

"Bearing witness to the best interests of the child: How the legal system treats children as witnesses in the criminal jurisdiction in Queensland, Australia"

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Article 3 of the Convention on the Rights of the Child places the “best interests of the child” as a primary consideration in all actions concerning children. This applies in all courts of law where children are playing a part, be it the Family Courts or the criminal court, be it as a party to the action or as a witness. Article 40 of the Convention has recognised the impact of the legal process in situations where children are the alleged offenders, but in reality the Convention is silent where children are the victims of criminal activity or where they are witnesses in criminal proceedings. This paper is directed to recent efforts in one Australian State to assure that the “best interests of the child” and a child’s “dignity and worth” is protected in the criminal justice system. In particular, the paper will focus on efforts that have been made in Queensland to protect the child complainant’s and child witnesses’ rights in a system where some have argued that defendant’s rights are paramount. The paper will explore these developments, with a particular emphasis on the role of the judiciary in upholding the “best interests of the child” and their “dignity and worth” in criminal proceedings where the child is the victim or a witness.

Introduction

Since the enactment of the *Family Law Act 1975*⁴ the Family Court in Australia has recognised that the interests of the child are paramount in their proceedings. Therefore, within that jurisdiction, the statutory framework and legal practices provide significant support to children embroiled (usually reluctantly) in litigation. By way of example, the court has embraced the concept of the separate child representative as a means through which the child’s voice is heard, and the child’s “dignity and worth” is protected.

The family jurisdiction is fundamentally different to the criminal jurisdiction in Australia. Whilst proceedings in the two courts often become entwined, particularly where there are prosecutions of sexual abuse allegations, there is a very different culture in the criminal courts.

The reporting of sexual abuse against children has increased significantly over the last decade. Police data from Queensland, Australia shows that between 1995 and 1998 there was almost a 100% increase in reporting, from 2,502 complaints in 1995 to 4,402 complaints in 1998. A similar trend is evident in reporting to child welfare agencies, namely 209 substantiated instances of child sexual abuse in 1993-4,

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⁴ *Family Law Act 1975 (Cth)*, s64(1)(a)

compared to 500 in the 1997-98 year.⁵ Data from a recent Queensland investigation into child sexual abuse reveals that Queensland children are particularly vulnerable to abuse between the ages of 7 and 12, but the risk of abuse increases up to age 14 with 90 per cent of reported offences involving victims within this age group.⁶ The primary witness in a criminal prosecution for child sexual abuse is thus likely to be a child between the age of 7 and 14. The criminal courts in Australia operate within an adversarial system with an emphasis placed on the rights of the accused and the fairness of the trial to the accused. It is only in relatively recent times that the rights of victims of crime and witnesses have been examined.⁷

Whilst the rights of the child are clearly entrenched in the Family Court, and the same is true in respect to juvenile offenders in the criminal courts,⁸ the child as a victim of a sexual crime or witness in a criminal prosecution does not have the same protection.

The Convention on the Rights of the Child (the Convention) does not address, as a separate area, the rights or treatment of the child as a witness and the provisions that may be broadly interpreted as covering the rights of the child in the court have not been closely considered within the confines of the adversarial criminal process.

Australia is a federation of six States and two Territories. The Convention is ratified at the Federal level. As a matter of constitutional law, crime is administered by the State or Territory governments unless it is a crime involving matters over which the Federal government has primary control, for example illegal importation of substances, counterfeiting of currency or immigration. Generally speaking the criminal offences over which the Commonwealth has jurisdiction do not involve children. The State criminal courts deal with many offences which involve children as witnesses particularly offences where there are allegations of child abuse. With the exception of the Family Court and the question of children being held in detention as refugees, the Convention is rarely considered or cited at trial level in the Australian Courts.

Of the 54 Articles which comprise the Convention, three Articles [3.1,12 and 39] consider specific rights that are compatible with the protection of the child witness during the prosecution of sexual crimes against children. Taken together these can be interpreted to impose practical obligations on the prosecution and the courts to develop processes and protocols that protect the dignity and worth of the child as a victim of abuse and promote the child's recovery from that abuse.

Article 3.1 states:

In all actions concerning children, whether **undertaken by** public or private social welfare institutions, **courts of law**, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration** [emphasis added].

⁵ Crime & Misconduct Commission, Project Axis: Child Sexual Abuse in Queensland: The Nature and Extent, 2000, p.27.

⁶ Crime & Misconduct Commission, Project Axis: Child Sexual Abuse in Queensland: The Nature and Extent, 2000, p.39

⁷ For example in Queensland, see the *Criminal Offence [Victims] Act 1995*

⁸ see the *Juvenile Justice Act 1992* (Qld)

Article 12 states that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, **the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child**, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law [emphasis added].

Article 39 goes on to say that:

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child [emphasis added].

The criminal courts have historically considered children and particularly children complaining of sexual abuse as part of a group of witnesses that are classified as inherently unreliable.⁹ As such juries were warned of the dangers of convicting on the evidence of children alone. However, social research has indicated that the likelihood of a false complaint of sexual abuse by a child is relatively rare and the real problem is with false denials and retractions.¹⁰ This research has been judicially acknowledged in the Family Court where the focus of the court is directed towards the best interests of the child. The standard of proof in the Family Court of such allegations is not as high as the criminal courts:¹¹

The reality is that child sexual abuse is often as difficult to prove as it is difficult to refute ... At the same time it must be borne in mind that false accusations or total fabrications of child sex abuse are regarded by many experienced child psychologists and child psychiatrists as being somewhat rare. This does not mean of course that allegations of sexual abuse are to be approached on the basis that they are true or likely to be true. Indeed, it is recognized that a relatively small but significant percentage are likely to be false. ... The court's concern must be to adopt an approach which will be just and which will place the welfare of the child ahead of all other considerations.¹²

Fundamentally, the family jurisdiction is not concerned with “resolving” such allegations and the Family Court can, and often does, leave the truth of the allegations

⁹ This has been statutorily removed in most jurisdictions: *Acts Amendment (Evidence of Children & Others) Act 1992* (WA); *Evidence Act 1995* (Cth) s 13(5); *Evidence Act 1995* (NSW) s 13(5). The Commonwealth Act applies in proceedings in all Federal courts and in all courts in the Australian Capital Territory: *Evidence Act 1995* (Cth) s 4; *Evidence Act 1929* (SA) s 9(1); *Evidence Act 1910* (Tas) s 122C; *Evidence Act 1958* (Vic) s 23(1)(b).

¹⁰ See for example G. Goodman & B. Bottoms (eds) *Child Victims, Child Witnesses: Understanding and Improving Testimony*, Guilford, New York, 1993; S Ceci & M Bruck “Suggestibility of the child witness: A historical review and synthesis”, (1993), 113 *Psychological Bulletin* 403, 425-427

¹¹ This standard is on the balance of probabilities

¹² *S v S* [1993] NZ FLR 657 at 660, cited with approval in *S v R* [1999] FamCA 12 at paragraph 111.

unresolved. This luxury is not the domain of the criminal jurisdiction, where the standard of proof is “beyond a reasonable doubt” and the issue must be resolved.

It is within the criminal courts of each of Australia’s States and Territories that a serious review of procedure and practice relating to children as witnesses has been undertaken over the last fifteen years. It is now generally accepted that reform is necessary. The question has been how to reform the long standing adversarial criminal process to ensure that children are able to give their evidence effectively and with dignity. His Honour Justice Jerrard, in the Queensland Court of Appeal, observed as recently as 2002:

Others may share my view that it is an unacceptable oddity in this 21st Century that the criminal processes in this State place the entire evidentiary burden of proof of the serious charges brought against the appellant upon the evidence of a child who was only 11 and a half years old in May 2002, whereas other courts making equally important determinations on the same topic of the sexual abuse of children by family or extended family members routinely, and almost invariably, gain information from many other sources, and positively discourage the concept that truth can be ascertained by the cross examination of a child. My opinion after observing and participating over a long period in the practices of the criminal jurisdictions of courts in this State as a Barrister, and for a brief period as an acting judge of the District Court, when comparing those practices to that of the Family Court of Australia from the position of four years experience in it as a Judge, is that the practices and procedures of the latter court provide a sound and satisfactory basis for judgment, and that those routinely engaged practices and procedures are far more a search for the truth than the procedures of the State criminal courts. I suggest that in cases of this nature, the focus of the inquiry ought to be upon what has happened in the child’s life rather than upon proof of a criminal charge, although the enquiry into what has happened may well establish that a criminal offence has been committed; and the procedures routinely used in the criminal jurisdiction should be radically reconsidered. This would require a paradigm shift, but would assist those who are wrongly accused in having that fact identified.¹³

However, the changes to the law have proceeded slowly and given that the liberty of an accused person is at stake, careful consideration of the changes is required. Even in the family jurisdiction “utmost caution” is applied to any evidence of sexual abuse that has not been tested by cross-examination. Findings of “an unacceptable risk of abuse” occur more frequently than do definitive positive findings of actual abuse. In August 2004 the full court of the Family Court reminded the judiciary and practitioners of the need for utmost caution, observing that ‘the risk that the Court will find heinous behaviour where none has occurred needs be borne in mind at all times.’¹⁴

The Convention & Criminal Legal Processes

The Convention indicates that in any legal proceedings the child should be heard, in a manner that integrates the principles of the Convention with the processes and procedures of the State’s relevant legal systems.

¹³ *R v D* [2002] QCA 445, at paragraph 46

¹⁴ *Re W (Sex abuse: standard of proof)* 2004 FamCA 768

As an adjunct to the Convention, the *Guidelines for Action on Children in the Criminal Justice System* were drafted in 1997 by the International Association of Prosecutors. Those guidelines call for measures to ensure the safety of child victims and witnesses from intimidation and retaliation; including the avoidance of direct contact between the child complainant and the accused during all stages of the criminal prosecution process.¹⁵

Within Australia, criminal defence advocates have steadfastly lobbied against any changes to evidentiary practices which they consider detract from the rights of the accused. Others who are not charged with protecting the rights of the accused believe that the adversarial system has unjustifiably privileged the accused to the exclusion of others including child witnesses. As a consequence of that:

The participants in the process: the complainant or victim, the witnesses and the defendant, are used by the barristers to construct a reality in which the complainant's version of the events is recounted and tested to the high standard of beyond reasonable doubt. The focus is on whether the Crown has proved the guilt of the accused. This was perhaps most frighteningly enunciated in the following quote from a barrister interviewed for a feature in [an Australian] newspaper article on child sex abuse trials:

“The Crown doesn't care about the child. The police don't care about the child. And I don't care about the child. You see, the trial is not about the child . . . it shouldn't be about the child and hopefully never will be about the child”.¹⁶

A state party eager to redress the balance between the rights of the accused and the rights of the child could readily use the Convention to justify changes of the type called for by Justice Jerrard. However, the Convention has not been used by the Federal, State or Territory governments as a basis for introducing reform to the system. In fact the government response to the Convention has, generally, been less than impressive.

As most would be aware, it is a requirement that all signatories to the Convention report on their progress in implementing the Convention to the Committee on the Rights of the Child in the Office of the High Commission for Human Rights.

Australia ratified the Convention on 17 December 1990 and it entered into force within Australia on 16 January 1991. Australia's first report to the Committee was submitted in February 1996 and was considered by the Committee in January 1997. Australia's second report was submitted in July 2003 and will be considered by the 40th General Assembly to be held in September 2005.

Australia's first report (1996) made it clear to the Committee that although 'the best interests of the child is the key principle in most legislation concerning children in Federal, State and Territory jurisdictions',¹⁷ it was not a paramount principle. It was

¹⁵ International Association of Prosecutors, Model Guidelines for the Effective Prosecution of Crimes against Children, United Nations Economic and Social Council resolution 1997/30, annex of 21 July 1997

¹⁶ D.L. Kellie & H. O'Sullivan, "Ethical or Amoral: Is an unqualified right to silence at trial defensible from an ethical perspective?", *Legal Ethics*, 6/1, 74.

¹⁷ Australia's First Report Under Article 44(1)(A) of the Convention on The Rights of the Child, December 1995 (*Initial Reports Of States Parties Due In 1993: Australia. 01/02/96*, at paragraph 200

not paramount because it had not been enacted into Australian laws. It reminded the Committee that although Australia had ratified the Convention that did not automatically mean that citizens thereafter ought to have a legitimate expectation that it would in fact honour the Convention.¹⁸ This is particularly pertinent given the fact that most crime is a State matter, not a Federal matter.

The report advised, on two separate occasions, that it was the intention of the Federal government to give a reference to the Australian Law Reform Commission (ALRC) and the Human Rights and Equal Opportunities Commission (HREOC) to inquire into children and the legal process.

Seen & Heard: Moving towards Dignity & Worth

The joint inquiry by HREOC and ALRC resulted in a report which was released in 1997 under the title “Seen & Heard: Priority for Children in the Legal Process”. Its findings were not at all positive. The inquiry’s approach to children as witnesses revolved around Articles 3, 12 and 39 of the Convention. They interpreted these Articles in the same manner that we have adopted in this paper: that is, that the Articles require that the evidence of children be taken in a way which promotes the physical and psychological recovery, health, self-respect and dignity of the child.

The report found that generally:

...whatever the jurisdiction, the structures, procedures and attitudes to child witnesses within all these legal processes frequently discount, inhibit and silence children as witnesses. ...children often become so intimidated or distressed by the process that they are unable to give evidence satisfactorily or at all.¹⁹

Western Australia stood out as a beacon and model for other States. Western Australia has allowed the pre-recording of a child’s complete evidence: i.e. evidence-in-chief, cross-examination and re-examination since 1992. The purpose of this change in practice was to reduce the trauma for children giving evidence in court. This represented groundbreaking legislation in Australia and despite the concerns of the defence advocates in Western Australia the sky did not fall. In fact, a subsequent study of the effectiveness of the pre-recording of the children’s evidence has shown little difference in conviction rates under the scheme.²⁰ This “radical” change in the way children’s evidence was received in court has been a significant step towards promoting the best interests of the child in the criminal legal process.

The inquiry recommended that the Western Australian model be adopted across Australia, and that the Federal Attorney-General should “encourage” all States and Territories to enact similar legislation.²¹ The reason such encouragement was necessary related to the fact that the Australian government does not have general

¹⁸ *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 69 ALJR 423

¹⁹ Australian Law Reform Commission 84, “Seen and Heard: Priority for Children in the Legal Process”, Canberra, AGPS, 1997, at 14.1

²⁰ Evaluation research conducted in Western Australia four years into their implementation discovered that ‘there had been no reduction in the rate of convictions when CCTV was used’. C. O’Grady “*Child Witnesses & Jury Trials: An evaluation of the use of closed circuit Television and Removable Screens in Western Australia*,” January 1996, Ministry of Justice of Western Australia.

²¹ ALRC 84, recommendation 94

control over criminal law. That domain is largely one for each respective State and Territory.

The inquiry's report and recommendations were released in 1997. There is no mention of the success or otherwise of the Attorney-General's "encouragement" of the other States and Territories in Australia's second, and most recent report to the UN on the Convention. The 2003 report²² would appear to suggest that, at the time it was written, there had been limited success in encouraging the States to progress reform, which is a little bemusing given that each State had by that date implemented their own inquiry into children and the legal process,²³ and several had commenced the reform process.

Between 1989 and 1994 several Australian States made significant amendments to their legislation as regards the evidence of vulnerable witnesses. Queensland,²⁴ South Australia,²⁵ Western Australia,²⁶ Tasmania and Northern Territory²⁷ were amongst those States that had considered "special arrangements" or "special measures" for vulnerable witnesses (including children in child sex abuse cases). These special measures included such things as screens, support persons, and closed circuit television to ease the stress of giving evidence. But in most cases an application had to be made for an order for the special measures to be provided. In consequence, these special arrangements were rarely applied in practice. Queensland's Attorney-General commented in December 1993 that lawyers were not making full use of these provisions and that anecdotal evidence from the Office of the Director of Prosecutions showed the provision had been used only 20 times since it was introduced in 1989.²⁸

In 1999 there was a flurry of media activity as regards child witnesses in sexual abuse cases. The ABC's "*Four Corners*" is a documentary program which prides itself on presenting ground breaking exposes and it has a special place in Australian public life. It is often the catalyst for significant social debate and for subsequent change. In July 1999 they devoted an episode to the high failure rate in prosecutions for child sex abuse. The program revealed that South Australia had the highest acquittal rate in child sex assault trials with eight out of every ten child sexual assault prosecutions failing. *Four Corners* assembled a panel of judges, prosecutors and child experts²⁹ from across the country, who all admonished Australia's prevailing legal system,

²² Australia's Second & Third Report Under Article 44(1)(A) of the Convention on The Rights of the Child, July 2003

²³ *New South Wales* – first reference made in 1992; report delivered in 1994; second reference made in 2001; report delivered 2002; *Queensland* – reference made in 1997; report delivered in 2000; *South Australia* – White Paper delivered in 1992; *Tasmania* – reference made in 1995; report delivered in 1998; *Victoria* – reference made in April 2001; report delivered 2004; National Child Sexual Assault Reform Committee, *Discussion Paper: Alternative Models for Prosecuting Child Sex Offences in Australia (Draft)* (Sydney, 2003)

²⁴ *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld)

²⁵ *Evidence (Vulnerable Witnesses) Amendment Act 1993* (SA).

²⁶ *Acts Amendment (Evidence of Children and Others) Act 1992* (WA).

²⁷ *Evidence Amendment Act (No 2) 1994* (NT).

²⁸ Special-care witness options ignored: Wells" *The Courier Mail* (9 December 1993) at 25

²⁹ The panel included O'Sullivan DCJ & Robertson DCJ (Qld); Di Fingleton CSM (Qld); Royce Miller, DPP (Qld); John Reilly Police(Qld); Terry O'Gorman (Qld); Doyle CJ (SA); Paul Rolfe, DPP (SA); Lindy Powell, Law Society SA; John Heslop, Police (NSW); Nicholas Cowdery, DPP (NSW); John Nicholson Senior Public Defender (NSW); Jayne Rickard, NAPCAN Child Protection Organisation; George Christie, Witness Support Volunteer.

saying it simply fails to account for the special needs of children. Their key criticism was the gruelling and traumatic cross-examination of children by defence lawyers.

In an interview the day after that *Four Corners* program South Australia's Chief Justice of the Supreme Court John Doyle said that he thought: "it is better if the jury can see the child rather than just through a screen, and can assess the child's reaction, as it were, at first hand. I think that is easier for the jury, so that's why it's better for the child to give evidence in court."³⁰ His Honour Justice Doyle was not alone in his view - it is a view that has long prevailed amongst prosecution and defence lawyers, and is perhaps one barrier that may have faced the Attorney-General in his encouragement of the ALRC recommendation.

The push towards reform gathered momentum after the *Four Corners* program, perhaps inspired by several scandals involving high profile members of various church denominations. A national committee on child sexual abuse reform was even established with representation from each State and Territory. But resistance from over 200 years of adversarial practice is not so easy to shift.

In 2003 the Queensland government introduced its own reform loosely modelled on the Western Australian legislation. This was a State in which the provisions of its *Evidence Act* had, for some years, allowed for an application to be made by the prosecution to adopt "special measures" for child witnesses (which had been noted in Australia's first report to the UN). However, those special measures were rarely adopted. In fact, the resources for giving evidence by closed circuit television did not exist in the majority of the State's courtrooms. The 2003 legislation introduced far-reaching changes:

1. ordinarily there is to be no cross-examination of child witnesses at the committal hearing³¹ and child witnesses would not be required to attend the committal hearing;
2. pre-recording of the child's complete evidence for the trial (evidence-in-chief, cross-examination, and re-examination),
3. allowed evidence of all complaints made by children before formal complaint to the police to be given in a trial
4. excluded direct cross-examination of a child by a self-represented accused person at trial.

Although the Queensland legislation is a step towards the 'paradigm shift' that His Honour Justice Jerrard mooted, we are a long way from his vision as articulated in *R v D*.³²

Resistance remains. As one Brisbane barrister phrased it, speaking on behalf of the Queensland Bar Association in 2003:

³⁰ ABC Radio, PM Archive - Tuesday, 20 July, 1999, <http://www.abc.net.au/pm/stories/s37812.htm>

³¹ A committal hearing is a preliminary examination of the evidence by a magistrate to determine whether the evidence is of sufficient weight to support a conviction. If the magistrate finds this is the case, the defendant is committed to trial.

³² *R v D* [2002] QCA 445

The Association fully supports the efforts of government to make the task of a child witness easier. We have always supported that. But there must be a resolve to do everything possible to achieve that before altering the accused's rights and making the accused in cases involving significant child witnesses, in some different category to the rest of the accused in the criminal calendar.³³

A year later, in an address which was conducted as part of the continuing education program of the Queensland Bar Association, the sentiment that the legislation was fundamentally altering an accused's rights was again dominant:

...Committal proceedings are also an important part of the protection ordinarily afforded to an accused in the criminal process.... What was once good jurisprudence, and, one might have thought, an eminently fair view of the criminal process, is no longer the case. The *Evidence (Protection of Children) Amendment Act* has seen to that. ...[affecting] a major change to the way hearings of "child sex allegations" are to be conducted. Prima facie the right to cross examine an "affected child" at committal is lost...³⁴.

So just what was it that was causing so much angst amongst the members of the bar, and perhaps a little trepidation across members of the judiciary? The *Evidence (Protection of Children) Amendment Act 2003* came into effect on 5 January 2004. The Act makes it clear that it was 'Parliament's intention that a child who is a witness in a proceeding should be given the benefit of special measures when giving evidence.'³⁵ The Act articulated as general principles the requirement that children be treated with dignity, respect and compassion; that they not be intimidated in cross-examination; that the matter be resolved as quickly as possible; and that the special measures introduced by the Act should be implemented to the greatest practical extent.³⁶ The intent of the new division was to preserve the integrity of the child's evidence and to limit the distress and trauma experienced by the child as a witness.³⁷ This was a forward step towards implementing the spirit of the Convention.

After the introduction of the Act the Director of Public Prosecutions issued guidelines to her prosecutors stressing that it was now "mandatory [and departmental policy] that a child witness was to be treated with dignity, respect and compassion", and that prosecutors should be "robust in seeking compliance with those new provisions and the spirit of the legislation."³⁸

The most significant change made under the Act was that relating to a child's evidence:

... the division prescribes the following measures for an affected child when giving evidence for a relevant proceeding—

(a) for a criminal proceeding—

³³ ABC Radio, The Law Report – 20 May 2003,

<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s857955.htm>

³⁴ A. J. Glynn SC, *Evidence (Protection of Children) Amendment Act 2003*, Seminar to QBA, 31 March 2004

³⁵ *Evidence Act 1977*, s9E(1)

³⁶ *Evidence Act 1977*, s9E(2)

³⁷ *Evidence Act 1977*, s21AA

³⁸ Child Witnesses and prosecution policy, Leanne Clare, DPP (Queensland)

- (i) the child's evidence is to be pre-recorded in the presence of a judicial officer, but in advance of the proceeding;
 - (ii) if the measure in paragraph (a) can not be given effect, the child's evidence is to be given at the proceeding, but with the use of an audio visual link or with the benefit of a screen;
 - (iii) for a committal proceeding, 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;
- (b) for a civil proceeding, the child's evidence is to be given at the proceeding with the use of an audio visual link or with the benefit of a screen.³⁹

An "affected child" witness is a child under 16 years of age at the time the defendant is arrested.

Prior to the enactment of this legislation the defence at committal proceedings had a right to insist that a child whose evidence-in-chief had been pre-recorded by police be made available for cross-examination and that a child of 12 years and above who had provided a written statement to police be available for full evidence at committal [i.e. evidence-in-chief and cross-examination]. With the introduction of the *Evidence (Protection of Children) Amendment Act 2003*, the child's evidence is now presented in the form of either their statement or a video recording of the interview with the investigating officer. A Magistrate must not permit the cross-examination of a child witness about any issue unless satisfied that the interests of justice cannot adequately be served by leaving the cross-examination of the child to trial.⁴⁰ A stringent four part test applies in determining whether the application to cross examine will be successful, including the identification of a clear issue to which cross-examination would be directed, supported by reasons as to why the child's evidence is relevant, why the prosecution material is insufficient on that point and an identification of what questions would be put to the child to address that issue.⁴¹

It was this part of the Act that drew the most concern from criminal practitioners in Queensland. The committal proceedings have been seen for many years as fertile fields for testing a witness because they take place without a jury being present. Counsel are therefore not constrained by the thought that they may be making a bad impression upon a jury and therefore are able to be robust in their cross-examination of a complainant. It is often in this atmosphere that the child becomes confused and unable to answer questions. It sets the stage for the trial and underlines the unease the child already feels. The fear was that the removal of the opportunity to cross-examine the child at the committal stage would greatly disadvantage the accused and lead to an unfair trial.

That fear was perhaps unfounded. As has already been noted this has not been the Western Australian experience.⁴² Neither has it been the Tasmanian experience,

³⁹ *Evidence Act 1977*, s21AB

⁴⁰ *Evidence Act*, s21AG

⁴¹ *Evidence Act*, s21AG(3)(a)

⁴² Western Australia had originally had the traditional committal at which cross-examination of the child complainant was commonplace. In 1992 their legislation was amended to provide that a child was

where there has been a prohibition on cross-examination at committal since 1995. Indeed, in Western Australia, committals were abolished completely in 1999. Defence counsel in Western Australia have supported that State's measures because, it is argued, it assists in clarifying issues earlier, and leads to nolle prosequi or changes to the indictment. In 2003 New South Wales also exempted child complainants from attending at the committal stage.⁴³

On introduction of the Act, the Queensland Parliament specifically acknowledged the fact the children are vulnerable in situations where they are dealing with authority. In recognition of that fact and the fact that a court can be a traumatic place at the best of times the Act allowed for other special measures such as having a support person with the child during the process,⁴⁴ and enabling the child to be in an "appropriately equipped room" rather than the court room.⁴⁵

Arguably, the interplay of Queensland's legislation now imposes a positive duty on the judiciary to balance the traditional need for the accused to receive a fair trial with the interests of the child.⁴⁶ There is growing recognition that "judicial officers must play an active role and monitor proceedings to ensure that the objectives set out in s21AA are achieved".⁴⁷ Judicial officers are also required to ensure that the general principles for dealing with children as witnesses are upheld. Historically, the 'proper control of the cross-examination of child witnesses, has not always been well managed by judges, who very often have felt reluctant to interfere, particularly in the absence of an objection'.⁴⁸ The playing field has now changed.

The present context: protecting dignity & worth?

Queensland has now had just over 15 months of implementation of legislation which had been tried and tested and working effectively in Western Australia for 12 years. But, as is so often the case, each jurisdiction has to make its own path and learn from its own mistakes. There have been both policy and practical implications from the new legislation for both the lower courts (Magistrates courts) and the superior courts (predominantly the District Court). A radical change such as this cannot take place without some teething problems.

Queensland has 83 Magistrates Courts, and 31 District Courts. A major issue has been resourcing the courts with the necessary equipment. Financial constraints have meant that not all centres and courts can be equipped with the necessary technology. At the

not to be called at committal unless there were special circumstances which justified the complainant being called.

⁴³ *Crimes Legislation Amendment Act 2003*, commenced operation on 18 August 2003

⁴⁴ *Evidence Act 1977*, s21AV

⁴⁵ *Evidence Act 1977*, s21AK(9)

⁴⁶ *Constitution of Queensland Act 2001*, s59; *Evidence Act 1977*, s21, s21AL(1), s21AL(4)(b), s21AX; *Criminal Offence (Victims) Act 1995*, s4(3), s6.

⁴⁷ H. O'Sullivan DCJ, *Children Giving Evidence : An overview*, paper presented to the Annual District Court Conference, April 2004

⁴⁸ J. Wood CJ, *Child Witnesses: the New South Wales Experience*; paper presented to the Australian Institute of Judicial Administration Conference on Child Witnesses: Best practice for Courts, Parramatta NSW, 30 July 2004

committal stage this resourcing impact has been somewhat lessened by the fact that the Act provides that cross-examination at the committal stage should be the exception, rather than the norm.⁴⁹ At the initial implementation of the provisions it was mooted that securing an order in favour of the accused for cross-examination at committal would be almost impossible for a defendant to obtain.⁵⁰ Several factors contributed to that view. First, was the stringent requirement of the Act itself. Second was the Chief Magistrate's Guidelines for the Queensland Magistrates Courts. Thirdly, was the stated policy of the Director of Public Prosecution to "pursue all that can be done to avoid such a result". In the accused's favour, that policy extends to "reducing the charges in advance of the committal if necessary".⁵¹

Since the introduction of the legislation the Queensland magistracy reports that there have been very few applications to cross examine the child complainant. Only two of those applications have resulted in the child being cross-examined at the committal stage of proceedings. If an application is made, it seems that the usual course is to adjourn the matter to allow the prosecution to record a further interview with the child.

The reasons for the minimal requests to cross-examine a child witness at committal may, in part, reflect the praxis around criminal defence in Queensland. A large proportion of criminal clients charged with crimes of sexual violence qualify for legal aid. Standard practice amongst Queensland practitioners has therefore been for solicitors to conduct the committal hearing, partly because aid is often refused for counsel to participate. Legal Aid Queensland has not changed its policy as regards funding in matters concerning affected child witnesses. This has a further impact as regards the conduct of the matter beyond committal. The requirement to pre-record the evidence means that Counsel needs to be engaged for two separate occasions and again funding constraints affect the proper preparation of these matters.

The second issue is that initially few District Courts were equipped with the necessary closed circuit TV. Just prior to the introduction of the legislation one prominent defence counsel noted that in almost 20 years of his criminal practice:

... the first closed circuit TV proceeding I have ever been involved in was last week. The first. Now why is that? Because there's been a lack of resolve and I think it's an indictment on the system that there are still many cases where CCTV is simply not available...⁵²

Although the District Court of Queensland in 2004-5 is planning the installation of what the Chief Judge hopes will be "the best child witness suite in Australia"⁵³ which will be linked to 6 courtrooms, at present there are some operational difficulties:

Courthouses in the major centres have been equipped for the taking of pre-recorded evidence of affected child witnesses and for the playing of that evidence at trial.... Remote witness rooms in some centres are dark, small or unsuitably

⁴⁹ *Evidence Act*, s21AF

⁵⁰ A.J.Glynn SC, *Evidence (Protection of Children Act) Amendment Act 2003*, Seminar paper delivered 31 March 2004, p5

⁵¹ L. Clare, DPP (Qld) *Child Witnesses & Prosecution Policy*

⁵² Above note 33

⁵³ District Court of Queensland Annual Report 2003-2004, p7

furnished. Faulty equipment has resulted in an affected child's evidence not being recorded or not properly recorded, resulting in the child being recalled to give evidence again and trials being aborted.⁵⁴

Another issue of concern has been the safe custody of the pre-recording itself:

The court decided that the most efficient way to ensure the security of videotapes of affected child witnesses' pre-recorded evidence, wherever the evidence is taken in Queensland, was to provide that the Principal Registrar has custody of the videotapes, responsibility for carrying out a Judge's orders for copying and/or editing and/or delivery of the tapes and responsibility for ensuring the tapes are available for trial of the matter, wherever it is to be held. This is working well. No tapes have been lost...⁵⁵

The restriction on cross-examination at committal may, in some circumstances, delay the potential for an early plea of guilty. The first time the accused gets an opportunity to fully test the complainant witness now is during the pre-recording phase of the trial. This can be several months after the committal process. The pre-recording of the evidence is resource intensive in that it requires the judges, barristers, prosecutors and court staff to be present for the initial recording as well as the playing of it at trial. The effect may be to delay the final resolution of the matter.

In so far as Queensland is concerned it is too early to indicate whether the process has increased the conviction rate. The Attorney-General authorised an evaluation of the implementation of the Act in October 2004. The target date for the completion of that evaluation is January 2006, at which time the Act will have been in operation for two years. The dominant focus for the evaluation is to ascertain whether or not cross-examination is still happening at committal, given that is one of the primary and most significant changes in the adversarial practice. The evaluation will also be directed to whether or not child witnesses are required to give further evidence after the pre-recording of their trial evidence, and whether or not matters involving child witnesses are progressing through the system more quickly. Data collection for that review is being undertaken in two stages. It is envisaged that both quantitative data and qualitative data will be collected over the course of the evaluation. The Queensland Courts and the Queensland Bar Association have been invited to make submissions to that evaluation: to date a submission has not been received from either entity.

Anecdotally, it would seem to have caused little change in conviction rates at trial.

On the positive side, the evidence of the child is recorded and preserved at an earlier stage, the child does not have to give evidence more than once and does not have to face the accused when giving evidence. Whilst there may be delay in the matter being finalised, once the child's evidence has been given, he or she can proceed to have counselling and proceed with the recovery process. The evidence is given in a more appropriate setting and the child has support whilst giving that evidence.

⁵⁴ District Court of Queensland Annual Report 2003-2004, p7

⁵⁵ District Court of Queensland Annual Report 2003-2204, p6

It may well be the case, as was suggested by Justice Doyle, that juries find a child's evidence more compelling when the child is in the same room as them. There is research that indicates that people do perceive information differently when confronted with a TV image as against the real image - particularly as regards perceptual visual information such as age, height and body language. Certainly, there are few sights that are more poignant than a small child, dwarfed by the adult trappings of the witness box, giving a tearful account of the abuse she or he has suffered. However, the tenants of the Convention require that the interests of the child are paramount and it can never be in the child's best interests to put them to the kind of trauma involved in giving evidence in court simply because it meant that their evidence is more compelling. In any event, one can only wonder at the quality of the kind of evidence that is given by a small child when they are placed into such hostile surroundings. The balance between the effect of seeing the child "in person" and the chance of a child giving more relaxed and less stressed and probably more accurate evidence remotely must tip the scales in favour of the Western Australian model.

A future vision: is there room for a paradigm shift?

Some may consider that the best way to promote the dignity and worth and promote the best interests of the child witness is to have a specialist court in which measures specific to the needs of the child are adopted, and indeed that approach has been adopted in Australia by New South Wales.

New South Wales first floated the concept of trialling a specialist court for child sex offences in November 2002. The Attorney-General's press release made it clear that the impetus for the pilot was predominantly to improve conviction rates. The interests of the child were a secondary reason.⁵⁶ What was specialist about the tribunal was that it was to be staffed with "expert judicial officers, prosecutors and court staff with specialist training in child sexual assault" with the intent of ensuring that "everything is done to secure a conviction and to protect children from further trauma and victimisation."⁵⁷ The pilot commenced in March 2003 at Parramatta in New South Wales. What was unique about their concept was the focus on improving the understanding of the special difficulties child witnesses presented through training for prosecutors and judicial officers. The trial was extended to Campbelltown and Penrith Courts (also in Western Sydney) in late 2003. The Attorney-General has now appointed a taskforce to undertake a full evaluation of the specialist courts.

Whilst a specialist court is a positive step for children, it is also important that defence counsel and the public as members of the jury receive educational information and/or assistance. In any cultural change tinkering with structure and process is only part of the solution: there have to be parallel reforms. One

⁵⁶ R Rodger, New Specialist Child Sexual Assault Jurisdiction for New South Wales, Paper presented at the Child Sexual Abuse Justice Response or Alternative Resolution Conference, Australian Institute of Criminology, Adelaide, 1 – 2 May 2003, p.2.

⁵⁷ Attorney General for New South Wales, "New Court for Child Sex Offences", Media Release, 18 November 2002

such essential reform is a full understanding of the psychology of communication with children. Few of the reforms that have been adopted in the criminal jurisdiction in Australia have addressed this issue. There are significant problems in relation to the type of questioning that goes on in the criminal courts. Whilst the judiciary may have been given a stronger role in the process in terms of control of cross-examination, this presumes awareness in the judiciary of the type of questions that may be age appropriate to a particular child. Similarly an exhortation by the Director of Prosecutions to prosecutors to be vigorous in their objections assumes a level of expertise that may not be present. Barristers cross-examining children are still prone to repetitive and complex questioning, they tend to ask questions that are leading and deliberately misleading and insist on answers to questions which may be beyond the child's capacity to recall or fully comprehend.

The South African experience of using an intermediary to "translate" the question into child appropriate language has not been really countenanced in Australia. Western Australia does have provision within its legislation for an intermediary,⁵⁸ but it has rarely been used.⁵⁹ However, there is a growing recognition that children are different. This raises the potential for the use of expert witnesses in child psychology to assist the jury in better understanding evidence; such a view would move the criminal jurisdiction closer to the family jurisdiction and would be a step towards the paradigm shift that Justice Jerrard appears to support. To date, child psychology experts have been excluded from the criminal trial. There is a growing recognition that this sort of expertise could be very useful to juries; as Justice Wood, Chief Judge of the Supreme Court in NSW, phrased it:

The possible admissibility of general expert evidence of this kind ... is worthy of consideration for cases involving child sexual assault. Otherwise there is always a danger of insufficiently informed juries bringing to their determination of these cases, their own prejudices, sexual orientation and experiences, or beliefs founded in the myths, which do surround conduct of this kind.⁶⁰

Conclusion

Whilst it has long been asserted that 'rigorous adversarial procedure damages child complainants in sexual abuse case',⁶¹ arguably the present legislative arrangements have not caused that aspect of criminal procedure to abate. The legislative changes introduced in Western Australia in 1992, recommended as the model for all States by the ALRC in 1997 and partially adopted by Queensland in 2003 have allayed some of the stress of the criminal process in so

⁵⁸ *Evidence Act 1906 (WA)*, s106F

⁵⁹ N Friedman & M. Jones, *Children Giving Evidence of Sexual Offences in Criminal Proceedings*, (2005) 14 JJA 157, 169.

⁶⁰ J. Wood CJ, *Child Witnesses: the New South Wales Experience*; paper presented to the Australian Institute of Judicial Administration Conference on Child Witnesses: Best practice for Courts, Parramatta NSW, 30 July 2004.

⁶¹ M.A. Yeats DCJ, *Alternative arrangements for giving evidence: a judicial perspective*, paper presented to Children as Witnesses workshop, Judicial College of Victoria, 14 November 2003, Melbourne, p.4

far as the waiting game is concerned, but there is still significant room for improvement.

Across Australia most States and Territories have now made steps towards reform in this area, with the most recent review being that undertaken by Victoria.⁶² Irrespective of which State or Territory, the reviews have discussed similar reasons, received similar submissions, and made similar recommendations in respect to children as witnesses in sexual assault cases. Some States and Territories have acted on their reviews and implemented legislative change.⁶³

As has been mentioned above the impetus for reform has generally not been aligned to the Convention. None of the legislative changes in any State have made reference to the Convention as an overarching or guiding principle. The acceptance of a separate voice for the child in the family jurisdiction drew significant impetus from the Convention: arguably, that opportunity is also open to State legislatures. At the present time Australia appears to be in a state of dynamic flux as six State and two Territory jurisdictions grapple with the tensions of priority in an adversarial criminal process. The federated nature of the country has resulted in a variety of reforms being implemented. All are geared to a similar aim: to reduce the “systems abuse” that a child complainant suffers, whilst at the same time preserving the right to a fair trial for the accused. It seems that central to any paradigm shift is a need for each State and Territory to embrace the Convention on the Rights of the Child and to consider how best to give real substance to the intent of the Convention. Political, as well as legal, will is required to take the best reforms and develop a nationwide approach to the prosecution of sexual crimes against children.

⁶² Victorian Law Reform Commission, *Sexual Offences: Final Report*, 2004, available on line at <http://www.aifs.gov.au/acssa/research/lawpolicy.html>

⁶³ See Friedman & Jones (note 58 above) for a brief review of the current state of affairs in Australia.