules of evidence determine what information or evidence can be considered in cases, how the evidence is presented and how it is assessed." and that the secretariat be given leave to ensure that the executive summary is consistent with all amendments made to the draft report.

Executive Summary, as amended, agreed to.

Resolved, on the motion of Mr Primrose, that the draft report (as amended) be the Report of the Committee and that the Chairman and Director be permitted to correct stylistic, typographical and grammatical errors; and that the report, together with the (non-confidential) transcripts of evidence, submissions, documents and correspondence in relation to the inquiry, be tabled and made public.

Tanya Bosch
Director

Appendix 4

Implementation of previous reports' recommendations

Implementation of previous reports' recommendations