
Chapter 5

Improving the System for Child Complainants

INTRODUCTION

5.1 Chapters 3 and 6 of the Interim Report discussed problems in the way that the criminal justice system deals with child complainants in sexual offence cases. Over the past two decades many other law reform reports have made similar findings.⁵⁴¹

5.2 Historically the legal system regarded children as unreliable witnesses. ‘This view was reflected in rules of evidence that limited children’s competence to give evidence and required corroboration and judicial warning in relation to children’s evidence.’⁵⁴² Although these rules have now been modified, the criminal justice process still fails to respond adequately to the needs of children.

5.3 In their joint report on children in the legal process the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission commented that:

541 See for example Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* Project 87 (1991); Crime Prevention Committee, Parliament of Victoria, *Combating Child Sexual Assault: An Integrated Model: First Report Upon the Inquiry into Sexual Offences Against Children and Adults* (1995); Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997); New South Wales, Royal Commission into the New South Wales Police Service, *Final Report—Volume VI: The Paedophile Inquiry: Appendices* (1997); Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002); Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* Report No 55 (2000).

542 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 541, 304.

[t]he legal system has traditionally given little support and preparation to child witnesses. Within the courtroom children are often subject to harassing, intimidating, confusing and misleading questioning...A significant amount of evidence was presented to the Inquiry that children are frequently traumatised by their court appearance... The abuse many children suffer is compounded by the abuse perpetrated by the legal system itself.⁵⁴³

[W]hatever the jurisdiction, the structures, procedures and attitudes to child witnesses within...legal processes 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 at all.⁵⁴⁴

5.4 The difficulties which child complainants in sexual offence cases face in giving evidence at committal and trial are now widely recognised. Judge Mary Ann Yeats of the Western Australian District Court recently commented that the increased number of trials of sexual offences against children had resulted in :

an increased general awareness of the special problems children face in giving evidence before a judge and jury. In that sort of formal setting in the face of 12 strangers making up the jury and a number of strangely costumed barristers, court staff and judge—not to mention the presence of the accused person—children’s evidence has, on occasion, not been heard. Children have been overwhelmed by the strangeness and strangers of the courtroom such that, on occasion, they have simply been unable to answer questions reliably or at all. We learned that children were being further damaged by the court process. Reliable research has shown that the traditional courtroom setting and procedures placed children under such stress in giving their evidence that they suffered further injury as a result of the court process.⁵⁴⁵

5.5 The difficulties faced by all children in the criminal justice system are compounded for Indigenous children, children from non-English speaking backgrounds (NESB) and children with disabilities. Indigenous children have historically had significant reasons to fear police and may have cultural difficulties

543 Ibid 335.

544 Ibid 297.

545 (Her Honour Judge) Mary Ann Yeats, 'Alternative Arrangements for Giving Evidence: A Judicial Perspective' (Paper presented at the Children as Witnesses Workshop, 14 November 2003, Melbourne).

in communicating with authority figures and participating in the legal process. Similarly, children from some NESB backgrounds may fear the police. Children with cognitive impairments and other disabilities may be unable to give oral evidence and may face problems with perceptions about the reliability of their evidence.⁵⁴⁶ All these factors contribute to the low reporting rate of offences against children and the even lower rate of alleged offences that result in prosecution.⁵⁴⁷

5.6 There is some evidence that conviction rates in cases involving offences against children are actually dropping.⁵⁴⁸ Low conviction rates may be partly attributable to rules of evidence which do not permit adequate assessment of children's competency to give evidence, are based on misapprehensions about the ways in which children who are sexually assaulted typically behave and which take insufficient account of empirical information about the behaviour patterns of those who sexually assault children.⁵⁴⁹

5.7 People accused of offences against children are entitled to the presumption of innocence and must receive a fair trial in which they are not convicted unless their guilt is established beyond reasonable doubt. However there is also a public interest in ensuring that child complainants are treated fairly and that they have an opportunity to tell their story without being victimised or traumatised. As well as preventing false convictions, the law must give due weight to the public interest in encouraging people to report child sexual assault to the police and in securing

546 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* Report No 84 (1997); Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, '18. Children's Involvement in Criminal Justice Processes' in *Seen and Heard: Priority for Children in the Legal Process* (1997) 351.

547 Only around 14.5% of penetrative offences other than rape (for example incest and penetration of children) that are reported to Victoria Police result in a prosecution: Interim Report para 2.81. No data is available on the prosecution rate for offences that do not involve penetration.

548 In Victoria, of the 258 penetrative offence matters prosecuted from 1997–8 to 1998–9, there were 116 convictions at trial or as the result of a guilty plea (44.9%) for at least one penetrative offence; Interim Report para 2.74 Table 3 and para 2.81. There are no Victorian figures enabling these figures to be compared with earlier years. The conviction rates in Victoria seem to be lower than those in NSW. See National Child Sexual Assault Reform Committee, *Discussion Paper: Alternative Models for Prosecuting Child Sex Offences in Australia (Draft)* (2003), Table 1, 7; Table 2, 8. These tables show conviction rates for child sex offences and other offences in higher courts in NSW from April 1991–April 1992, January 1992–December 1996 and January 1998–September 2001. The draft paper says that similarly low conviction rates apply in other jurisdictions in Australia.

549 For a discussion of factors which may affect conviction rates: see *Ibid* 10–13.

convictions of those who have committed offences and who are likely to continue to assault children if they are not apprehended and convicted.

5.8 This Chapter proposes reforms designed to make the criminal justice system more responsive to the needs of child complainants and witnesses in sexual offence cases and to increase the likelihood that those who abuse children are convicted. It makes recommendations on:

- improving support for child complainants and other child witnesses;
- use of alternative arrangements for children to give evidence;
- changes to the rules of evidence to make it easier for children to give evidence and to allow admission of children's hearsay evidence;
- better judicial control of cross-examination; and
- imposition of a duty on lawyers in relation to the questioning of children.

Many of the reforms proposed are already in force or have been recommended in other Australian jurisdictions or in New Zealand or Canada.

5.9 In Chapter 9 we make recommendations for changes to some of the substantive sexual offences that are relevant to children.

SUPPORT FOR CHILD WITNESSES

THE NEED FOR SPECIALISED SUPPORT

5.10 In the Interim Report,⁵⁵⁰ we argue that witnesses in sexual offences cases need appropriate support throughout their involvement in the criminal justice process. Research shows⁵⁵¹ that the provision of support can be effective in minimising the trauma of giving evidence, improving the standard of evidence and increasing confidence in the criminal justice system. It may also assist in increasing reporting and conviction rates.

5.11 As we describe in the Interim Report, a number of Victorian agencies currently provide witness support to both adult and child witnesses in sexual offences cases. The State's network of Centres Against Sexual Assault (CASAs) provide both crisis and ongoing counselling, support and advocacy to

550 Interim Report paras 5.151–5.

551 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* Report No 84 (1997) above n 541, 335–9.

victim/survivors of sexual assault.⁵⁵² Court Network provides court support to witnesses⁵⁵³ and the Witness Assistance Service (WAS), based at the Office of Public Prosecutions (OPP), provides information and support to prosecution witnesses in homicide, culpable driving and sexual offences cases.⁵⁵⁴ The Children's Protection Society operates a sexual abuse counselling and prevention program that provides support to child witnesses.

5.12 In the Interim Report we recommended that support be made available to assist adult⁵⁵⁵ and child⁵⁵⁶ complainants in sexual offences cases and we listed the various features appropriate for support services. Submissions⁵⁵⁷ made in response to the Interim Report were generally supportive of the need for a witness support service with the various features recommended. Several of the CASAs and the Federation of Community Legal Centres⁵⁵⁸ favoured the increase of support services and took the view that an increase in resources to CASAs would be the most effective way to deliver general witness support.⁵⁵⁹ The Gatehouse Centre and the Disability Discrimination Legal Service emphasised the importance of statewide support⁵⁶⁰ and adequate resources for services. The Criminal Bar Association⁵⁶¹ supported the recommendation but insisted that 'clear guidelines be established to ensure that this support does not taint the process or compromise the integrity of the trial'.

HOW SHOULD CHILD WITNESS SUPPORT BE DELIVERED?

5.13 In Chapter 6 of the Interim Report we focused particularly on the crucial role of specialised witness support for children in increasing children's ability to participate in criminal justice processes. We described the type of support we considered appropriate and then discussed the three possible modes of service

552 See discussion of CASAs in Interim Report. See also Chapter 3.

553 Interim Report paras 5.152–3.

554 Ibid.

555 Interim Report Recommendations 51 and 52.

556 Ibid Recommendations 53-9.

557 Including submissions from the Department of Human Services, the Youth Affairs Council of Victoria and Judge Anderson of the County Court.

558 Submission 47.

559 Submission 19, 26 and 28.

560 Submissions 28 and 40.

561 Submission 42.

delivery: the service could be an extension of the current Office of Public Prosecutions based WAS; it could be an independent, Department of Justice funded service or it could be an expansion of the services provided by agencies that currently provide support to child witnesses such as the Children's Protection Society and various CASAs. In the Interim Report, we asked which of these models was preferable. Several submissions address this question.

5.14 Various submissions took the view that adult and child support should be separated, including Barwon CASA,⁵⁶² the Gatehouse Centre⁵⁶³ and the VOICES group.⁵⁶⁴ On the other hand, the Department of Human Services (DHS) considered that adult and children's services could be provided by the same service provided that children's particular needs are recognised,⁵⁶⁵ and the Violence Against Women Integrated Services⁵⁶⁶ took the view that although a suitable idea in theory, in regional areas 'it would be difficult to justify that separation due to separate services being potentially financially unviable'.

5.15 Several submissions⁵⁶⁷ expressed the view that specialist services for children would be most appropriately delivered by an independent service, rather than an OPP-based service as is currently the case. The DHS and the Australian Childhood Foundation both commented that a service independent of the OPP, based on the Western Australian model, would be the preferred model. On the other hand, the WAS considers that:

It is important that the OPP is the agency that continues to deliver support and information to child witnesses and their families through its WAS service, as it is provided in a timely manner, and provides continuity of care and is in the best position to provide updates and information in relation to the progress of a matter. WAS has gained the confidence of the legal staff within the OPP...and the Police informants...and this ensures that information and support are delivered in a timely manner.⁵⁶⁸

562 Submission 16.

563 Submission 28.

564 Submission 30.

565 Submission 44.

566 Submission 24.

567 Submissions 29, 41 and 44.

568 Submission 55.

5.16 Only one submission commented on the suitability of linking witness support to counselling services. Loddon Campaspe CASA took the view that child witness support should be provided by 'professionals who are trained for this work, separate from, but with links to counselling services'.

OTHER MODELS

5.17 In the Interim Report, we described the Western Australian specialist witness support service for children and people with cognitive impairment in detail.⁵⁶⁹ Western Australian child witnesses questioned about the work of the service acknowledged its effectiveness as a support mechanism.⁵⁷⁰

5.18 In New South Wales there is a Witness Assistance Service based at the Office of the Director of Public Prosecutions (DPP) which is similar to the Victorian model. However, the service is significantly more substantial and is able to give a more comprehensive level of support to victims of personal violence. The service currently employs a manager, an administrative officer, a senior lawyer in the role of sexual assault liaison officer, four senior Witness Assistance Officers who perform a joint clinical and supervisory role, three Aboriginal Witness Assistance Officers and 24 Witness Assistance Officers. The service provides statewide support, with officers based at the 11 DPP Offices throughout the State. The Witness Assistance Officers are trained in child sexual assault support and in dealing with child witnesses. The service prioritises child sexual assault cases when determining the allocation of resources and support. A key aim of the service is to ensure that child sexual assault victim/survivors are linked to appropriate counselling services and to liaise with the counselling service in the provision of support to the child.

5.19 Despite the capacity of the service, it is still not able to deliver a comprehensive service to all victims of personal violence and must rely on the prosecuting solicitors to provide support to victims of more minor offences.⁵⁷¹

569 Interim Report paras 6.22-5.

570 Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002) Criminology Research Council 81.

571 Information provided by the Witness Assistance Service Manager during discussions on 23 November 2003 and 19 May 2004.

THE COMMISSION'S VIEW

5.20 Although there are advantages and disadvantages to each method of service delivery, on balance, the Commission considers that specialised child witness support would most appropriately be delivered by an independent Department of Justice-based service. The new Victim Support Agency could play a role in developing a framework for such a service. Given their budgetary and geographic constraints, the current Witness Assistance Service and various other agencies provide excellent service to many complainant witnesses but there are significant advantages in an independent and specialist service for child witnesses.

5.21 A specialist service for child witnesses acknowledges the particular needs of this especially vulnerable group and allows expert staff to develop best practice responses to their needs. The specialist service could implement programs to ensure that it can provide assistance to children from diverse backgrounds (including Indigenous children and NESB children) and children with special needs (including children with cognitive impairments and other disabilities). The service could also serve an educational role within the broader criminal justice sector and assist in increasing the understanding of the needs of child witnesses and maximising their effective participation in the system. An independent service would also allow defence witnesses to receive assistance also and would alleviate concern that witnesses may be 'coached' inappropriately by counsellors.

5.22 If it is not possible for the Department of Justice to establish an independent specialist child witness service, we recommend that the Office of Public Prosecutions receive dedicated funding for the Witness Assistance Service to enable it to more appropriately service the particular needs of child witnesses. This funding should be sufficient for services to be provided promptly and appropriately to all children throughout Victoria including Indigenous children, NESB children and children with disabilities.



RECOMMENDATION(S)

105. The Department of Justice should establish an independent specialist witness support service for child witnesses.
106. The service should provide support to child witnesses, their parents, guardians or carers in sexual offences cases, both within Melbourne and in rural and regional areas.

! RECOMMENDATION(S)

107. The purpose of this support should be to facilitate child witnesses' more effective and credible participation in the criminal justice process, while protecting their wellbeing.
108. The support should be appropriate for Indigenous children, children from non-English speaking backgrounds and children with differing physical and intellectual requirements.
109. Specialist child witness support should be provided by professional staff with expertise in relation to the developmental needs and capacities of children and an understanding of the requirements of the criminal justice system in relation to the prosecution of sexual offences.
110. Where circumstances require it, there should be appropriate collaboration between the service and other agencies providing services to the child witness.
111. Support for child witnesses should include:
 - assessing the requirements of the individual child witness and coordinating the appropriate program for the child and for parents, guardians or carers;
 - keeping the child and their parents, guardians or carers informed of the progress of the case and liaising and advocating with prosecutors, solicitors and police on behalf of the child;
 - explaining the court process and preparing the child, parents, guardian or carer for the experience of giving evidence;
 - accompanying the child to court or arranging for a court companion of the child's choice;
 - providing appropriate psychological and welfare support to children, including their parents, guardians or carers; and
 - making necessary referrals for children and families, guardians or carers to therapeutic counselling, medical care and other services necessary.



RECOMMENDATION(S)

112. Child friendly facilities should be provided for children within court complexes, including in interview areas and waiting rooms.

ALTERNATIVE ARRANGEMENTS FOR CHILDREN TO GIVE EVIDENCE

THE CURRENT LAW IN VICTORIA

5.23 Victorian law provides two main alternatives to a child giving the whole of their evidence in the court room.

- Interviews with the police may be video or audio-taped, and the tape may be used as the child's evidence-in-chief at trial.
- At committal or trial, the court may order that the child gives evidence from another room by closed circuit television (CCTV) or that a screen be erected to block the complainant's view of the accused.

VIDEO OR AUDIO RECORDING (VATE) OF A CHILD'S EVIDENCE-IN-CHIEF

5.24 Section 37B of the *Evidence Act 1958* allows the admission of the evidence-in-chief of prosecution witnesses in sexual offences proceedings, in the form of an audio recording or videorecording, if the witness is under 18 years or is a person with 'impaired mental functioning'. The interview with the witness which is videotaped or audiotaped must be undertaken by a prescribed person. Most members of the Victoria Police Sexual Offences and Child Abuse (SOCA) units are trained to conduct VATE interviews and most interviews with children are taped. The VATE tape can only be used in evidence if the witness appears at the trial and attests to the truthfulness of the contents of the recording. Witnesses must be available for cross-examination or re-examination about what they said on the tape.⁵⁷²

5.25 Introduction of the VATE tape was intended to:

- be less traumatic for children, because it would reduce the number of times the child would have to tell their story;

572 *Evidence Act 1958* s 37B(3).

- ensure that the court had access to statements made by the child shortly after the alleged offence was reported to the police;
- ensure that the interview process was appropriate and that the child was not influenced by the questioning process; and
- encourage offenders to plead guilty.⁵⁷³

5.26 The viewing of the VATE tape, by the accused and defence counsel before trial, may result in the accused pleading guilty. This means that the child complainant does not have to give evidence at a trial or be subjected to cross-examination. However in cases where the accused does not plead guilty and there is a trial, the prosecutor may decide not to tender the VATE recording at all but to call the witness, or to tender the VATE recording and supplement that evidence by calling the witness to answer additional questions.⁵⁷⁴

5.27 The prosecutor may choose not to tender the VATE tape because he or she believes that the tape contains inadmissible evidence that the defence will challenge, or because he or she thinks that a conviction is more likely to be obtained if the child gives evidence orally. If the prosecutor does seek to introduce the VATE tape, the defence may raise objections to its admission. The judge may then decide to exclude the tape or part of it.

5.28 Although Victoria Police do not keep statistics on use of VATE tapes, our consultations suggest that relatively few VATE tapes are admitted in evidence at trial.⁵⁷⁵ Prosecutors told us that there are sometimes difficulties with the quality of interviews recorded on VATE tapes. If the tape contains inadmissible material, or the police interviewer appears to be leading the child, the prosecutor may not seek to use the VATE tape in evidence because the defence is likely to challenge its admission.

5.29 Victoria Police told us that they were often not informed of the prosecutor's decision that the VATE tape should not be used or of the reasons for

573 Law Reform Commission of Victoria, *Sexual Offences Against Children*, Report No 18 (1988) 108.

574 Chris Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75.

575 This is the impression of members of the judiciary, OPP staff and representatives of service provider organisations we have consulted. A study by the NSW Police, conducted between May 2000–May 2002, found that although electronic evidence was submitted as a child's evidence-in-chief in a small numbers of cases, those cases constitute a reasonable proportion of cases in which children gave evidence at trial. The evaluation of the process of electronic recording generally was favourable. NSW Police, 'Evaluation of the Electronic Recording of Children's Evidence'.

that decision. This lack of feedback means that police are not necessarily aware of the need to change interviewing procedures to ensure that the evidence is usable. Comments in some cases suggest there may also be some judicial resistance to the use of VATE tapes.⁵⁷⁶

5.30 The Commission arranged a meeting between Victoria Police and the DPP, Paul Coghlan QC, to establish a process for systematic feedback about the quality of VATE tapes, which could result in improvements in interviewing techniques and increase the use of VATEs. The Commission has worked with the SOCA Coordination Unit to design a form for use by prosecutors, to record whether a VATE is used or not and if not, why not. This form is to be completed by the individual Police Prosecutor or OPP solicitor responsible for the prosecution of a case for which VATE was made and returned to the SOCA Coordination Unit for processing. It is anticipated that the systematic completion of these forms will provide Victoria Police with useful guidance regarding the preparation of VATEs. This will need to be combined with commitment by the Victoria Police and the OPP to improve the process so as to increase the use of VATE tapes.

CCTV

5.31 In Victoria, section 37C of the *Evidence Act 1958* allows the court, on its own initiative or on application of the prosecution or defence, to direct that alternative arrangements be made for a child witness in sexual offence proceedings

576 In the case of *R v NRC* [1999] 3 VR 537, the defendant was charged with sexual offences and personal injury offences against his daughter. At the first trial, the evidence-in-chief of the complainant (who was five years old at the time of the offences) was given by means of VATE. The defendant was convicted and appealed on the basis that the judge erred in failing to warn the jury about convicting on the complainant's evidence alone and that the verdict was unsafe or unsatisfactory. The Court of Appeal upheld the first ground but not the second and a new trial was granted. The court took the view that various factors required the trial judge to give a stronger warning than was given, including the fact that the complainant had been interviewed repeatedly before making the VATE and that defence counsel was unable to cross-examine her in any significant way because she was unresponsive. President Winneke was critical of the VATE process, calling it a procedure with 'inherent potential for unfairness', although he noted that it is permitted by the legislation and that there are circumstances where it will not operate unfairly. At the second trial, the judge disallowed the admission of the VATE as evidence-in-chief and the complainant gave evidence herself via CCTV. However, the VATE was admitted into evidence in re-examination 'to show the full context'. The second jury convicted the defendant who then appealed and the second Court of Appeal denied the appeal.

to give evidence.⁵⁷⁷ Alternative measures include provision for the child to give evidence by CCTV or for a screen to be used to remove the defendant from the witness' direct line of vision.⁵⁷⁸

5.32 During our consultations we were told that an application for the use of CCTV by a child complainant aged 12 or under is usually, but not invariably, allowed where the facilities are present and functioning properly.⁵⁷⁹ However, it appears that children are often required to give their evidence in court rather than by using the remote facility.⁵⁸⁰ The Commission undertook a review of committal hearings in sexual offences cases over a four-month period between September 2003 and December 2003. Fourteen of the 40 cases examined involved complainants under 18. Successful applications to cross-examine the child were made in all of these 14 cases and the child gave evidence by CCTV in only four of them.⁵⁸¹

5.33 Prosecutors may not apply for child complainants to give evidence by CCTV because they believe they are more likely to secure a conviction if the child testifies in court.⁵⁸² Sometimes defence counsel objects to the use of CCTV by older children and judges uphold the objection.⁵⁸³ Although section 37B of the *Evidence Act 1958* allows the magistrate or judge to direct use of CCTV without the prosecution applying, it appears that this rarely occurs. In the course of our consultations we were told of a number of cases where the requirement to give evidence in court created significant stress for children or young people.

577 The provision is not limited to children. See above para 4.6.

578 *Evidence Act 1958* s 37C(3) (a) and (b). The court can also direct that a person be allowed to be beside the witness for the purpose of providing emotional support, that legal practitioners do not robe and/or remain seated while examining or cross-examining a witness and that only specified persons be present in court while the witness is giving evidence. See para 4.7.

579 For example Submission 18 to the Discussion Paper. According to representatives of Victoria Legal Aid, at one committal, where arrangement had been made for the use of CCTV, there were technical difficulties and the complainant had to testify in court, consultation 9 August 2001.

580 According to the Witness Assistance Service, it is very rare for a witness over the age of 12 to be allowed to testify from the remote facility: Submission 67 to the Discussion Paper.

581 For a more detailed account of the research see paras 3.43–6.

582 According to the Witness Assistance Service, many prosecutors are reluctant to use the CCTV facility and only infrequently make applications for its use: submission 67, above n 38.

583 According to confidential submission, Submission 18.

INTERIM REPORT PROPOSALS

5.34 The Interim Report recommended that:

- Police should continue to video or audio-tape children's evidence. A working party should be established to independently review the VATE process.
- Child witnesses should have the right to give their evidence by CCTV. The judge should have the power to order that CCTV not be used, on application of the prosecutor. The judge should only order that CCTV not be used if they are satisfied that the child is able to and wishes to give evidence in court.
- Victoria should enact legislation similar to Section 106I(1)(b) of the *Evidence Act 1906* (WA), which allows children in a sexual offences case to give the whole of their evidence at a hearing held before the trial. The hearing would be conducted according to the rules of evidence with examination, cross-examination and re-examination all conducted by counsel, subject to judicial control. The videorecording of the hearing would be played at the trial instead of the child giving evidence orally.⁵⁸⁴

5.35 Most submissions supported this 'package' of alternative measures as a means of reducing the stress which children experience in giving evidence and increasing the accuracy of their evidence.

RECOMMENDATIONS

5.36 Our final recommendations are discussed below and deal with:

- VATE;
- CCTV; and
- pre-recording of children's evidence.

RETENTION OF VATE TAPING PROCESS

5.37 Relatively few submissions made comments on the recommendation that the VATE process should be retained.⁵⁸⁵ The submission from the Australian

584 See Recommendations 60–4, Interim Report para 264.

585 See however Submission 16, which spoke of the distress of a child who had to give their evidence-in-chief in court, because a VATE tape had not been made and Recommendation 40, which raised issues about the use of VATE tapes for people with a cognitive impairment.

Childhood Foundation commented that the VATE system itself created hurdles for children and was not sensitive to the ways in which children need to be supported in order to communicate their experiences of sexual assault. The Foundation was critical of the interaction between the police and DHS in handling allegations of sexual assault and explicitly supported a formal evaluation of the VATE system, as was recommended by the Commission.⁵⁸⁶

5.38 The Commission believes that police interviews with child witnesses should continue to be recorded. We also recommend the pre-recording of children's evidence-in-chief and cross-examination.⁵⁸⁷ However this will not make VATE tapes redundant. If the child's evidence is pre-recorded, the VATE tape could be admitted as the child's evidence-in-chief.

5.39 Viewing the VATE tape is likely to result in some defendants pleading guilty at an early stage. Taping the interview reduces the possibility of improper questioning and lessens the likelihood of distortion that may result when an interviewer writes up interview notes after the event.⁵⁸⁸ Evaluation of the electronic recording of children's evidence⁵⁸⁹ has found that it 'improved the quality and completeness of the statement'.⁵⁹⁰ Other advantages include the recording of the child's appearance, demeanour, gestures and emotional state close in time to the initial report.

5.40 Further work needs to be done to ascertain why relatively few VATE tapes are admitted in evidence. We recommend that Victoria Police establish an independent evaluation of the VATE taping process, as has already occurred in New South Wales. The evaluation should include:

- assessment of a sample of VATE tapes, to determine whether prosecutors' concerns about the admissibility of VATE tapes are well founded;

586 Submission 41. See also comments about the use of VATE for people with a cognitive impairment in Submission 40 and Submission 44, which supported evaluation of the VATE system by an independent academic.

587 See para 5.58.

588 Gail Goodman and Vicki Helgeson, 'Child Sexual Assault: Children's Memory and the Law' (1985) 40 *University of Miami Law Review* 181 198.

589 Youth and Child Protection Team, NSW, *Evaluation of the Electronic Recording of Children's Evidence* (2002).

590 *Ibid* ii.

- recommendations about changes to police training which may be necessary to improve the quality and admissibility of interviews recorded on VATE tapes; and
- recommendations about training of lawyers involved in the prosecution of child sexual offences to encourage them to rely on VATE tapes wherever possible.

5.41 A Joint Police/OPP working party should be established to oversee implementation of any recommendations made as a result of the evaluation. The Working Party should include a person with expertise in dealing with child victims of sexual assault and a representative of DHS.

!	RECOMMENDATION(S)
	113. Police should continue to make video and audiotaped evidence (VATE) of statements given by children and people with a cognitive impairment.
	114. Victoria Police should establish an independent evaluation of VATE statements in sexual offence cases and of the use of VATE statements in evidence.
	115. The evaluation should include <ul style="list-style-type: none"> • arranging for a review panel, including a magistrate, a member of Victoria Police, a judge, an experienced defence barrister, an experienced prosecutor and a child psychologist with expertise in methods for questioning children, to view a sample of VATEs (including tapes played at trials and tapes not played) to assess their admissibility, forensic quality and the appropriateness of the interview techniques used; • researching Australian and international best practice with respect to the preparation of video recordings of evidence and making recommendations about changes to police training which may be necessary to improve the quality and admissibility of VATE interviews; and • making recommendations for prosecutor training which might encourage greater reliance on VATE tapes.

! RECOMMENDATION(S)

116. A joint Working Party of Victoria Police and the OPP should be established to oversee implementation of any recommendations made as a result of the evaluation.
117. The Working Party should include a person with expertise in dealing with child victims of sexual assault and a representative of the Department of Human Services (DHS).

ROUTINE USE OF CCTV

5.42 Only the Criminal Bar Association and Victorian Bar submissions opposed routine use of CCTV for child witnesses.⁵⁹¹ The Criminal Bar Association thought that the same procedures should apply to adults and children.

5.43 A number of submissions explicitly supported the child's right to use CCTV,⁵⁹² though many of the positive comments took the use of CCTV for granted and focused on the proposal that all the child's evidence be pre-recorded and played at trial. The Department of Human Services submission said that the child should have the right to decide whether to use the facilities:

It is important that the child be given a sense of control over the process and that the process accord with the child's sense of fairness, with the likelihood that the quality of the child's evidence be improved.⁵⁹³

Judge Anderson also supported routine use of CCTV by child witnesses.⁵⁹⁴

5.44 In Chapter 4 we recommended that all complainants in sexual offence trials should have the right to give evidence by CCTV.⁵⁹⁵ We make a separate recommendation that children's evidence should routinely be taken in this way, because of the importance of ensuring that children do not have to give evidence in open court.

591 Submissions 42, 48.

592 See Submissions 5, 10, 12, 19, 20, 25, 28, 29, 30, 38, 47, 44 and 49.

593 Submission 44.

594 Submission 49.

595 See paras 4.26–32 and Recommendations 59–65.

5.45 New South Wales, Queensland, Western Australia, Tasmania, the ACT and the Northern Territory provide for routine use of CCTV by child complainants in sexual offence cases⁵⁹⁶ and similar provisions apply in England. Our recommendation will ensure that child witnesses in Victoria are treated in the same way as in most other States and Territories.

5.46 In Western Australia, provision for use of CCTV was part of a package of reforms designed to meet the needs of child complainants, which according to Judge Yeats 'have been grasped with enthusiasm and have become part of [the] legal culture'.⁵⁹⁷ The Commission's enquiries show that despite initial concerns, Western Australian judges, prosecutors and defence counsel now support children giving their evidence in this way,⁵⁹⁸ though some judges⁵⁹⁹ emphasised the need for good quality technical and trained operators to manage it. An formal evaluation of the system, which included an exit survey of jurors in 13 trials, was very positive.⁶⁰⁰ The only reservation was that almost half of the jurors found it difficult to judge the size of the child witness and more than a quarter found it difficult to judge the child's age. As a result, the transmission procedure was changed to give the jury a view of the child coming into the remote room with a court officer so that the whole of the child can be seen and the jury can judge the child's size.

5.47 Judge Mary Ann Yeats says that:

596 *Evidence (Miscellaneous Provisions) Act 1991*, Republication No 10 (ACT) s 8(1)(b); *Evidence Act* (NT) as in force 1 January 2004 ss.21A(2)(a); *Evidence (Children) Act 1997* (NSW) s 18; *Evidence Act 1977* (Qld) s 21AB, s 21AP (normally the child's evidence is to be pre-recorded at a special hearing; if this does not occur the child must normally give evidence by CCTV); *Evidence (Children and Special Witnesses) Act (2001)* (Tas) provision s 6(1).

597 (Her Honour Judge) Mary Ann Yeats, 'Alternative Arrangements for Giving Evidence: A Judicial Perspective' (Paper presented at the Children as Witnesses Workshop, 14 November 2003, Melbourne) 2.

598 Notes of meeting with members of the Criminal Bar on 9 May 2003; meeting with His Honour Chief Judge Hammond on 8 May 2003; meeting with His Honour Judge Jackson on 8 May 2003; meeting with Legal Aid on 9 May 2003; meeting with Prosecutors on 8 May 2003.

599 Meeting with His Honour Chief Judge Hammond on 8 May 2003; meeting with His Honour Judge Jackson on 8 May 2003.

600 Ministry of Justice, *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996). Only 16 of the 109 jurors thought it would have been easier to reach a verdict if they had seen the child in the courtroom.

the use of CCTV is now the norm and prosecution and defence lawyers use it without difficulty. Some defence counsel welcome the remoteness of the child and see some benefit to the accused in keeping the child out of the courtroom. But the statistics on conviction rates do not support any bias in favour of the defence... When the changes are analysed from a judicial perspective there seems to be no diminishment of an accused's right to a fair trial according to law.⁶⁰¹

5.48 According to Judge Yeats, the use of screens is less satisfactory because of difficulties in ensuring the child does not see the accused when the child enters the courtroom or enters the witness box. Further, the use of a screen does 'nothing to prevent the child being overwhelmed by the courtroom setting in the presence of strangers...(and) did nothing to ensure that the child's evidence could be properly heard'.⁶⁰²

5.49 Where the child gives evidence by CCTV they should be entitled to have a support person present. A support person and a court officer are generally present in Western Australia.⁶⁰³ Recommendations 2–7 (in Chapter 4) which apply to adult complainants who give evidence by closed circuit television are also intended to apply to children.

5.50 In Western Australia, it is the practice to simultaneously video and audio record the evidence of child witnesses who testify via CCTV. This means that, in the case of a retrial or another situation requiring the court to hear the child's testimony again, the child is not recalled. Instead, the child's evidence, exactly as given the first time, is played to the court as evidence in the subsequent trial. We recommend that this process is introduced in Victoria as a way of avoiding the problem of requiring a child complainant to testify at more than one trial about the same material.



RECOMMENDATION(S)

118. Section 37 of the *Evidence Act 1958* should be amended to give child complainants in sexual offences cases the right to give evidence by CCTV.

601 Mary Ann Yeats, above n 597, 12.

602 Ibid 9–10.

603 Ibid 14.

! RECOMMENDATION(S)

119. The prosecution should be able to apply for an order that the alternative arrangement not be used. Before the court makes such an order the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to give evidence by CCTV and that the complainant is able and wishes to give evidence in the court room.
120. Recommendations 62–67 should also apply in relation to child complainants.
121. Child complainants in sexual offence cases should be entitled to have a person beside them for the purpose of providing emotional support while they are giving evidence (whether or not they give evidence by CCTV) except where the presiding judge or magistrate has satisfied him/herself that the complainant does not wish to have a support person present.
122. All child complainants' evidence given by CCTV should be simultaneously audio and video recorded so that in the event of a retrial or other situation arising that requires the court to rehear all or part of the child complainant's evidence, the tape can be played instead of the child being called to testify again.

PRE-RECORDING OF EVIDENCE-IN-CHIEF AND CROSS-EXAMINATION AND RE-EXAMINATION OF CHILD COMPLAINANTS**Submissions on Pre-Recording**

5.51 The majority of submissions supported the recommendations for the introduction of a process of pre-recording the child's evidence-in-chief and cross-examination.⁶⁰⁴ The Youth Affairs Council of Victoria commented that:

these recommendations possibly stand to make the most positive impact on the lives of children and young people involved in the court process...minimising the contact the complainant has with the court system will considerably enhance their ability to recover from the traumatic events that they have experienced and allow them to move on with their lives[.]

604 See Submissions 5, 7 (which commented that the accused should be supported as well)8, 9, 10, 16, 19, 20, 21, 25, 26, 29, 30, 38, 41, 40, 44, 47 and 49.

5.52 Magistrate Lisa Hannan said that:

This recommendation would represent a significant step forward in terms of process for the reasons identified in the report and I strongly support it. Issues relevant to appropriate defence disclosure would need to be carefully considered as would process in terms of how and at what stage of proceedings recording is to occur.

5.53 Judge Anderson's submission and the submission from the Federation of Community Legal Centres 'strongly supported' the recommendations.

5.54 The recommendations were opposed by the Victorian Bar and the Criminal Bar Association. The Victorian Bar thought that although some children were traumatised by giving evidence in court many children were not.

For those who are distressed in giving evidence, we question whether that trauma would be significantly diminished by the special hearing process. We also submit that taped evidence is not as illuminating for a jury as evidence given 'live'. The demeanour and body language of a witness are significant, and the jury is likely to perform less well in its function of assessing the witness.

5.55 Similarly, the Criminal Bar Association disagreed with the proposal, suggesting that if a judge was available it would be better to have an early trial, rather than pre-recording the child's evidence. The Criminal Bar was concerned that pre-recording of cross-examination might occur at a time when the defence was not adequately prepared.

5.56 The Criminal Bar was also concerned that the absence of the child in court would prevent the jury asking the child questions and that the process would cause problems with the rule in *Browne v Dunn*,⁶⁰⁵ which is a rule designed to ensure fairness in an adversary trial process. The *Browne v Dunn* rule requires a person who wishes to introduce evidence inconsistent with the evidence given by a witness for the other side, to give the witness an opportunity to comment during cross-examination on the evidence that has been led. The Criminal Bar raised the problem that at the trial evidence may be given that is inconsistent with evidence given previously by a child complainant and the child may not have been cross-examined by the defence on this issue. We address this problem below.

605 (1894) 6 R 67.

The Commission's View

5.57 Our recommendation that children should have the right to give evidence by CCTV will reduce the stress experienced by child complainants to some extent, but in the Commission's view it does not respond adequately to the needs of child complainants.⁶⁰⁶

Advantages of Pre-Recording

5.58 The Commission believes that there would be significant advantages in allowing a child complainant's evidence-in-chief and cross-examination to be pre-recorded at a hearing held before the trial.

- Despite the statutory time limits which apply in Victoria⁶⁰⁷ there are still long delays between the commencement of prosecution and children giving their evidence at trial. Until cross-examination of the child has been completed it will be very difficult for them to begin the process of recovery from the events on which the charge was based. The procedure has the potential to reduce delays to some extent and consequently reduce the stress which children suffer while waiting for a court appearance.
- The procedure may result in better quality evidence, both because evidence may be captured while the witness' recollections are fresher and also because 'the child may perform better as a witness because he or she is allowed to perform in a less stressful environment'.⁶⁰⁸
- The pre-recording process is less intimidating for a child complainant than giving evidence at committal or trial. The witness can attend specifically for the scheduled hearing, without being required to wait to give evidence. Proceedings can be conducted more informally. The complainant can testify by CCTV to a court occupied by the accused, the judge and counsel for the prosecution and defence.
- Unlike the current situation with VATE tapes, the prosecutor would not have a discretion as to whether or not to use the tape, because the pre-recorded evidence would function as the evidence of the witness.⁶⁰⁹ The

606 See discussion of the difficulties child complainants experience: Interim Report paras 6.8–18 and 6.53–8.

607 See above para 3.48.

608 Andrew Palmer, 'Child Sexual Abuse Prosecutions and the Presentation of the Child's Story' (1997) 23 (1) *Monash University Law Review* 171–88.

609 *Evidence Act 1906 (WA)* s 106T.

recorded testimony would be played at the trial and the witness would not normally be required to attend.

- Counsel can object to the admission of evidence. In Western Australia, objections are often left for the editing stage and argued before the judge after the witness has been excused. The adoption of a similar process in Victoria would mean that child complainants would be interrupted less than in conventional testimony and permitted to tell their stories in a more direct manner.⁶¹⁰
- Once the pre-recording is completed, the child will rarely be required to give evidence again. This gives the opportunity for a relatively early sense of at least partial ‘closure’ and the chance to move on to counselling and eventually, healing. Without early recording, ‘the goal of rehabilitation of the witness through counselling can conflict with the forensic need to keep the evidence of the witness uncontaminated’.⁶¹¹
- If there is a retrial following a successful appeal, the tape can be replayed so that the child would not be required to give evidence again.⁶¹²

5.59 Child complainant’s evidence-in-chief and cross-examination have been able to be pre-recorded in Western Australia for many years.⁶¹³ Under the present legislation the prosecution can apply for an order directing that the child’s evidence be pre-recorded.⁶¹⁴ Since 1995, approximately 580 of the 1200 children who have given evidence in specified sexual offence cases have given pre-recorded evidence in accordance with section 106I(b) of the *Evidence Act 1906* (WA).⁶¹⁵ The ALRC/HREOC joint report⁶¹⁶ on children in the criminal justice system

610 Information provided by the Child Witness Service, 7 October 2002.

611 Chris Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75 77.

612 In *H v The Queen* [1977] Supreme Court of Western Australia, Court of Criminal Appeal Library No 97037 (Unreported, 6 February 1997), Wallwork J at 11 it was held that the video-tape from the first trial could be played at the second trial. This was confirmed by the *Evidence Act 1906* (WA) s 106T(5)(b). The child’s evidence must be video recorded see s106N.

613 Section 106T provides for an alternative process whereby only the child witness’ evidence-in-chief is pre-recorded and the child is called at trial for cross-examination and re-examination. However, this limited process is seldom used.

614 *Evidence Act 1906* (WA) s 106I.

615 Chris Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75 84.

616 Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, above n 541.

examined the Western Australian system for prerecording, noted its many advantages and recommended its adoption.⁶¹⁷

5.60 Initially lawyers were concerned that the process would be unfair to the accused, but the Commission's meetings with lawyers in Western Australia confirmed that the process was now well accepted, though some concerns were still expressed about delays occurring before the pre-recording was conducted. Judge Jackson who has written extensively about the experiences of child witnesses has commented that:

There is no basis for the suggestion that the legislative, administrative and judicial steps taken in Western Australia have impacted adversely on the rights of the accused to a fair trial. They have, however, reduced the unfairness to children and other vulnerable witnesses. The two are not in competition.⁶¹⁸

5.61 Eastwood and Patton's study of the experiences of child complainants⁶¹⁹ in Western Australia, New South Wales and Queensland also provide evidence that child complainants in Western Australia find the criminal justice process less stressful than complainants in New South Wales and Queensland where pre-recording was not used.⁶²⁰ Nearly two-thirds of child complainants in Western Australia said that if they were sexually abused again they would report sexual abuse again. By contrast, only 44% of Queensland children and 33% of New South Wales children said they would report again.

5.62 These differences were also evident in the responses of lawyers and judges. Forty-six percent of Western Australian lawyers and judges surveyed said they would want their child in the justice system if the child was a victim of serious sexual assault, compared with 18% in Queensland and 33% in New South Wales.⁶²¹

617 Ibid 316.

618 His Honour Judge Hal Jackson, 'Child Witnesses in the Western Australian Criminal Courts' (2003) 27 (4) *Criminal Law Journal* 199 210.

619 Eastwood and Patton interviewed 63 child complainants aged between 8 and 17 years, 39 parents/guardians and 28 lawyers from the three States.

620 The numbers of children from NSW and Qld who participated in the study were relatively small—9 and 18 respectively.

621 Christine Eastwood and Wendy Patton, *The Experience of Child Complainants of Sexual Abuse in the Criminal Justice System 2*. WA children found the process less stressful than children in the other two States for a number of reasons. These were not confined to the pre-recording process. No WA child was physically present in the court room. Thirty per cent pre-recorded evidence-in-chief and cross-

5.63 In Queensland, pre-recording of children's evidence has now become the standard practice for child complainants giving evidence in sexual assault trials as a result of recent amendments to the *Evidence Act 1977*.⁶²² Once a committal has occurred⁶²³ the evidence-in-chief of a child under 16 and the child's cross-examination must normally be pre-recorded at a preliminary hearing, presided over by a judicial officer.⁶²⁴ The evidence must be videotaped and shown at trial, unless the court orders otherwise. If this measure cannot be given effect (for example because no court room with appropriate facilities is available and the procedure would delay a trial) the court may make an order that this procedure is not to apply, for good reason, having regard to the child's wishes and the purposes of the provisions.⁶²⁵ In exercising this discretion the court must take account of the need to preserve the integrity of the child's evidence and the principle that the child's evidence should be taken in an environment that limits, to the greatest extent practicable, the distress or trauma that might otherwise be experienced by the child in giving their evidence.⁶²⁶

5.64 In England⁶²⁷ the *Youth Justice and Criminal Evidence Act 1999*⁶²⁸ allows the court to give a special measures direction providing for cross-examination, as

examination and all the others gave evidence by CCTV. The WA children had the benefits of the specialised child witness service for court preparation and also while waiting to give evidence on the day of the trial.

- 622 *Evidence Act 1977* (Qld) s 21AK–21AM. Queensland previously had provisions allowing pre-recording of the evidence of children under 12 and people who, as the result of a mental, intellectual or physical impairment or other relevant matter, were likely to be disadvantaged as witnesses. However this procedure was rarely used; Queensland Law Reform Commission, above n 541, 159.
- 623 The Queensland legislation also provides that at the committal 'the child's evidence in chief is to be given only as a statement and, ordinarily, the child is not to be called as a witness for cross-examination; *Evidence Act 1977*, s 21AB(iii), 21AF, 21AG.
- 624 *Evidence Act 1977* (Qld) s 21AB, 21AK. The child may be required to give evidence in the court room, rather than by audio-visual link, but the accused must not be in the same room. In this situation the accused must be capable of seeing and hearing the child when they give their evidence, 21AL.
- 625 *Evidence Act 1977* (Qld) s 21AO.
- 626 *Evidence Act 1977* (Qld) s 21AA, see also s 9E. Under *Evidence Act 1977* (Qld) ss 21AP–AR; if the child does not give evidence at a preliminary hearing the child must usually give evidence by CCTV, or the accused must be held in a room apart from the court room and the child's evidence transmitted to that room by audio-visual link. If audio-visual facilities are not available a screen or other device must be used so the child cannot see the accused.
- 627 The English provisions were based on recommendations in three previous enquiries see Home Office, *Report of the Advisory Group on Video Evidence* (1989) 21–6 and Recommendations 1–4; Department of Health, 'People like Us' *The Report of the Review of the Safeguards For Children Living Away From Home* (1997) Chapter 20; Home Office, *Speaking Up for Justice*, Report of the Interdepartmental

well as examination-in-chief, of child witnesses giving evidence in sexual offences cases to be videorecorded.⁶²⁹ If this occurs the witness cannot be cross-examined or re-examined on any evidence given by the witness unless the court gives a further direction for cross-examination and re-examination.

Possible Problems With the Introduction of the Procedure

Resource Implications

5.65 The Commission acknowledges that the introduction of pre-recording will add to judicial workload as it will be necessary to assign a judge to preside over the separate hearing. Defence counsel will be required to prepare and appear at this hearing and then the trial, which may increase legal aid costs. We believe that this cost is justified by the benefits of the procedure for child complainants and the likelihood that such changes will contribute to an increase in the number of people who are willing to report child sexual assault to the police because they have more confidence that the child will be treated appropriately. There would also be some cost savings where successful appeals result in retrials because the child would not have to give evidence again.

Safeguarding the Accused's Right to Test the Evidence

5.66 Pre-recording will have to occur at a time when defence counsel has sufficient notice of the prosecution case to cross-examine the child at the special hearing. In Chapter 3 we recommend that in the case of an indictable offence the special hearing should occur soon after case conference in the County Court. (We also recommend some changes to committals in child sexual assault cases.)⁶³⁰ Provision for the child's evidence to be pre-recorded after committal and after the presentment has been filed will ensure that accused persons have sufficient notice of the case against them.

5.67 If at trial evidence is given that the accused could not have anticipated when the pre-recording was conducted, so that the child could not have been cross-examined on it, provision should be made for the child to be recalled for cross-examination on this new evidence. The Western Australian and Queensland legislation allows the judge to order the child to give further evidence at another

Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System (1998) 56–8, Recommendations 41, 45, 46.

628 Section 28.

629 *Youth Justice and Criminal Evidence Act 1999* (Eng) s 21.

630 Recommendations 43–9.

special hearing or to attend the court to give further evidence,⁶³¹ although the Commission was told that this had rarely been necessary in Western Australia. The adoption of a similar provision in Victoria would meet concerns about the rule in *Browne v Dunn* that were expressed by the Criminal Bar.

5.68 In England the court can only order that the child attend court if a party seeks to cross-examine the child because the party has become aware of a matter that could not have been ascertained with reasonable diligence at the time the pre-recording was conducted, or if it is in the interests of justice to permit further cross-examination for any other reason.⁶³² Similar limits should be placed on the recall of the child in Victoria.

5.69 An issue has arisen as to what approach should be taken when the child does not come up to proof on all the counts in the presentment when they give their pre-recorded evidence.⁶³³ To ensure fairness to the accused we recommend that the presentment be filed before pre-recording occurs.⁶³⁴ If the child's evidence is insufficient to support all of the counts on the presentment the prosecution will not be able to proceed with all the counts at the trial. In that case we recommend that the accused be presented on the original counts, the entire pre-recording be played to the jury, and the prosecution should then formally withdraw the counts which were not supported by sufficient evidence. This ensures fairness to the accused, as it is closest to what would occur if the child gave evidence at the trial in the usual way.

631 *Evidence Act 1977* (Qld) s 21AN; *Evidence Act 1906* (WA) s 106K(5), 106T.

632 *Youth Justice and Criminal Evidence Act 1999* (Eng) s 28(5) and (6). See also the limit on recall of witnesses in *Evidence Act 1977* (Qld) s 21AN.

633 See *Grinrod v The Queen* [1999] WASCA 44 at para 14 (Ipp J, Kennedy and Owen JJ concurring) and discussion in (Her Honour Judge) Mary Ann Yeats, 'Alternative Arrangements for Giving Evidence: A Judicial Perspective' (Paper presented at the Children as Witnesses Workshop, 14 November 2003, Melbourne), 20–2.

634 Recommendation 47.

**RECOMMENDATION(S)**

123. The *Evidence Act 1958* should be amended to create a presumption in favour of videorecording of children's evidence-in-chief and cross-examination. Pre-recording should occur at a hearing presided over by a judge at which the accused and counsel for the prosecution and defence are present.
124. The prosecution should be able to apply for an order that a child complainant should give evidence at the trial rather than pre-record his or her evidence. Before the court makes such an order, the presiding judge or magistrate must satisfy him or herself that the complainant is aware of his or her right to have evidence pre-recorded at a separate hearing and that the complainant is able and wishes to give evidence at the time of the trial by CCTV or in the court room.
125. The child's recorded evidence should be admissible as if the evidence were given orally in accordance with the usual rules of evidence in the same way as evidence given orally in a hearing.
126. Unless the court orders otherwise, the child's recorded evidence should be admissible in a retrial of the same offence, or for a trial of an offence arising out of the same circumstances.
127. At the hearing the defendant must not be in the same room as the child, but must be capable of seeing and hearing the child when the child gives evidence.
128. The child must give their evidence by closed circuit television from a place outside the courtroom.
129. If the child's evidence has been pre-recorded the child may not be subsequently cross-examined or re-examined on any matter unless either:
 - a party seeks to recall the child as a result of that party having become aware of a matter of which that party could not have been aware with reasonable diligence at the time of the pre-recording, or
 - it is in the interests of justice for the court to permit the child to be re-examined or cross-examined; or

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- if the child were giving evidence in court in the normal way the child could be recalled to give further evidence and it would be in the interest of justice to make the order.
130. If the child's evidence is insufficient to support all of the counts on the presentment the accused should be presented on the original counts, the entire pre-recording played to the jury, and the prosecution should then formally withdraw the counts that were not supported by the child's evidence.
131. A similar pre-recording process should also be available for witnesses with cognitive impairment.⁶³⁵

SUMMARY

- 5.70 To summarise, the recommendations on use of alternative measures:
- provide for continued use of video and audio recording of police interviews for child witnesses and the use of recordings as evidence-in-chief. We make proposals for the evaluation and improvement of the existing process;
 - ensure that children have a right to give their evidence by CCTV; and
 - introduce pre-recording of children's evidence-in-chief and cross-examination, similar to the system which works successfully in Western Australia.

CHANGES TO EVIDENCE LAW

- 5.71 This section deals with changes to evidence laws including:
- laws which determine the competence of children to give evidence; and
 - laws relating to the admission of out-of-court statements made by children.

635 More detailed recommendations dealing with people with a cognitive impairment are set out in Chapter 6.

COMPETENCE

CURRENT LAW

5.72 Because sexual offences against children usually occur in secret, the evidence of the child who has been assaulted will often be crucial in proving that an offence has been committed. However children cannot give evidence unless they are ‘competent’ witnesses. The legal tests which determine competency to be a witness are not consistent across Australia.⁶³⁶

5.73 Under Victorian law children aged 14 or over are assumed to be capable of giving sworn evidence.⁶³⁷ Children under 14 are only able to give evidence on oath (sworn evidence) if they ‘understand the nature and significance of an oath’.⁶³⁸ To determine whether a child under 14 is competent, the judge or magistrate questions the child in the absence of the jury⁶³⁹ to assess the child’s understanding of the obligation and significance of giving sworn evidence.

5.74 Where a child is assessed as incompetent to give sworn evidence they may give unsworn evidence. Section 23(1) of the *Evidence Act 1958* allows a child to give unsworn evidence if, in the opinion of the court, the child understands the duty of speaking the truth and is capable of responding rationally to questions about the facts in issue. The law regards evidence given on oath as carrying greater weight than unsworn evidence, but in practice it is not known whether juries are actually influenced by the fact that evidence is sworn or unsworn.

PROBLEMS WITH THE CURRENT LAW

5.75 The Interim Report argued that the tests which determine competence to give sworn and unsworn evidence disadvantage children who report sexual abuse.

- Children may be unable to give sworn evidence, even though they are capable of understanding that they should tell the truth, because the competency test which applies in Victoria probably requires them to understand the religious significance of taking an oath.⁶⁴⁰ Children from

636 For discussion of the approach in other jurisdictions see Interim Report paras 6.84–91.

637 *Evidence Act 1958* s 23(1).

638 *R v Brasier* (1799) 1 Leach 199; 168 ER 202.

639 *Evidence Act 1958* s 23(2).

640 *R v Brasier* (1799) 1 Leach 199; 168 ER 202 laid down the common law test, which has not been modified by legislation in Victoria.

secular backgrounds are unlikely to satisfy this test. For children from religious or cultural backgrounds other than Christian ones, swearing an oath may be quite inappropriate and may add to the stress which they experience in giving evidence.⁶⁴¹

- Children may be incompetent to give unsworn evidence because they cannot undertake to tell the truth⁶⁴² even though they are able to accurately communicate information which is relevant to the charge. The competency requirement for unsworn evidence could result in a failure to charge an alleged offender or could deprive the prosecution of the main evidence relevant to the charge.⁶⁴³ Excluding the evidence of a child because the child is not competent to give sworn or unsworn evidence may also result in the conviction of an innocent person.⁶⁴⁴

5.76 The Interim Report also argued that the current processes for determining competency do not work well:

- Competency is tested by the judge or magistrate asking the child a series of questions, but there is no evidence that the questions that are commonly asked adequately test the child's understanding.⁶⁴⁵ Courts do not hear expert evidence on the capacity of a particular child to give evidence, even though a person with expertise in the development patterns of children may be able to provide important information about the child's capacity to give evidence.

641 The Victorian Parliament Law Reform Committee heard evidence that it is not customary for Sikhs, Buddhists, Muslims or Quakers to swear an oath on a religious text in the way that Christians swear on the Bible: Law Reform Committee, Victorian Parliament, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community* (2002) 79–96.

642 J. R. Spencer and Rhona H. Flin, *The Evidence of Children, The Law and the Psychology* (2nd ed) (1993) 54.

643 Ibid 54.

644 See *Sparks v The Queen* [1964] AC 964, discussed in Ibid 55.

645 At a Victorian trial observed by a researcher at the VLRC on 16 May 2002, a 10-year-old witness was asked by the judge 'what is the truth?'—an open-ended and conceptual question that reduced her to confused silence immediately. Judge Yeats has described a situation in which she asked an 8 year old child about her birthday and whether she had a cake and presents. She replied no to both these questions. The child came from a cultural background in which birthdays were not celebrated, so these questions were not helpful in determining competence (Her Honour Judge) Mary Ann Yeats, 'To Swear or Not to Swear' (Paper presented at the Children as Witnesses Workshop, 14 November 2003, Melbourne).

- Judges and magistrates find it difficult to know what questions they should ask a child to determine the child's competence.⁶⁴⁶ Judges are not trained in child development and may not know how to ask the child appropriately worded questions.⁶⁴⁷ They may be unaware of the complexities that arise in questioning children from NESB or Indigenous backgrounds. Sometimes the questions asked are far too difficult and abstract.⁶⁴⁸
- Inappropriate questioning may cause children significant stress, may mean that they 'dry up' when they are questioned to determine their competence. This could result in the exclusion of evidence that should have been admitted.
- Lack of guidance on how to test the competency of a child to give evidence may result in inconsistent decision-making on this issue.

RECOMMENDATIONS IN THE INTERIM REPORT

5.77 The Interim Report recommended that the *Evidence Act 1958* be amended to:

- include a presumption that all witnesses, regardless of age, are competent to give evidence;
- change the test for competence to give evidence on oath to allow children who can understand questions put to them as witnesses and answer them and who understand the obligation to tell the truth, to give evidence on oath;
- change the test for competence to give unsworn evidence so that children can give unsworn evidence if they can understand questions put to them and give comprehensible answers to those questions; and
- allow the court to seek an expert report on the child's competence to give evidence.

646 See comments on these difficulties in *R v Stevenson* [2000] WASCA 301, Pidgeon, Wallwork and Parker JJ, (18 October 2000).

647 Louise Sas, *I'm Trying to Do My Job in Court. Are You? Questions for the Criminal Justice System* (1999) 50.

648 See above n 645.

SUBMISSIONS

5.78 Most submissions which commented on the issue supported changes to the test for competency to give sworn evidence.⁶⁴⁹ Magistrate Lisa Hannan said that:

The current requirements are archaic and do not reflect any reality for children. In my experience this is an area for ongoing concern for judicial officers.⁶⁵⁰

5.79 The Department of Human Services submission said that it is desirable that a larger number of children be allowed to give sworn evidence as this will uphold children's dignity and integrity. The submission criticised the fact that the current law specifies a particular age to determine competency to give sworn evidence, when adults who may not understand the nature of the oath are not questioned in the same way.

An arbitrary age does not take into consideration wide differences in patterns of child development.⁶⁵¹

5.80 Relatively few submissions commented on changes to the test of competency to give unsworn evidence.⁶⁵² The recommendation that the court should be able to order an expert report to assess a child's competence was strongly supported by the Salvation Army, the Disability Discrimination Legal Service, the Australian Childhood Foundation, DHS⁶⁵³ and Dr Michelle Earle of the Eastern Victims Assistance Program⁶⁵⁴ who commented that:

Assessment of competence requires knowledge and skills in such fields as child development, child psychology and cognitive development and cannot be undertaken by laypersons... [I]t seems absolutely crucial to base the decision on current expert evidence.

5.81 Submissions which commented on use of expert evidence thought this should occur as a matter of course. The County Court submission did not oppose the provision allowing for an expert report on the child's competence, but 'upon

649 Submissions 8, 19, 21, 71 (which supported abolition of the requirement for an oath for both children and adults).

650 Submission 8.

651 Submission 44.

652 Supported in Submissions 34, 40, 41, 44; opposed in Submissions 42 and 48.

653 Submission 33, 40, 41, 44.

654 Submission 14.

the basis that the trial judge has the final say'.⁶⁵⁵ The Victorian Bar took a similar view.⁶⁵⁶

5.82 The Criminal Bar Association opposed any change to current law and practice in relation to competence, although it commented that:

Victoria is currently considering whether or not to adopt the provisions of the Uniform Evidence Act. If the Uniform Evidence Act is adopted by Victoria, then competence will be determined in accordance with that Act. In the meantime the current provisions should continue.⁶⁵⁷

5.83 In the Criminal Bar's view the current tests for competence to give sworn and unsworn evidence were appropriate and there was no evidence to suggest that judges required assistance from experts in assessing competence.⁶⁵⁸

5.84 The Victorian Bar also opposed changes to the test for competency to give sworn and unsworn evidence. In the case of sworn evidence:

There does seem to be a certain incongruity in regarding evidence as being on oath when there is no reference to the religious significance of the oath. If the law is to be changed in this area then it should be changed for all witnesses and the nature of the oath should also be changed.⁶⁵⁹

5.85 In the case of unsworn evidence the Bar thought the test should be whether the child understands that they must tell the truth.

RECOMMENDATIONS

SWORN EVIDENCE

5.86 The Commission reiterates the recommendations on competence that were made in the Interim Report. Recommendation 132 on the presumption of competence and Recommendation 133 on the test for competence to give sworn evidence are based on the Uniform Evidence Act provisions which apply in New South Wales, South Australia, Tasmania and the ACT, as well as at

655 Submission 52.

656 Submission 48.

657 Submissions 42, 46.

658 Submissions 42, 46, 47.

659 Submission 48.

Commonwealth level.⁶⁶⁰ The Commission sees no reason to delay the introduction of these provisions until the Uniform Evidence Act provisions are applied in Victoria, as proposed in the Criminal Bar Association submission.⁶⁶¹

UNSWORN EVIDENCE

5.87 The test for competence to give unsworn evidence which applies under the Uniform Evidence Act is that:

- the court is satisfied that the person understands the difference between a truth and a lie;
- the court tells the person that it is important to tell the truth; and
- the person indicates, by responding appropriately when asked, that he or she will not tell lies in proceedings.⁶⁶²

5.88 In the Interim Report we argued that a more liberal test for competence to give unsworn evidence should apply in Victoria. The proposed test is that a person should be able to give unsworn evidence if they can understand questions put to them as witnesses and give answers to them which can be understood.

5.89 The test does not require the court to be satisfied that 'the person understands the difference between a truth and a lie'. In our view there is no point in having a test for admission of unsworn evidence which is substantially similar to the test of competence to give sworn evidence. The Uniform Evidence Act test will often prevent children under about 10 or 11 years giving unsworn evidence, since it is not until that time that most children will fully understand the abstract notion of dishonesty.⁶⁶³ In our view the solemnity of participation in legal proceedings is sufficient to convey to the child witness the importance of telling the truth. Recent Canadian research suggests that the way a child answers

660 *Evidence Act 1995* (NSW) ss 12, 13; *Evidence Act 1929* (SA) s 9(1); *Evidence Act 2001* (Tas) ss 12, 13(1); *Evidence Act 1995* (Cth) ss 12, 13; For the position in the ACT, see *Evidence Act 1995* (Cth) s 4(1) and 8(4)(a), which provides that the Commonwealth Act applies to proceedings in ACT courts. Under the latter provision, the *Evidence Act 1995* (Cth) does not affect provisions of the *Evidence Act 1971* (ACT) specified in regulations until the day fixed by proclamation.

661 Submission 42.

662 *Evidence Act 1995* (Cth) s 13.

663 Australian Law Reform Commission, *Evidence*, Report No 26, Vol 1 (1985) 129.

questions about truth-telling or lying has no bearing on whether a child will actually tell the truth.⁶⁶⁴

5.90 The test we recommend is based on the test of competence to give unsworn evidence that applies in England under the *Youth Justice and Criminal Evidence Act 1999* (Eng).⁶⁶⁵ A similar test for competence to give unsworn evidence applies in Queensland,⁶⁶⁶ the Northern Territory⁶⁶⁷ and Western Australia⁶⁶⁸ and has been recommended in New Zealand.⁶⁶⁹ The Commission's inquiries in Western Australia suggest that this approach has not created difficulties.

5.91 A provision allowing a child, who can understand and answer questions, to give unsworn evidence will facilitate the prosecution of alleged offenders of crimes against young children, as child witnesses may be able to convey information before they have reached the stage of development where they can demonstrate that they understand the difference between truth and a lie. The jury will have to decide whether the child's evidence is credible. The fact that the evidence is unsworn may affect the weight which is given to the evidence, rather than its admissibility.

5.92 Researchers on children's competence have suggested there may be some benefit (and at least no harm) from a child being asked to tell the truth.⁶⁷⁰ For this reason we have added a recommendation that the court should be required to tell the child that it is important to tell the truth. Jurisdictions that have implemented the Uniform Evidence Act have such a provision, as has Queensland.⁶⁷¹ The Evidence Code, proposed by the New Zealand Law Commission, will also require

664 Nicholas Bala, Kang Lee, Rod Lindsay et al, 'A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses' (2000) 38 *Osgoode Hall Law Journal* 409 411.

665 Section 55(3), (8).

666 *Evidence Act 1977* (Qld) s 9A(2), (3).

667 *Oaths Act* (NT) as in force 1 December 2000, s 25A.

668 *Evidence Act 1906* (WA) s 106C allows children to give unsworn evidence if they can give an intelligible account of events they have observed or experienced.

669 New Zealand Law Commission, *Evidence*, Report 55, Vol 1, 96 and Vol 2, s 78.

670 New Zealand Law Commission (1996) *The Evidence of Children and Other Vulnerable Witnesses*, Preliminary Paper 26, 6–9.

671 See for example *Evidence Act 1995* (Cth) s 13(2)(b). Queensland has enacted similar legislation see *Evidence Act 1977* (Qld) s 9B(3).

the judge to tell a child witness of the importance of telling the truth and not telling lies.⁶⁷²

PROCESS FOR ASSESSING COMPETENCE

5.93 At present the judge questions the child to assess the child's competence. In the Interim Report, the Commission recommended that the court should be able to seek an expert report on the child's competence to give sworn or unsworn evidence, though the judge should make the ultimate decision on competence. We affirm that recommendation. A similar provision already exists in Queensland⁶⁷³ and was recommended in the ALRC/HREOC Report on children in the legal process.⁶⁷⁴ Judicial education programs on child sexual abuse should provide judges with information about how such experts might be used.

5.94 Later in this Chapter we discuss proposals to ensure that children are not subjected to harassing or oppressive cross-examination. However these recommendations do not meet the concerns expressed during our consultations and at our roundtable on evidentiary issues, about the pressure and confusion children face when responding to forceful cross-examination that puts particular facts to them (leading questions).

5.95 An assumption underpinning the adversarial process is that persistent questioning, which occurs during cross-examination, will expose the fact that a witness is lying or does not remember events accurately. However, children who are constantly questioned on a matter may change their answers in order to please the questioner. Children often have difficulty understanding why defence counsel should suggest that they are not telling the truth, are mistaken or have been prompted to make an accusation by another person. When subjected to forceful cross-examination along these lines they may withdraw true statements because they think they are giving the 'wrong answer'.⁶⁷⁵

5.96 In the Commission's view, children would be assisted in understanding the role of defence counsel if the judge were to explain the purpose of cross-

672 New Zealand Law Commission, n 669, Vol 2, s 78.

673 *Evidence Act 1977* (Qld) s 9C; see also *Evidence Act 1929* (SA) s 9(3) which allows a judge to inform him/herself as he thinks fit about the witness' capacity.

674 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* Report No 84 (1997) 324.

675 Mark Brennan and R Brennan, *Strange Language: Child Victims under Cross-Examination* (1988), 91–3.

examination to them. This should occur at the same time that children are instructed that they must tell the court the truth. Some judicial officers in the Children's Court already make similar comments to children.

! RECOMMENDATION(S)

132. Section 23 of the *Evidence Act 1958* should be amended to provide that all witnesses, regardless of age, should be presumed competent to give sworn evidence.
133. The test for competence to give evidence on oath should be that witnesses understand that they are obliged to give truthful evidence.
134. People who are not competent to give sworn evidence should be able to give unsworn evidence if they can understand questions put to them as witnesses and give intelligible answers to them.
135. People who are not capable of giving comprehensible answers to a question about a fact should not be competent to give evidence about that fact, but may be competent to testify about other facts.
136. Before children give unsworn evidence the judge should tell them that it is important to tell the truth and not to tell lies.
137. At the same time that the judge instructs a child that the child must tell the truth, the judge should also tell the child:
 - that the child may not know or not be able to remember some things that the child is questioned about, and that the child should tell the court if this is the case;
 - that the child will be asked questions that may make suggestions that are true or untrue;
 - that the child should agree with true statements, but should not feel under pressure to agree if the statement is incorrect, according to the child's understanding of what happened.

! RECOMMENDATION(S)

138. In cases involving allegations of child sexual assault, the court should be able to seek a report from an independent and appropriately qualified expert on the child's competence to give sworn or unsworn evidence.

ADMISSION OF EVIDENCE OF OUT OF COURT STATEMENTS MADE BY CHILDREN

CURRENT LAW

5.97 A child who has been sexually abused may eventually tell a trusted person about the abuse. Children who have been abused rarely report the abuse immediately and many do not tell anyone about it for a considerable period.⁶⁷⁶ Out of court statements, which children make to others about the abuse, cannot usually be admitted as evidence that the abuse has occurred.

Hearsay Rule

5.98 The hearsay rule prevents admission of evidence of out of court statements (whether made orally or in writing) to prove the facts made in those statements.⁶⁷⁷ Most States, including Victoria, have modified the rule to allow admission of the videotaped evidence of children and people with impaired mental functioning in sexual offences cases.⁶⁷⁸ However the hearsay rule prevents the prosecution from calling someone other than the child (for example the child's mother or teacher) to give evidence that the child told them about the abuse, in order to substantiate the allegations against the accused.

676 For a good overview of the literature on this see National Child Sexual Assault Reform Committee, *Discussion Paper: Alternative Models for Prosecuting Child Sex Offences in Australia (Draft)* (2003) 4.2.1.

677 The rule does not prevent the use of hearsay evidence for other purposes, for example to establish a person's state of mind which is at issue at trial: see *Walton v The Queen* (1989) 166 CLR 283; *Pollitt v The Queen* (1992) 174 CLR 558 BC 9202688, or to support their credibility in a case where it is alleged that their account was a recent invention or to show that a person complained of a sexual assault at the first available opportunity (the recent complaint principle). These qualifications are discussed below and see *R v Geoffrey Arthur Hall* (Unreported, Supreme Court of NSW, Court of Appeal, BC 9700339, Hunt CJ, Studdert and Simpson JJ, 28 February 1997, 1–2).

678 See for example *Evidence Act 1958 s 37B*. The person must identify himself or herself at the hearing and attest to the truthfulness of the statement and must be available for cross-examination.

5.99 The basis for the hearsay rule is that evidence given by a third person about what someone else said to them is likely to be less reliable than direct evidence that the affected person gives in court,⁶⁷⁹ which can be tested by cross-examination. The jury can assess the demeanour of the person giving evidence and observe the person's response to questions. If third parties testify about what the alleged victim told them these safeguards do not apply.

5.100 The rule against hearsay⁶⁸⁰ also prevents the alleged victim of a sexual assault from giving evidence that they told someone else about the assault.⁶⁸¹ For example, a child cannot usually give evidence that she told her mother of the abuse to support the evidence that she gives in court. Here the child's prior consistent statement is excluded because it is regarded as 'self-serving'. 'Self-serving' statements⁶⁸² are not admissible as proof that the alleged facts occurred, because of the suspicion that a person might fabricate them to support their case. This rule applies to children's prior consistent statements, even though the child is not a party to the proceedings and it is unlikely that a child would have sufficient understanding of criminal proceedings to seek to bolster the prosecution case in advance.

5.101 The rule which prevents the jury hearing evidence of prior consistent statements does not prevent a person from being cross-examined about prior inconsistent statements in order to discredit them.⁶⁸³ Complainants in sexual assault cases are commonly cross-examined about inconsistencies between what they said to police, what they said at committal and what they said at trial. One of the main purposes of cross-examination is to cast doubt on the credibility of the witness by highlighting such inconsistencies.⁶⁸⁴

679 A. Ligertwood, *Australian Evidence Law* (3rd ed, 1998) 526.

680 The rule against admission of evidence of prior consistent statements to prove what is alleged in court is sometimes seen as an aspect of the hearsay rule (see, for example, J. R. Spencer and Rhona H. Flin, *The Evidence of Children, The Law and the Psychology* (2nd ed) (1993) 129 and sometimes as a separate rule. Prior consistent statements can sometimes be admitted to bolster the credibility of the witness, but not to prove the truth of what is asserted. One situation where they can be admitted is where they are 'recent complaints' and are admitted as evidence of consistency.

681 A. Ligertwood, above n 679, 480

682 For other justifications for the rule, see Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 541, 172.

683 See also *Evidence Act 1958* s 35.

684 A. Ligertwood, above n 677, 480, 517–9.

Qualifications on the Hearsay Rule

5.102 There are two situations in which the court will allow evidence to be given that the child made prior statements about sexual abuse.

Admission of Prior Consistent Statements to Rebut Allegations that the Child is Dishonest or Mistaken

5.103 If the defence suggests that the child has lied or been mistaken in making the allegation of abuse, evidence can sometimes be given of a prior consistent statement to refute this suggestion. For example, the defence case may be that the child made a false allegation of abuse after her parents separated because she was coached by a parent to do so. Hearsay evidence that the child told her teacher that she had been sexually assaulted by her father long before her parents separated could be admitted to rebut the defence claim, but not to prove the truth of the statement that she was abused.⁶⁸⁵ This exception is limited to the situation where the defence suggests a reason why the witness invented or was mistaken about the alleged fact and where the prior consistent statement rebuts that suggestion, as in the example given above.⁶⁸⁶ It does not allow evidence of a prior consistent statement to be given in every situation when it is suggested that the child's evidence is inaccurate.

Recent Complaint

5.104 Evidence that the child told someone about the sexual assault very shortly after the assault occurred is also admissible for limited purposes.⁶⁸⁷ The principle allowing admission of evidence of a 'recent complaint' is based on the assumption that people who are sexually assaulted will usually complain at the first available opportunity and that failure to complain quickly suggests that the complaint is false.⁶⁸⁸ Evidence of 'recent complaint' is only admissible to support the complainant's credibility and not to prove the truth of the allegation of sexual assault.

685 See para 4.103.

686 Ligertwood, above n 679, 482.

687 *Kunmatil John Suresh v The Queen* (BC 9800989 [1998] HCA 23) Gaudron and Gummow JJ and *Papakosmas v The Queen* (1999) 196 CLR 297, 303.

688 See *R v Knigge* [2003] USCA 94.

*PROBLEMS WITH THE HEARSAY RULE***Rule May Prevent Admission of Best Evidence**

5.105 The hearsay rule reflects the view that direct evidence given in court is preferable because it is usually the ‘best’ evidence. There are several reasons why direct evidence given by a child in court may not be ‘better’ than hearsay evidence of a child’s earlier statements about sexual abuse.

- There is often a considerable delay between the sexual assault and the time when the child gives evidence in court. By the time the evidence is given in court the child’s memory of the event will often have faded.⁶⁸⁹ A statement the child made to someone out of court closer to the time of the alleged assault will often be more comprehensive and reliable than a later account. A contemporaneous account can provide support for a memory that has become less clear because of the passage of time. While admission of hearsay evidence will often support the prosecution case it could also assist the accused by showing that the child’s current memory of events is mistaken.
- Children typically have to tell their story several times before the trial. Often they do not understand why they have to repeat their story. As a result their testimony in court may not sound as credible as their initial disclosure of abuse.

[T]he story through repeated telling may have become stale and a flat and emotionless recitation of events [which] is unlikely to persuade a jury that the child is telling the truth.⁶⁹⁰

- The stress of giving evidence may affect children when they give their evidence in court, so that they appear unreliable even though they are telling the truth.
- Children are frequently abused by family members or other people whom they know. Children who disclose familial abuse may be pressured by the alleged perpetrator or other family members to withdraw a true allegation.

689 Andrew Palmer, ‘Child Sexual Abuse Prosecutions and the Presentation of the Child’s Story’ (1997) 23 *Monash University Law Review* 171, 180. Note that the admission of a VATE tape may give the jury access to the initial interview. However VATE tapes are not used in all cases and apply only to a complaint in the context of a police interview.

690 *Ibid.*

When combined with other supportive evidence admission of the child's statement could provide the basis for prosecution.

5.106 In addition to the fact that children's out-of-court statements will often be the 'best evidence' of an alleged assault, there are other reasons for admitting such hearsay evidence. Evidence about the circumstances in which the allegation was made and what the child said when disclosing abuse may be crucial in assessing the reliability of the child's evidence.⁶⁹¹ The hearsay rule will often prevent the jury hearing this evidence. Although the child may be cross-examined about a delay in reporting the offence to the police, evidence that the child made an earlier disclosure of abuse will not always be admissible. This may result in the jury drawing inaccurate conclusions about the child's credibility and about the accuracy or inaccuracy of the child's complaint.

Limitations of Recent Complaint Principle

5.107 As we explained above, the recent complaint principle allows evidence to be given of a prompt report of sexual assault by the complainant, in order to support the complainant's credibility. The recent complaint principle has been interpreted restrictively in Victoria.

When is a Complaint 'Recent'?

5.108 In *R v Knigge*⁶⁹² the Court of Appeal held that this principle did not justify extending the concept of a 'recent complaint' to cover a statement made by a child to her teacher about five months after the last incident of alleged abuse. Because the statement had not been made 'at the first reasonable opportunity' it was not admissible to support the complainant's credibility.⁶⁹³

5.109 Although some Australian Courts have interpreted the recent complaint principle a little more liberally than the Victorian Court of Appeal in *R v Knigge*,⁶⁹⁴

691 Palmer, above n 689, 177.

692 *R v Knigge* [2003] VSCA 94.

693 The second ground for its inadmissibility was that it did not amount to a complaint. See also *Suresh v The Queen* (1998) 72 ALJR 769, 772 per McHugh J, 778 per Kirby J. In that case the High Court suggested that a six month delay was too long, but dismissed the appeal on the ground that evidence of the complaint had been admitted without any objection by the accused.

694 *R v Knigge* [2003] VSCA 94. In *R v W* [1996] 1 Qd R 573 at 575, the Qld Court of Appeal said that instead of requiring the complaint to be made at the earliest available opportunity before it could be admitted in evidence, the court should consider whether 'having regard to the circumstances surrounding the complaint, including the time which has elapsed since the alleged commission of the offence, the complaint is capable of supporting the credibility of the witness.' In that case evidence of

even this more liberal application is likely to exclude evidence of most out-of-court statements about sexual assault made by children.

Restrictions on the Meaning of a 'Complaint'

5.110 In *Knigge*⁶⁹⁵ the Court of Appeal also held that evidence of statements which the child made to her teacher about behaviour of the child's stepfather, which the prosecution argued was aimed at preparing the child to participate in sexual acts, was also inadmissible to support the child's credibility. The Court of Appeal suggested that the recent complaint principle only referred to explicit statements about sexual abuse.

5.111 The difficulty with this restriction is that it prevents the jury hearing hearsay evidence about behaviour that typically precedes sexual abuse of children, even for the purposes of supporting the child's credibility. Third parties cannot give evidence that the child has complained to them of such behaviour, even if the statement was made shortly after the behaviour occurred. Children cannot give evidence that they have complained of such behaviour to someone, even if their complaint is made immediately after the behaviour occurred.

5.112 Interviews with offenders convicted of offences against children show that they often test children's responses before they engage in explicitly sexual behaviour. For example they may participate in sexual 'games' or conversations with the child or touch the child's genitals as if by accident. Evidence of a course of conduct of this kind may be relevant to the credibility of the child, but juries are unlikely to hear evidence that the child has previously complained of this type of behaviour. As a result, an alleged sexual assault may be presented as an isolated incident rather than as the culmination of a pattern of behaviour. In these circumstances the child's evidence may not seem credible, even when they are telling the truth.⁶⁹⁶

Patterns of Disclosure of Child Sexual Assault

5.113 Because children rarely report an assault immediately,⁶⁹⁷ the recent complaint principle will rarely allow evidence to be given of a prior consistent statement made by a child, to support the child's credibility.

a statement made by a young girl one week after the alleged events occurred was admitted to support her credibility. See also *R v M* (2000) 109 A Crim R 530

695 *The Queen v Jack Ronald Knigge* (2003) .

696 National Child Sexual Assault Reform Committee, above n 676, 4.2.2.

697 See para 5.97.

A detailed review of the psychological literature shows that the typical pattern of disclosure for sexually abused children is in the order of months or years after the abuse, and that this response is not, as assumed by judges for hundreds of years, evidence of fabrication, but rather, evidence of the trauma experienced by the sexually abused child.⁶⁹⁸

5.114 Delay in reporting is particularly likely to occur where the child is sexually assaulted by a person who has the child's trust and confidence. As Justice Mary Gaudron pointed out in *M v The Queen*:

[t]he victim may be reluctant to resist the offender or to protest, and on that account, reluctant also to complain. As well, a child in that situation may be reluctant to complain from fear that he or she will not be believed, from fear of punishment, or, even, fear of rejection by the offender.⁶⁹⁹

5.115 Courts sometimes suggest that restrictions on recent complaint evidence are necessary to protect the accused against unfair conviction. This argument is based on the demonstrably false assumption that those who are sexually assaulted typically complain at the first available opportunity. It is inconsistent with the philosophy which underpins section 61(1)(b) of the *Crimes Act 1958*, which requires the court to tell the jury that there may be good reasons why a person who has been sexually assaulted may delay in reporting the assault.

RECOMMENDATIONS IN THE INTERIM REPORT

5.116 The Interim Report recommended that the hearsay rule should be amended to give the court a discretion to admit the hearsay evidence of a child complainant if it was of the opinion that the evidence was of sufficient probative value to justify admission, whether or not the child was available to give evidence. For example, where a child told her teacher that she had been sexually assaulted by her father but later refused to give evidence against her father, the court would have a discretion to allow the teacher to give evidence about what he was told by the child.

5.117 To safeguard accused people against unfair conviction the Interim Report recommended that a person should not be able to be convicted solely on the basis of such hearsay evidence.

698 National Child Sexual Assault Committee, above n 676, 4.2.3.

699 (1994) 181 CLR 487, 514–5 per Gaudron J.

5.118 The recommendations in the Interim Report took account of ALRC/HREOC Report on children in the legal system, which recommended that the hearsay evidence of children should be admissible.⁷⁰⁰ Western Australian⁷⁰¹ and South Australian⁷⁰² legislation already give the court a discretion to admit such evidence where the child is available to give evidence. More recently Queensland has enacted legislation to make admissible evidence of ‘how and when any preliminary complaint was made by the complainant about the alleged commission of the offence’.⁷⁰³ This provision does not explicitly require the complainant to be available to give evidence, though this may be implicit. The court has a discretion to exclude the evidence if it is unfair to the accused to admit the evidence.⁷⁰⁴ A number of overseas jurisdictions, including Canada and many States in the United States,⁷⁰⁵ also allow admission of the hearsay evidence of children in sexual assault cases.

SUBMISSIONS

5.119 Submissions which commented on the issue generally supported the recommendation that children’s hearsay evidence should be admissible provided the court is of the view that it is of sufficient probative value. The Australian Childhood Foundation commented that the current rules were a significant barrier to effective prosecution of cases of child sexual assault:

700 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* Report No 84 (1997) 330–2.

701 *Evidence Act 1906* (WA) s 106H. The defendant must be given a copy of the statement or details of the statement and must be given the opportunity to cross-examine the child.

702 *Evidence Act 1929* (SA) s34CA. The victim must be called or available to be called as a witness. See also *Evidence Act 1977* (Qld) s93B. This provision applies to sexual offences and is not confined to the evidence of children. It allows admission of evidence of a representation about an asserted fact if the representation was made shortly after the asserted fact happened and in circumstances making it highly likely that the evidence was reliable, where the person making the representation is mentally or physically incapable of giving evidence.

703 *Evidence (Protection of Children) Amendment Act 2003* (Qld) s 40, inserting new s 4A in the *Criminal Law (Sexual Offences) Act 1978*.

704 *Evidence (Protection of Children) Amendment Act 2003* (Qld) s 40, inserting new s 4A in the *Criminal Law (Sexual Offences) Act 1978*.

705 See Interim Report paras 6.155–56.

It is clear that children disclose to people they know and trust. Such trust is built on children's day to day experiences of relationships. In this context, adults who have regular contact with a child are well positioned to understand the child's language, their ability to be accurate about the information they provide and support the child to communicate to others. Once a child has made a disclosure to a trusted adult, it may be unlikely that the child will want to tell another adult, especially someone they have met only for the first time. It is our experience that children feel they have 'told' someone they believe can help them. Young people in particular, do not understand the need to repeat their disclosure to others.

It is crucial that the original disclosure is made available to the criminal justice system.⁷⁰⁶

5.120 Similarly, Judge Anderson said that:

as a matter of principle there seems no reason why these changes should not be made as otherwise relevant evidence would not be admitted. There appear to be adequate safeguards in the processes recommended.⁷⁰⁷

5.121 By contrast, submissions from the Criminal Bar Association, the Victorian Bar, the County Court and the County Court judges who made a separate submission expressed reservations or were strongly opposed to the proposal. Judges Neesham, Nixon, Kelly and Hart were concerned about the reliability of hearsay statements. They argued that children (particularly young children) were susceptible to suggestions made by others. In addition:

Children can, and some do, lie in court. A child may become upset at the prospect of going to court for fear of being unmasked as a liar. That is no basis for the admission of the lie by way of hearsay.

There is no reliable way of eliciting the circumstances in which the hearsay accusation was made. What was its context? What questions were asked beforehand? What was the demeanour of the questioner? What was the relationship between the questioner and the complainant?⁷⁰⁸

5.122 The Victorian Bar referred to the fact that evidence of a 'spontaneous and timely complaint could already be admitted' under the recent complaint principle and said that such evidence was frequently admitted in sexual offence trials. Their

706 Submission 41.

707 Submission 49.

708 Submission 39.

submission also expressed concerns about the reliability of hearsay evidence and the thought that ‘great caution should be exercised before measures are introduced which would assist those children who fabricate evidence and make it almost impossible for such fabrication to be revealed’.⁷⁰⁹ Concern was expressed that the admission of such evidence could lead to unjust convictions.

5.123 The County Court also referred to the possibility that children may fabricate accusations or be manipulated by others. The Court’s submission suggested that if the hearsay rule was modified the judge should have the discretion to exclude the evidence if its admission was unfair in all the circumstances. The Court did not believe that the proposed recommendation requiring the evidence to have significant probative value was sufficient. Magistrate Lisa Hannan also indicated the need for further safeguards before such evidence could be admitted.

OUR RECOMMENDATIONS

5.124 The Commission believes that there are compelling reasons to allow the court to admit children’s hearsay evidence in sexual assault cases, provided the jury is made aware of the factors that may affect the reliability of this evidence. For the reasons set out above⁷¹⁰ the child’s initial statement about the abuse will often be the ‘best evidence’ of contested facts. The hearsay rule may also prevent the jury having access to information that is crucial in assessing the reliability of the child’s evidence.⁷¹¹

5.125 Our initial preference was to follow the approach in the Interim Report, which recommended that the court should have a discretion to admit children’s hearsay evidence, regardless of whether or not the child is available to give evidence. This would ensure that evidence of statements made by young children to a third party would be admissible, even if the child’s memory of the event had faded or if the child refused to give evidence, for example because of pressure from family members. Admission of such evidence, combined with direct evidence by other witnesses, could contribute to successful prosecutions of some offenders who currently escape conviction and punishment. An example is provided by the

709 Submission 48.

710 See paras 5.105–7.

711 Evidence of statements is only admissible in support of credibility under the recent complaint principle or to rebut a suggestion of recent invention.

Canadian case of *Kahn*,⁷¹² in which evidence of a four-year-old girl's complaint to her mother that she had been assaulted by her paediatrician was held admissible by the Canadian Supreme Court. The child was incompetent to testify herself. If the child's hearsay evidence had been held inadmissible it is unlikely that the doctor would have been convicted, though the child's story was supported by the presence of semen on her clothing.

5.126 Some lawyers and judges have argued that it may be unfair to people accused of sexual offences to admit such evidence, where the child's evidence cannot be tested in cross-examination because the child is not available to give evidence. It is arguable also that provisions allowing the court to admit hearsay evidence if the evidence is of sufficient probative value, in a situation where the child is unavailable, may have limited effect. Courts may routinely exercise their discretion to exclude hearsay evidence in this situation.

5.127 For this reason we now propose a specific child hearsay exception, limited to the situation where the child is available to give evidence. Child-specific hearsay exceptions for sexual assault cases already exist in most parts of Australia. The recommendation will allow the admission of relevant hearsay statements of a child under the age of 16 in a sexual assault case as evidence of an asserted fact, where the court is of the opinion that the evidence is of sufficient probative value to justify its admission and the child is available to give evidence. The court will be able to exclude the evidence where its probative value is outweighed by the danger of unfair prejudice to the defendant.

5.128 The recommendation for a child-specific hearsay exception is intended to operate in conjunction with the recommendation in Chapter 4 that Victoria should adopt the Uniform Evidence Act exceptions making the hearsay evidence of both adults and children admissible in specified circumstances. The recommendation is intended to extend the admissibility of children's hearsay evidence beyond the circumstances set out in the Uniform Evidence Act, in cases where the child is available for cross-examination. The Commission believes that it is necessary to introduce a child specific hearsay exception, in addition to the exceptions in the Uniform Evidence Act, because the latter provisions will often only allow the admission of hearsay evidence where the statement is made shortly after the assault is alleged to have occurred. As we have discussed above, children typically delay telling others that they have been sexually assaulted.

712 [1990] 2 SCR 531.

5.129 The recommendation is not intended to detract from current common law principles that allow admission of previous statements made by a child, in order to support the child's credibility. In the unusual situation where the child complains shortly after the assault, the recent complaint principle will continue to apply. However the principle will usually be redundant, because in these circumstances, the proposed Uniform Evidence Act provisions will allow this evidence to be admitted in support of the truth of the allegation. If the defence claims that the child's allegations are a 'recent invention', relevant evidence of a child's prior consistent statement will be able to be admitted to support the child's credibility, even if the court does not permit the statement to be used as evidence of the truth of the statement under the child hearsay exception proposed above.

5.130 To summarise, our recommendations envisage that statements made by children to third parties about sexual assault will be admissible in the same circumstances as statements made by adults under the Uniform Evidence Act provisions. In addition, disclosures of sexual assault made by children under 16 may be admissible under the child specific exception. In both situations the court will have a discretion to exclude evidence which is unfairly prejudicial to the accused. We also recommend that the court should be required to warn the jury that hearsay evidence may not be as reliable as direct evidence.

! RECOMMENDATION(S)

139. Evidence of a hearsay statement made by a child which is relevant to the facts in issue shall be admissible to prove the facts in issue in any criminal case involving child sexual assault allegations where:
- the child is under the age of 16 and
 - the child is available to give evidence and
 - the court, after considering the nature and contents of the statement and the circumstances in which it was made, is of the view that the evidence is of sufficient probative value to justify its admission.
140. The court must warn the jury that the hearsay nature of the evidence may make it unreliable.

! RECOMMENDATION(S)

141. Provisions allowing admission of the hearsay evidence of children to prove facts in issue should not detract from or modify common law rules allowing admission of evidence of statements made to third persons for a purpose other than as proof of the facts in issue.
142. The provisions that allow admission of hearsay evidence of children are not intended to derogate from the broader provisions relating to the admission of hearsay evidence specified in Recommendations 87–93.

PROTECTING CHILDREN FROM INAPPROPRIATE CROSS EXAMINATION

5.131 In the Interim Report we discussed the difficulties which many child witnesses experience in responding to cross-examination.⁷¹³ The language used in questioning children in court is likely to add to the stress they experience in answering questions in a formal and unfamiliar environment. The ALRC/HREOC report on children's experience of the legal process said that children find cross examination particularly difficult.⁷¹⁴ Factors contributing to this difficulty include aggressive and harassing cross-examination and cross-examination which involves use of complex language, or constant leading or repetitive questioning.

AGGRESSIVE TREATMENT OF WITNESSES

5.132 A number of barristers told the Commission that child witnesses in sexual offence cases are rarely cross-examined aggressively because such cross-examination by the defence is likely to have a negative effect on the jury.⁷¹⁵ Although defence lawyers thought that harassing cross-examination rarely occurred, the Commission received a number of submissions describing the harsh impact of cross-examination on child witnesses, which made the experience of giving evidence intimidating and confusing and impaired children's ability to testify: one young complainant told us 'it was the worst six hours of my life'. She said the process

713 Interim Report paras 4.18–24, 6.9–14.

714 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* Report No 84 (1997) 343–7.

715 Evidentiary Roundtable, 11 February 2004.

made her feel not that she was the victim, but that she was in the wrong.⁷¹⁶ In its 1995 Report, the Victorian Parliament Crime Prevention Committee referred to ‘aggressive defence counsel who badger, berate and intimidate witnesses’ and a defence counsel screaming at a child that they were lying.⁷¹⁷

5.133 Similarly, the ALRC /HREOC Inquiry

heard significant and distressing evidence that child witnesses are often berated and harassed during cross-examination to the point of breakdown.⁷¹⁸

COMPLEX LANGUAGE AND CONFUSING AND INAPPROPRIATE QUESTIONS

5.134 The ALRC/HREOC review of children’s role in the criminal justice system cited research showing that barristers regularly use language that is beyond the everyday experiences of children.⁷¹⁹ Questions asked of a child witness may be inappropriate in a number of ways.

- The question may draw upon cognitive concepts the child is unable to comprehend.
- The question may be inappropriately structured by, for example, using a double negative or suggesting a particular answer.
- The order of the questions may be confusing, for example not chronological or repetitive.

5.135 The adversarial system requires rigorous testing of the evidence. The purpose of cross examination in a criminal trial is to create a reasonable doubt in the mind of the jury about the prosecution case against the accused.⁷²⁰ Barristers are not trained to question children and may unintentionally confuse a child by using complex or inappropriate language.

716 Submission 74 to Discussion Paper.

717 Crime Prevention Committee, Parliament of Victoria, *Combating Child Sexual Assault: An Integrated Model: First Report Upon the Inquiry into Sexual Offences Against Children and Adults* (1995) 191. The Crime Prevention Committee suggested that this was particularly likely to occur in committal hearings when a jury was not present and where magistrates may have less experience controlling aggressive counsel and prosecutors may be less experienced at intervening.

718 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, above n 541, 344.

719 Ibid 343.

720 Of course the onus is on the prosecution to persuade the jury that the accused is guilty beyond reasonable doubt.

5.136 It has also been argued that ‘the techniques of cross-examination within a child sexual assault trial are arguably, an important defence method for constructing the child complainants as unreliable and untrustworthy and, thus, influencing a jury’s decision as to the guilt or innocence of the accused’.⁷²¹ The Victorian Parliament’s Crime Prevention Committee reported that:

Examples of defence counsel asking multiple questions designed to confuse witnesses or lead them into a statement which suits the needs of the defence are commonplace. It is a technique which accomplished legal counsel perfect... Confusing a child into making statements which are not accurate is contrary to the needs of the justice system.⁷²²

5.137 Researcher Dr Mark Brennan has analysed a number of transcripts which provide examples of the kind of language often used in cross-examining children. Brennan’s research shows that ‘Children six to fifteen years of age fail to hear as sensible language about half of what is addressed to them during cross-examination’.⁷²³ The child’s ability to give evidence may be impaired by cross-examination that relies on unclear connections and strange expressions. The child’s confusion may be accentuated by the use of linguistic constructions that ‘are put together in such an obtuse and confusing way that they cannot even be heard as language, let alone responded to coherently’.⁷²⁴ Complex and confusing language is often combined with questions that characterise the child as a witness who should not be believed.⁷²⁵

COGNITIVE APPROPRIATENESS

5.138 In order to obtain accurate testimony⁷²⁶ from a child witness it is important to use words and phrasing that are appropriate for the individual child’s age, cultural background and maturity. However, it seems that questioners of

721 National Child Sexual Assault Reform Committee, 6.

722 Crime Prevention Committee, Parliament of Victoria, above n 717, 207.

723 Mark Brennan, ‘The Discourse of Denial: Cross-Examining Child Victim Witnesses’ (1995) 23 *Journal of Pragmatics* 71.

724 Ibid 74. Mark Brennan calls this ‘the discourse of denial’

725 Mark Brennan, ‘The Battle for Credibility—Themes in the Cross Examination of Child Victims Witnesses’ (1994) VII (19) *International Journal for the Semiotics of Law* 51.

726 Karen Saywitz, ‘Improving Children’s Testimony: The Question, the Answer, and the Environment’ in Maria Zaragoza, John Graham, Gordon Hall, Richard Hirschman and Yossef Ben-Porath (eds) *Memory and Testimony in the Child Witness* (1995) 116.

child witnesses are often unaware, or do not take account of the way in which children's vocabulary develops over time. Saywitz et al refer⁷²⁷ to a child witness who was asked 'to point' to the person who hurt her and did so readily. However, later she was asked 'to identify' the assailant and she failed to do so. According to Saywitz, this failure damaged her credibility.

5.139 Research has established that children understand concepts such as height, weight, size and time gradually, as they age. When a child is asked about cognitive concepts such as time, space and distance before she has reached that stage of understanding, the child is unable to respond accurately, regardless of how simply the question is phrased. A recent study of transcripts in 58 Canadian child sexual abuse cases found that children were often asked developmentally inappropriate questions. For example a ten-year-old was asked 'How wide are the windows at Pizza Dan's?' and 'How far is the lake from your home?' The children often responded 'I don't know' or, when pressured by counsel to answer, gave inaccurate answers.⁷²⁸ These answers detract from the persuasiveness and credibility of the child's testimony.

5.140 In order to maximise the ability of children to give accurate evidence, it is essential that they are asked questions appropriate to their cognitive level. This is not fundamentally different from ensuring that witnesses who cannot communicate in English are questioned via an interpreter, in a language they can understand. The South Australian 2003 Child Protection Review⁷²⁹ pointed out that a child's lack of familiarity with concepts such as space and time does not prevent the child being able to recount an incident accurately.

Structure of Questioning

5.141 Conventional cross-examination often involves questions with suggested answers attached, for example 'I put it to you that you were never in his house' or 'You were never there, were you?' This technique is known as putting leading questions to a witness and is allowed in cross-examination. On the surface, there is

727 Karen Saywitz, Carol Jaenicke and Lorinda Camparo, 'Children's Knowledge of Legal Terminology' (1990) 14 (6) *Law and Human Behaviour* 523.

728 Laura Park, 'Legal Disparities and the Child Witness' (Paper presented at the "Redefining the Legal Issues of Sexual Assault and Abuse" sponsored by the Society for the Psychological Study of Social Issues, June 28–30, 2002, Toronto).

729 Robyn Layton, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (2003) 15.14.

nothing particularly insulting or inappropriate sounding about a question of this type. However, the significant power imbalance between a child complainant and a defence barrister may mean that a question that sounds as if it requires a certain answer is likely to elicit that answer, not because it is necessarily the correct answer but because that is what the child feels compelled to say.⁷³⁰

5.142 Research by Brennan also suggests that ‘atypical use of the negative’ is particularly problematic for child witnesses: ‘That happened on Thursday, did it not?’⁷³¹ Compound sentences incorporating more than one question are also confusing and sometimes impossible for children to respond to accurately: ‘When you were on vacation during the summer of third grade and you visited your maternal grandmother’s house, did your uncle take you to his apartment, and what happened there?’ Despite the inappropriateness of this kind of question, phrasing like this is ‘endemic to the investigative and judicial process’.⁷³²

Order of Questioning

5.143 Studies have found that repetitive questions can be very confusing for children and may induce inconsistent answers as children try to understand what is required. Children may change their answer when the question is repeated because they believe that the first answer was wrong or somehow unsatisfactory.⁷³³

5.144 According to the ALRC/HREOC report, lawyers often interrupt witnesses. The effect of this confusion prevents children from remembering events in order and also makes it more likely that children’s evidence will be contaminated.⁷³⁴

730 Observation made by judicial officers during consultations.

731 Mark Brennan and Roslin Brennan, *Strange Language, Child Victims Under Cross Examination* (3rd ed) (c1988) 62–4.

732 Karen Saywitz, ‘Improving Children’s Testimony: The Question, the Answer, and the Environment’ in Maria Zaragoza, John Graham, Gordon Hall, Richard Hirschman and Yossef Ben-Porath (eds) *Memory and Testimony in the Child Witness* (1995) 117.

733 Judy Cashmore and Kay Bussey, *The Evidence of Children* (1995); Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* Report 55, Part 2 (2000) 41.

734 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* Report No 84 (1997) 343.

CURRENT LAW

5.145 The criminal justice process features a number of checks and balances to control the way witnesses from the opposing side are treated in cross-examination. Judicial officers have a general power to control courtroom processes and to ensure that questions asked of witnesses are fair, comprehensible and appropriate.⁷³⁵ They may intervene to clarify a question or to enquire whether the witness is able to answer, particularly when the witness is in some way vulnerable. In addition, Victoria legislation requires the court to disallow indecent or scandalous questions⁷³⁶ and questions intended to insult or annoy.⁷³⁷

5.146 The Commission believes that these powers tend to be exercised sparingly by judicial officers. Magistrates' and judges' approaches to intervention in cross-examination are individual and primarily a matter of personal style.⁷³⁸ A judicial officer with a less interventionist style will allow questioners greater freedom to pose whatever questions they choose. The current legislation is limited to indecent, scandalous, insulting and annoying questions and does not explicitly deal with questions that are age-inappropriate or misleading and repetitive. The Commission takes the view that these controls are insufficient to ensure that child witnesses are protected against inappropriate questions.

OTHER APPROACHES

5.147 The legislative provisions in most other Australian States which allow questions to be disallowed are broader than those which apply in Victoria. Unlike the Victorian legislation, the Uniform Evidence Act, which applies in the Commonwealth,⁷³⁹ NSW,⁷⁴⁰ Tasmania⁷⁴¹ and the ACT,⁷⁴² allows the court to

735 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* Report 55, Part 2 (2000) 267.

736 *Evidence Act 1958* s.39 The court shall forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the court, unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed.

737 *Evidence Act 1958* s. 40 The court shall forbid or disallow any question which appears to it to be intended to insult or annoy, or which though proper in itself appears to the court needlessly offensive in form.

738 Robyn Layton, *Our Best Investment: A State Plan to Protect and Advance the Interests of Children* (2003) 15.14.

739 *Evidence Act 1995* (Cth).

740 *Evidence Act 1995* (NSW).

disallow ‘a question put to a witness in cross-examination, or inform a witness that it need not be answered, if the question is – (a) misleading; or (b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive’.⁷⁴³ Section 41(2) provides:

Without limiting the matters that the court may take into account for the purposes of subsection (1), it must consider:

- (a) any relevant condition or characteristic of the witness, including age, personality and education, and
- (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.⁷⁴⁴

5.148 The Queensland Law Reform Commission recommended a slightly broader version of the power to disallow inappropriate questions as follows:⁷⁴⁵

The court may disallow a question put in cross-examination to a witness under the age of 18 years, or inform the witness that it need not be answered, if the question is:

- (a) misleading or confusing;
- (b) phrased in inappropriate language; or
- (c) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

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 characteristics of the witness, including age, culture, personality, education and level of understanding; and
- (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

741 *Evidence Act 2001* (Tas).

742 *Evidence Act 1971* (ACT).

743 Section 41(1).

744 *The Evidence Act* (NT) as in force at 1 January 2004 s21B enables the court to disallow a question to a witness under 16 years of age that is ‘confusing, misleading or phrased in inappropriate language’. In deciding whether to disallow a question the court must have regard to the age, culture and level of understanding of the child.

745 Queensland Law Reform Commission, *The Receipt of Evidence By Queensland Courts: The Evidence Of Children* Report 55, Part 2A (2000) Recommendation 13.1, 270.

OUR RECOMMENDATION

5.149 It is vital to ensure that children who must testify in child sexual assault prosecutions are questioned fairly and appropriately. Child witnesses confront difficulties that are not experienced by adults. This should be recognised in the criminal justice system. Protecting children from unfair questioning will minimise the trauma experienced by those who have already been subjected to abuse and may blame themselves for the repercussions that follow when they disclose it.⁷⁴⁶ Ensuring fair questioning will improve the quality of children's evidence because the children will understand and be able to respond effectively to the questions they are asked. There is a public interest in supporting children to give evidence in sexual offence cases. In some cases their evidence will lead to the conviction of offenders who, if they were not apprehended, would go on to abuse other children.

5.150 The Commission considers that existing Victorian legislation which gives the Court a discretion to forbid indecent, scandalous, insulting or annoying questions is not adequate to protect children. Questions that cause difficulty for children, particularly in cross-examination, may not fall into these categories but may nevertheless be unfair, inappropriate or impossible for the child to answer coherently.

5.151 The Commission's view is that the Uniform Evidence approach is too limited. Our recommendation draws on the Queensland Law Reform Commission proposal, but imposes a duty on judicial officers, as far as practicable, to disallow questions that are inappropriate in the ways listed. When combined with Recommendation 137, which requires judges to give the child some guidance about the cross-examination process, this will ensure child witnesses are treated fairly. The recommendation does not fetter the judicial officer's discretion to decide when intervention is necessary. We recommend that the types of questioning to be disallowed include repetitive questions and questions which are ordered in a confusing way that may cause problems for child witnesses.

5.152 In order to maximise the effectiveness of tighter legislative controls on the types of questions asked of child witnesses, prosecutors, defence counsel and judicial officers need to be aware of the rationale for those changes. Previous experience has indicated that legislative change in isolation from attitudinal

746 Mark Brennan, 'The Discourse of Denial: Cross-Examining Child Victim Witnesses' (1995) 23 *Journal of Pragmatics* 71-72.

change is not effective.⁷⁴⁷ Information about children's cognitive development is specialised psychological information and is not necessarily available to police, lawyers and judges whose task it is to question children in the course of a criminal justice prosecution.

5.153 In Chapter 3 we recommend an education program be provided for prosecutors. This program should include material that addresses the developmental patterns of children and examines appropriate ways to question child witnesses. The training program for prosecutors should emphasise their important role in objecting to questioning that contravenes the restrictions.

5.154 Judicial officers play a key role in controlling the courtroom process, the types of questions that are put to witnesses by counsel and the manner in which those questions are put. To assist them to ensure that child witnesses are questioned appropriately, they require access to information about children's development and research findings about best practice methods for questioning children. We recommend that the Judicial College of Victoria program on sexual offences recommended in Chapter 3 should contain material on the issues that arise during trials involving child witnesses and include information from specialists in child development about best practices in questioning child witnesses.

5.155 Many judges would also find it useful to have regular access to resources on child witnesses. Such information could be usefully provided in a resource guide along the lines of an expanded version of a judicial bench book.⁷⁴⁸ An Aboriginal Benchbook for Western Australian courts has been prepared under the auspices of the Australian Institute of Judicial Administration. Information about cross-cultural issues that may arise in the course of the conduct of trials involving Aboriginal people has been brought together in a resource guide for the judiciary. It is intended that this should provide a model for bench books on Indigenous issues to be prepared by courts elsewhere in Australia.

5.156 It would be helpful for Magistrates and County Court judges to have access to a collection of materials on issues confronted by judicial officers in cases involving children. The AIJA is considering how to facilitate the production of a

747 For a discussion of various paradigms for a criminal justice system see Arie Freiberg, *The Tectonic Plates of the Criminal Justice System—Responding to Pressure Points or Collision Course?* (2002).

748 A benchbook is usually an internal document incorporating standard jury directions and background case law used as a guide by judges.

bench book on child witnesses. We urge the County Court to consider participating in this AIJA project.

! RECOMMENDATION(S)

143. That the *Evidence Act 1958* be amended to impose a duty on the court to ensure, as far as possible, that in the case of questions asked of children under 18 years of age:
 - neither the content of a question nor the manner in which a question is asked is misleading or confusing, phrased in inappropriate language or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive; and
 - the questions are not structured or sequenced in a way that is intimidating, harassing, confusing, annoying or misleading.
144. In deciding whether to disallow a question, the court is to take into account any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding and any mental, intellectual or physical disability of the witness.
145. The County Court should participate in the Australian Institute of Judicial Administration (AIJA) project for the preparation of a judicial bench book to assist judges in dealing with child witnesses. The Bench book should include material about children's development and guidelines for effective communication with children of different ages and backgrounds.
146. Programs for continuing professional development of lawyers and prosecutor training [See Recommendations 35–38] should draw lawyers attention to the legislative changes recommended above and include material that addresses the developmental patterns of children and the appropriate ways to question child witnesses.
147. Prosecutor training should draw prosecutors' attention to the legislative changes recommended above and to the desirability of objecting to questioning that contravenes these legislative restrictions.

**RECOMMENDATION(S)**

148. The program of judicial education referred to in Recommendations 40–41 should deal with the issues that arise during trials involving child witnesses and include information from specialists in child development about best practice questioning of child witnesses.
149. The Department of Justice should fund an independent evaluation of the effect of this package of reforms on child complainants.

