Children's Evidence in Sexual Abuse Cases: The Need for a Radical Reappraisal

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Introduction

The issue of child sexual abuse in Australia has received increasing recognition over the past decade. In New South Wales alone, this heightened concern is reflected in a number of inquiries and reviews which have been undertaken in an attempt to identify possible directions for reform (Judicial Commission of NSW 1997; NSW Child Protection Council 1991; NSW Department of Family and Community Services 1989; Family Law Council 1988; NSW Child Protection Council 1988; NSW Child Sexual Assault Taskforce 1985). A common problem highlighted in these various investigations is the role of the criminal justice system in facilitating the evidence of child witnesses in a growing number of court proceedings. It is commonly accepted that the increased awareness of child sexual abuse has generated a commensurate increase in the number of reported cases (Cashmore and Horsky 1987).[1] At the same time, however, the legal system has been slow to respond to the multitude of policy questions which arise when children are involved in giving evidence in such proceedings.

The recent enactment of the *Evidence Act* 1995 (Cth), and virtually identical legislation in NSW,[2] has done little to minimise the negative impact of children's involvement in cases of sexual abuse. This mirrors the wider failure of our legal system in general to accommodate the needs of children involved in litigation. In a current national inquiry into children and the legal process, the Australian Law Reform Commission has stated that '[t]he laws and practices concerning child witnesses and victims must take account of these children's vulnerability and right to proper and effective support in the legal process' (Australian Law Reform Commission 1996:109).

Focussing on the evidence of children involved in sexual abuse cases as one key problem area for the law[3] this article has a dual aim: first, it clarifies some of the existing evidentiary principles for children who are required to give evidence in such cases; and second, it identifies future directions for reform in this area which challenge current policy prescriptions.

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1 This can be traced back to the early 1980s. Over the four year period between 1981 and 1984, for example, Cashmore and Horsky noted an increase of 850% in the number of reported cases of child sexual assault to the old Department of Youth and Community Services. More recent statistics concerning the number of child sexual abuse cases in NSW is dealt with below.

2 See *Evidence Act* 1995 (NSW).

This article falls into three sections. The first section provides a description of the current rules for children's evidence under the new evidence legislation in NSW, including recent amendments to the *Crimes Act* 1900 (NSW). This section also provides a critical analysis of the new legislative measures as they relate to the issue of competency. The second section details the prevalence of child sexual abuse through the use of primary statistics and surveys some contemporary issues related to child witnesses. It must be noted that the statistics referred to do not adequately reflect the incidence of abuse involving children with disabilities and other marginalised youth. Particular attention in this section is paid to past recommendations for reform at an international and domestic level, by a host of agencies and other specialists in the field. In the final section the article considers some outstanding reform issues, including Australia's obligations under the United Nations Convention on the Rights of the Child and the need for a national agenda on the issue of children's evidence. The conclusion which is drawn suggests we need to undertake a radical rethink of the current procedures for receiving children's evidence. Rather than questioning the competency of children to meet arbitrary evidentiary principles, it is argued there is more merit in questioning the legal system's current ability to receive the evidence of children.

Current provisions for children's evidence

Competence and compellability of children

Following the introduction of both the *Evidence Act* (Cth) and *Evidence Act* (NSW), the general rules relating to competence and compellability have favoured the wider admissibility of evidence. Under the NSW legislation, the common law meaning of competence has been widened from understanding the taking of an oath to understanding the obligation to be truthful (s13(1)). Once the court is satisfied that a person has such an understanding, they will be permitted to give sworn evidence. Alternatively, unsworn evidence is allowed pursuant to s13(2) where provision is made for a person who understands the difference between telling the truth and fabrication (s13(2)(b)(a)). Under s13(2)(b)(c) a judge is obliged to make this distinction clear to a potential witness and the witness must guarantee that they will not depart from the truth (Odgers 1997:26–27).

For present purposes, it is important to establish the likely impact these new provisions will have on the giving of evidence by young people. Although NSW was quick to emulate the new Commonwealth legislation no other jurisdiction to date has followed this lead. This has meant that presently different rules for children's evidence apply in the various Australian jurisdictions with little, if any, uniformity in the context of sensitive cases such as child sexual abuse. What is apparent, however, is that the evidence rules pertaining to the competency of children in many of these other jurisdictions continue to preclude young children from giving any form of evidence at trial, unless the court is satisfied the child has a belief in God.[4] Despite a growing trend to remove the requirement for corroboration in some parts of Australia, children's evidence is still considered unreliable and in jury trials must be corroborated by other evidence and the jury cautioned of the danger of convicting on the child's evidence alone (Aronson and Hunter 1995:744).

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3 Although the issue of child sexual abuse arises in other legal environments, such as the Family Court, the discussion in this article focusses on criminal trials. The impact of a courtroom on children with disabilities raises a host of specific issues which are beyond the scope of this article. On this topic see, for example, NSW Law Reform Commission 1996 and Australian Law Reform Commission 1997b:351–352.

4 These jurisdictions include Queensland, South Australia and Western Australia. See *R v Brown*, *Dominic v R*, *F v Schlaefer*, cited in Hunter and Cronin 1995:299.

Whilst no specific reference is made to 'children' in s13 of the *Evidence Act* 1995 (NSW), it is commonly accepted that they are the most likely class of witnesses to be affected by the changes (Odgers 1997:27). In the context of child sexual abuse, the determination of competency is a very delicate issue. Under the new provisions, if the defence wishes to question the competency of a child they carry the onus of proving a lack of competence on the 'balance of probabilities' (s142(1)). Pursuant to the criteria in s13, a trial judge is likely to undertake a voir dire to enable an assessment of the child's level of understanding. The assessment of the child can relate to their level of schooling, capacity to understand different types of questions, and the purpose of giving their evidence. In procedural terms, the court enjoys a wide discretion 'to inform itself as it thinks fit' in determining the competency of a child (s13(7)). According to Aronson and Hunter, this flexibility allows the testing of a child to take place in or out of court, and with the assistance of someone supporting the child (1997:742). Arguably, it is also reflective of a paradigm shift towards greater legal awareness of victims rights (Manning and Griffith 1996).

The rights of victims of child abuse[5]

Crime Amendment (Children's Evidence) Act

Recognition of the rights of victims of crime has become increasingly topical in recent years following a number of initiatives which symbolise the move away from the conventional focus on due process for the offender. Although the issue has often been flagged in the area of child sexual abuse, it is only recently in NSW that the legislature has acknowledged the specific needs of child witnesses by introducing the *Crimes Amendment (Children's Evidence) Act* 1996. In his Second Reading speech on the Bill, the Attorney-General, Hon Jeff Shaw, argued that:

> [T]he bill's purpose is to ease the trauma experienced by children when giving evidence in court. ... [It] provides significant reforms to the way that children give evidence in court. By creating an environment in which children will feel more comfortable when giving evidence it will assist in ensuring that a child's evidence is properly taken into account and ensure that a just result is achieved (NSW Legislative Council, Parliamentary Debates 1996:4045–4055).

Under the new provisions, it is now possible for all children who give evidence as witnesses in certain proceedings to be accompanied by a parent, relative, friend or other supportive parent (s405CA). In cases of abuse and applications for an apprehended violence order, s405D of the *Crimes Act* 1900 (NSW) has been repealed and re-enacted to create a presumption that the evidence of any child witness will be given 'by means of closed-circuit television facilities or by means of any other similar technology' (s405D(2)). Special provision is also made to minimise the potential contact between the child and the offender, and the likely detrimental effect of such contact (s405DC). Where closed-circuit television (CCTV)[6] facilities are unavailable, the new s405F provides children with the right to 'alternative arrangements' such as the use of screens (s405F(3)(a)), special seating orders (s405F(3)(b)) or the adjournment of proceedings (s405F(3)(c)). Any bias against the offender is countered by a warning to the jury that no adverse inference is to be drawn against

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5 The philosophical question of human rights for young people is commonly associated with the UN Convention on the Rights of the Child. The relevance of this treaty for victims of child abuse is discussed below.

6 A detailed discussion of the use of CCTV is not intended in this article. For present purposes, it is accepted that CCTV can reduce the tension on child witnesses and improve their experience of giving evidence. However, it is also maintained that CCTV is not a panacea that resolves all the problems faced by child witnesses as elaborated throughout this article. On the topic of CCTV, see Australian Law Reform Commission 1992.

the accused, and the evidence is not to be given any lesser or greater weight where CCTV facilities or 'alternative arrangements' are used (s405H).

Genuine reform or political expediency?

To a large extent these amendments mirror the suggested reforms of the previous NSW Children's Evidence Taskforce, which called for the greater usage of CCTV to assist child witnesses (NSW Children's Evidence Taskforce 1994). In terms of the Government's overall strategy for providing protection to children in the justice system, the *Crimes Amendment (Children's Evidence) Act* 1996 will need to be closely monitored. In light of disturbing revelations from the recent Wood Royal Commission into the NSW Police Service, as well as a damning report into the Department of Community Services, the Government has been forced to react swiftly to appease growing public discontent with the State's protection and care of young people. It is argued here that the latest legislative measures need to be assessed in the context of this political climate, for although the measures now have the force of law, it remains to be seen whether the necessary State funding and support for the various initiatives will follow.

For example, any delay in introducing CCTV throughout NSW is related principally to the question of resources which may or may not be available. At the time of announcing the new provisions, the Government claimed to be allocating $2.5 million specifically for the introduction of CCTV in over 60 locations throughout the State (NSW Legislative Council, Parliamentary Debates 1996:4054). In the 1997–98 State Budget, it was revealed that $1.25 million had already been spent on the installation of CCTV. While this commitment is to be commended, there is no indication to date that the increased use of CCTV will be met by corresponding funds targeted at training and development in the use of CCTV. The Government also needs to guarantee that the benefits of this funding spread to regional and remote areas of NSW.

In addition to the question of funding, it is important to avoid complacency following the introduction of these new measures. The widespread introduction of CCTV coupled with other new support measures for child witnesses should not become a substitute for continued law reform in this area. As discussed below, there are a number of complex evidentiary issues relevant to the context of child witnesses in Australia which have yet to be resolved. These include extensive court delays, the language and methods employed by lawyers in our adversarial system and strategies for communicating effectively with victims of child abuse. If both the new evidence legislation and amendments to the *Crimes Act* 1900 (NSW) are to be effective and maximise the impact of children's evidence, corresponding judicial education is essential. If the judiciary is reluctant to embrace the changes or raises obstacles to the way evidence is presented by children, then the legislative changes in isolation will be futile.

Judicial attitudes towards children's evidence

In one of the few NSW studies which have examined the issue of judicial attitudes, Cashmore and Bussey (1995:3) found that judges and lawyers have obvious misgivings regarding the capacity of children to provide accurate evidence at trial. The magistrates and judges who were surveyed as part of the study in 1993 did not believe children were more prone to lying than adults, rather they cited children's 'unconscious errors' influenced by fantasy and others as a real concern (Cashmore and Bussey 1995:22). When asked to identify what they believed to be the primary sources of trauma for child witnesses, most respondents identified the formality of the courtroom as a key factor. Table 1 below illustrates the other sources as including confrontation and the questioning of child witnesses.

Interestingly, five judicial officers were not convinced that child witnesses are traumatised by the experience of giving evidence. Whilst this may be true of some child witnesses, it is difficult to accept that victims of child sexual abuse (or any other form of abuse) do not find the courtroom experience a stressful one. The NSW Children's Evidence Taskforce described the experience in the following terms:

> The fear of having to testify, often about events usually of an explicit and embarrassing nature, in front of the accused who is often well-known to them, together with a number of people they do not know, in intimidating formal courtrooms with unfamiliar language and procedures (as quoted in NSW Legislative Council, Parliamentary Debates 1996:4056).

Table 1 Judges' and Magistrates' Perceptions of the Main Sources of Trauma for Child Witnesses (Cashmore and Bussey 1995:15)

	Magistrates		**Judges**		**TOTAL**	
Source of Trauma	**n (24)**	**%**	**n (22)**	**%**	**n (46)**	**%**
Formality of court environment	13	54.2	8	36.4	21	45.6
Recounting events especially in public	9	37.5	11	50.0	20	43.5
Confronting accused	11	45.8	4	18.2	15	32.6
Questioning esp. cross-examination	6	25.0	4	18.2	10	21.7
Investigation and others' reactions	4	16.7	6	27.3	10	21.7
Child's fears and lack of understanding	5	20.8	4	18.2	9	19.5
Adversary system	3	12.5	3	13.6	6	13.0
Little trauma	1	4.1	4	18.2	5	10.9

Contrasting the judicial view, when children and parents were asked to isolate the main sources of trauma, confrontation with the defendant was nominated by over 75% of child respondents and 65% of their parents (Cashmore 1995:29). The significance of these findings cannot be underestimated: judicial perceptions concerning the competence of a child witness are crucial insofar as 'judges are in a unique position to influence court procedures and ultimately to affect the outcome in ways that can be either helpful or damaging to children's experience at court' (Cashmore 1995:1). It is for this reason that legislative measures such as those discussed above must be complemented by judicial education which challenges some of the questionable perceptions held by elements of the judiciary. Although legislative reform results from a greater awareness of the needs of children, the findings available suggest that commensurate changes in practice do not necessarily follow (Myers 1992). This may be explained by the fact that legal experience alone does not automatically equip legal professionals with the skills to communicate with children, appreciating their capacities as

well as incapacities. Parkinson has argued that lawyers and the judiciary receive an insufficient amount of training in these areas and are reluctant to subsequently recognise the need for it (Parkinson 1991).

The proceeding discussion turns to the primary data on the extent of child sexual abuse in NSW and the associated conviction rates. These figures are analysed to illustrate the importance of rethinking the rules for the evidence of children, attempting to minimise their impact on victims of child abuse in the future.

The primary evidence

Incidence of child sexual abuse

Notwithstanding the growing empirical analysis relating to the issue of child sexual abuse, there is a dearth of writing on the legal implications of this research (Parkinson 1996). Equally lacking is the existence of comprehensive and reliable data on child sexual abuse in all Australian jurisdictions. For example, it is commonly accepted that the available data does not adequately reflect the incidence of abuse involving children with disabilities. This results from a lack of uniformity in data collection and problematic measurement procedures in general. Thus when attempting to expose the prevalence of child sexual abuse and the need for sensitive evidentiary principles, one must be cautious of the particular data used. For present purposes, the primary reliance is on data provided by the Department of Community Services.[7] Adapted from departmental statistics, Table 2 below indicates that sexual assault cases, after peaking in 1992/93, decreased and have stabilised over the 1994/95 and 1995/96 periods. However, following the recent Wood Royal Commission and the NSW Government's push for more intensive investigation of child abuse, there is likely to be an increase in these figures in the future.

Table 2 Child Sexual Abuse Reports Investigated and Substantiated by NSW Department of Community Services

Age	1991/92		1992/93		1993/94		1994/95		1995/96	
<1 yr	14	1%	89	1%	14	1%	2	0%	13	1%
1–2 yrs	94	3%	86	2%	78	2%	48	2%	52	2%
3–5 yrs	617	9%	715	18%	596	18%	519	18%	535	19%
6–11 yrs	1111	35%	1439	37%	1282	39%	1094	37%	1028	37%
12–15 yrs	1119	35%	1407	36%	1153	35%	1145	39%	1056	38%
16+ yrs	133	4%	124	3%	107	3%	104	3%	62	2%
Unknown	90	3%	96	3%	72	2%	43	1%	40	1%
TOTAL	3178	100%	3886	100%	3302	100%	2955	100%	2786	100%

7 Under s22 of the *Children (Care and Protection) Act* 1987 (NSW), the Department of Community Services is required to receive and investigate notifications of suspected child abuse. The Department defines child sexual assault as follows: 'when an adult or older person uses his or her power over a child to involve the child in sexual activity or sexual process beyond their understanding or contrary to accepted community standards", see NSW Department of Community Services 1996 Profile 5.

Conviction rates

From the outset it needs to be recognised that there is a continual dropping off of child sexual abuse cases at every point of the legal system. This arises from a number of factors including family pressure to avoid the embarrassment of a child sexual abuse allegation, police refusing to press charges after an interview with the child, or cases not being committed to trial (Parkinson 1996:9). The available evidence suggests there is a great divide between the number of substantiated cases of sexual abuse and the level of associated convictions. According to Table 2, the number of notifications of child sexual abuse for 1992–93 was 3886, compared to 3302 in 1993–94. This equates to an average of 3594 during 1992–94. In 1994 297 persons were convicted of sex offences against children. In addition, 98 juveniles were convicted of sexual assault offences — many of which are likely to have been committed against minors (Parkinson 1996:11). Although not entirely comparable, the figures allow for a rough analysis of the proportion of cases in which convictions were obtained. Assuming each of the 98 juvenile cases related to child sexual abuse, the result in 1994 was 395 convictions from a total average of 3594 substantiated cases per year between 1992–94. In comparison to previous years, Table 3 below depicts that the conviction rate has decreased significantly from 92.3% in 1982 to 76.5% in 1992..

Table 3 Convictions for Child Sexual Abuse in NSW (Parkinson 1996:12)

Year	Plea Rate	Guilty at Trial	Conviction Rate
	%	%	%
1982	83.6	58.8	92.3
1984	79.0	47.8	87.3
1988	55.0	33.8	70.0
1989	55.0	39.9	75.0
1990	50.6	38.6	70.3
1991	55.5	41.3	74.1
1992	58.0	43.4	76.5

Parkinson (1996:12–15) interprets the declining conviction rate as evidence of a growing number of cases which don't reach the trial stage. He deduces a number of reasons for this phenomenon: the parents do not want their children to give evidence, the children themselves do not wish to give evidence, there is no corroboration for the child witness, or the child retracts the allegation. It is important here to examine those cases which do actually proceed to trial stage, but do not result in a conviction. Between 1 March 1992 and 31 December 1994, only 53.4% of child sexual assault cases led to a successful prosecution.[8] It is argued here that the interplay of the formal court proceedings, complex legal language and frequent court delays explains this relatively poor conviction rate. In summary, the

8 Answer of Attorney-General to parliamentary question on notice from Hon Alan Corbett MLC, March 1996, as quoted in Parkinson 1996:15

existing deficiencies in the processing of children's evidence have led to a low level of prosecution in a growing number of cases.

Survey of the issues at trial

As previously indicated, there is a growing body of literature relating to child sexual abuse. However despite this, there is a lack of analysis regarding the methods by which the legal system characterises children as witnesses, ultimately excluding their evidence. A series of inquiries by law reform bodies and academic commentators within and outside Australia are discussed below, identifying some crucial factors which explain the failure of our legal system to accommodate the evidence of child sexual abuse witnesses.

Inadequate procedural safeguards

It is commonly accepted by many commentators that the involvement of children in court proceedings raises a number of issues, the guarantee of procedural safeguards for child witnesses in sexual abuse cases being a paramount one. In its 1989 discussion paper, the Australian Law Reform Commission stated:

> Child witnesses may have special needs in adapting to an adult court-room environment. With cognitive, emotional, physical and communicative abilities differing from adults, they may require additional consideration and different treatment from that given to adults. Failure to recognise and address these special needs can result in both trauma to the child and a breakdown in the fact-finding process essential to the court's role. ... Although empirical data is scarce, over recent years a number of studies of criminal cases have shown that the children involved, especially young children, are emotionally and mentally traumatised due to the experience of giving evidence in court. It is generally accepted that a child's trauma rarely results from reluctance to make a false complaint but rather from fear and intimidation (as quoted in NSW Legislative Council, Parliamentary Debates 1996:4059).

Those involved with children's advocacy, including child welfare workers, community health workers, counsellors, police, lawyers and judicial officers are familiar with these concerns. They were highlighted in a recent Inquiry by the NSW Legislative Council Standing Committee on Social Issues (1996:83), which found that 'the lack of specialist children's lawyers, a general insensitivity or ignorance by members of the legal profession and the judiciary to children's issues and needs, and the whole adult-oriented structure and process of justice in this state' contributed to the lack of proper advocacy and procedural safeguards for children. Nowhere is this more evident than in the realm of child sexual abuse, where the victim is often subjected to a number of separate interviews by different professionals, each attempting to satisfy their own objectives. This rigorous interviewing is often a harrowing experience for children who have been sexually abused and only exacerbates an already delicate situation.

The court environment itself also serves to reinforce the inequalities of power between adults and children. In a comprehensive review of the evidence of children in Scotland, the Scottish Law Commission (1990:2) noted this inequality in the following terms:

> [I]t is no doubt true that giving evidence in court is likely to be a disagreeable experience for most witnesses, including those who are adults. However, children as a whole are given a particularly privileged position within our legal system on account of their youth, their immaturity, and their vulnerability; and we accordingly see no reason for not taking such steps as may be necessary and desirable to protect them, where it is appropriate to do so, from the more disagreeable aspects of giving evidence.

In the context of identifying suggestions for reform, the Scottish Law Commission concluded that the removal of all wigs and gowns in cases involving child witnesses under the

age of 16 would be a desirable procedural amendment that would go some way towards remedying this power imbalance. In the Australian context, however, save a brief period in the history of the Family Court, most jurisdictions have not embraced the notion of de-robing. Thus victims of child abuse when presenting their evidence are forced to accept the entire formality of the courtroom and the unsuitable design of some courtroom equipment — which in some courts may require the child to stand throughout their entire testimony and cross-examination. In light of these obstacles, it is obvious that the delivery of evidence is not a comfortable experience for many children.

Extensive court delays

Another particular problem for victims of child sexual abuse is the relatively prolonged court process and frequency of adjournments at trial. During the period 1 March 1992 to 31 December 1994, 69% of all child sexual assault cases in NSW took more than a year to complete. Over the same period, in 20.6% of all cases where a trial date had been set, the case was ultimately adjourned (Parkinson 1996:15). Similar delays were revealed in a longitudinal study of chid sexual abuse by Oates et al, where it was found that the average time interval between police interview and trial was 15 months (Oates et al 1995:127).

These statistics paint a disturbing reality not only for the victims of child sexual abuse, but also those who advocate for these children and their right to protection. There are several reasons why such delays eventually hinder the effective delivery of children's evidence in their trial. After preparing emotionally for their confrontation with the formalities of the legal process, it is a major setback for a child to be informed their case has been adjourned for weeks, maybe even months, or alternatively will be delayed for some technical reason. Moreover, delay in some cases can become an excuse to give up for a child who, emotionally and physically, has little incentive to return to the adversarial contest which is characteristic of our criminal justice system.

Complex language in an adversarial legal system

The giving of evidence in any adversarial court environment can prove to be a distressing experience for people of all ages. For children in particular, the formalities associated with a courtroom appearance can be overwhelming. In a genuine attempt to alleviate any anxiety for child witnesses in criminal trials, many Australian jurisdictions, including NSW, have been prompted to legislate to allow children to give evidence screened from the defendant or via CCTV as outlined above. Unfortunately, these measures are compromised by the continual use of complex legal language in cases involving children. Irrespective of the merits of 'alternative arrangements' which exist for the delivery of their evidence, the problem of legal language still exists for children.

In one of the leading Australian studies on the issue of child victims and the use of elaborate legal language, Brennan and Brennan (1989) found that the language of a courtroom often acts as a secondary form of victimisation of sexually abused children. The authors' findings echoed the view of many critics who argue that legal jargon freely used in the courtroom serves only to heighten the alienation and intimidation of a child witness. Cashmore (1995:34), for example, in her study of child witnesses and their parents, identified the persistent use of legal language as a real difficulty. Whilst most of the criticism stems from the cross-examination process, more general comment arises from difficult vocabulary (for example, 'allegation', 'fabrication', 'taunt'), legal references (for example, 'His Worship', 'my learned friend'), particular terms (for example, 'I put it to you that', 'No, I'll withdraw that'), asking questions which are multilayered, and framing them in the negative (Cashmore 1995:34; see also Appendix A).

Although children are not the only group who find legal language uncomfortable, they are clearly disadvantaged when it is used. Combined with the techniques often adopted in the cross-examination of child witnesses, the trial process becomes almost irrelevant for many children. These defence techniques include accusing the child witness of lying, subjecting them to harsh questioning, and asking repetitive and lengthy questions (Cashmore 1995:32). From a tactical point of view these methods are purely designed to intimidate, confuse and ultimately discredit the testimony of a child. The available evidence suggests children may change their response when questioned repeatedly on the same issue, believing that their initial response was either wrong or insufficient (Morton 1992:32).

The protection of vulnerable witnesses such as children is a matter of judicial discretion. In light of the Cashmore and Bussey study, however, it is clear that some members of the judiciary may be reluctant to intervene in cross-examination to protect children. This stems from those judicial attitudes which support the interrogation associated with cross-examination, viewing it as a necessary by-product of our adversarial legal system. The effect of this was well summarised by one child who commented: 'Right from the start I felt that the judge hated me and he was on their side, especially the way the barrister was bringing up totally irrelevant things and the judge didn't care' (Cashmore 1995:34).

The difficulties for children in the process of cross-examination and puzzling legal language are significant for a number of reasons. First, if one assumes that the criminal justice system is designed to be fair, it is questionable whether this objective is achieved when children do not understand what is being asked of them. Second, a child's attitude towards the legal system and their satisfaction as a witness is affected by the language used at trial (Brennan and Brennan 1989), for overly legalistic language is bound to frustrate a child's attempts to say what they mean in court. Finally, it is possible that the fascination with legal jargon as part of our adversarial system has overshadowed the need for careful and child-friendly deliberation upon the evidence and the issues in hand. In the discussion that follows it is argued that the issue of legal language requires urgent attention if existing 'alternative arrangements' for children's evidence are to succeed.

Outstanding reform issues

There are a number of implications from the survey of issues at trial for child witnesses as canvassed above. It is intended to only briefly address two of the most pressing concerns: the lack of national consistency in the evidentiary principles for child witnesses and the systemic failures of the legal system, related to the use of legal language, which confuses child witnesses and hinders the prosecution process.

A national approach to children's evidence

The need for consistency

As outlined in above, NSW has been the only jurisdiction to date which has adopted the principles of the Commonwealth *Evidence Act* (1995). Although the various States and Territories have their own specific measures for assisting children to deliver their evidence, it is disappointing that in the area of child sexual abuse there is no national approach. Although there are a number of worthwhile national prevention schemes being coordinated by the National Child Protection Clearing House and other similar bodies, these need to be complemented by a supportive and consistent legal system throughout Australia. It was shown above that despite a high number of child sexual abuse notifications, there is a low level of convictions in NSW — a pattern which is repeated in other jurisdictions.

A number of reasons can be identified for a national approach to children's evidence in cases of child sexual abuse. First, it has become commonplace for the Commonwealth to issue directions to the States and Territories on so-called 'State' issues. The previous decade has witnessed the proliferation of national committees and councils established to investigate and set guidelines for issues such as youth suicide, domestic violence, education, and gun control. Second, the diametrically opposed nature of the evidentiary principles in some States suggests an obvious need for national direction — at least for the purpose of consistency in approach to sexually abused children in the Australian legal system.

As such, there is much to commend the Federal Attorney-General's role in this debate. Apart from the obvious benefit to be gained from a national policy approach in terms of consistency, there is also the opportunity for the States and Territories to regularly review their policies in light of positive developments across the nation such as the introduction of the *Crimes Amendment (Children's Evidence) Act* 1996 in NSW, the Child Witness Support Service and the *Acts Amendment (Evidence of Children and Others) Act* 1992 in Western Australia.[9]

International human rights obligations

Additionally, it is the Commonwealth's responsibility to ensure all Australian jurisdictions observe our international human rights obligations under the UN Convention on the Rights of the Child in responding to cases of child sexual abuse. Pursuant to Article 19 of the Convention, signatories such as Australia:

> [S]hall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Additionally, Article 12 refers to the right of children to express views freely, and 'in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting [them]'. The Convention must be borne in mind when framing options for further reform of children's evidence. Although the Convention binds all jurisdictions equally, it is maintained here that the Commonwealth has a primary responsibility to guarantee it is met as a nation.

Challenging the legal system

Competency and reliability — a distinction with a difference

In terms of rethinking the evidence of children, the view that the issue of children's competency is distinct from the reliability of their evidence is commendable, for it is crucial to distinguish between a child's competence to bring evidence against a defendant and the relative weight to be given to this evidence. The NSW Government has made implicit reference to the issue through amendments to s405H of the *Crimes Act* 1900 (NSW). The amendment is premised on the assumption that children's evidence will be admitted in court. However, as described above, where use is made of CCTV facilities, or other 'alternative arrangements', the court is required to warn the jury not to draw any adverse inference against the accused or give the evidence any greater or lesser weight.

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9 The Child Witness Support Service in Western Australia is an instructive program for other States where courtroom procedures for children are being revised. This service provides assistance at the pre-trial, trial and post-trial stages for children who give evidence in court and was recently described by the Australian Law Reform Commission as an 'appropriate model' for other jurisdictions; see Australian Law Reform Commission 1997b:339. For a thoughtful critique of the Western Australian legislation, see Dixon 1995.

There is merit in this approach insofar as it recognises that problems of memory, suggestibility and fabrication with child witnesses should all relate to the issue of weight, and not admissibility of their evidence. It is submitted that the Australian Law Reform Commission's general policy statement which favours the greater admissibility of evidence must be encouraged. This policy framework itself is reflected in the new evidence legislation, a positive sign of increased flexibility in the general rules of evidence.

Rethinking legal language and systems theory

The use of complex legal language in cases of child sexual abuse remains a barrier for children providing their evidence in a relaxed setting. Arguably, the unjustified reliance on legal jargon in cases of child sexual abuse is damaging and likely to negatively impact other innovative solutions such as CCTV. The solution may be found in Luhmann's theory of autopoiesis (Luhmann 1985:281). In autopoietic theory, law is a system which, like other social systems, is normatively closed but cognitively open. It is normatively closed, because it is characterised by a self-referential coding of the outside world. Yet it is cognitively open because it draws selectively from its environment. In doing so, the legal system defines the world according to its own construction of reality and deconstructs other systems such as psychology and welfare through legal discourse designed to 'enslave' or 'exploit' these other disciplines.

If one recognises law as a social institution which 'thinks' independently of its members, one is forced to accept that traditional studies of child witnesses offer only a partial explanation of legal decision-making (King and Piper 1995:ch 2; King 1981:ch 5). A common finding in these conventional studies is that prejudicial attitudes towards child witnesses cause injustice for the children involved, hence frequent calls for more sensitive court personnel and retraining for members of the legal profession. However, rather than making the experience for child witnesses easier, these so-called 'sensitive' players in the legal system simply communicate, and will continue to do so, as legal officers within a system of communication which is closed and highly suspicious of other systems.

In order to reverse this tendency and increase the instrumentality of law for child witnesses one must contest the legal system's inherently adversarial nature, as well as the use of specialised language for its own purposes. If the principles relating to children's evidence are to reflect the needs of children themselves, the law must accept differing perspectives, including those offered by psychology, and reorganise trial procedures at every level. This requires a holistic approach which extends beyond the provision of safety screens or the use of CCTV. At the most fundamental level, it requires a total revision of the methods by which children's evidence is extracted by the legal system. Hence there must be an investigation of the feasibility for completely different procedures, rather than aimless searching for flexibility within the narrow confines of the traditional criminal trial. A corollary of this argument is the necessity for increased multidisciplinary research in this area, which analyses the legal system's capacity to receive the evidence of sexually abused children, rather than the child's ability to convey such evidence. In this regard, it will be interesting to monitor the outcome of the Australian Law Reform Commission's recent inquiries into the adversarial nature of our legal system (1997a) and its relationship with children (1997b).

Conclusion

Child sexual abuse cases present a peculiar challenge for the legal system because of the potential clash between welfare and justice principles. With its traditional focus on the latter, the legal system has been ill-equipped to adequately address the need to provide the

least inconvenience and stress to victims of child abuse. From a purely positivist legal standpoint, the role of the courts is to administer justice and leave the determination of welfare issues to other private agents of the State, including the family. Although this legal function has an undisputed history, this article has emphasised some useful ways of challenging this tradition.

It was argued that the practical and statistical reality faced by many victims of child abuse means that our legal system will be called upon to adjudicate this issue at a growing rate in the future. The findings of the recent Wood Royal Commission, coupled with the establishment of a Child Protection Enforcement Agency and a number of 1997–98 State Budget initiatives concerning child abuse confirm this. Accordingly, it was suggested that our legal system needs to stand back from its conventional scepticism of the evidence of children, and guarantee that justice is being delivered in cases of child sexual abuse. In pursuing reforms at a systemic level, it is maintained that the questioning techniques of lawyers (particularly in cross-examination), the time delays in the prosecution process (from the reporting of the abuse to the finalisation of court proceedings), as well as the adversarial nature of hearings require urgent attention as they do not sit comfortably with children in general, let alone those who have experienced the trauma attached to sexual abuse.

Not surprisingly, critics of these proposals (especially those within the legal profession itself) argue they are too optimistic and unlikely to be achieved. In response, this author asserts that complacency cannot continue. The positive signs for reform have arisen from many quarters: at a State level, the Government's response has been valuable, notwithstanding the political climate which has driven many of the reforms. In addition to the revamped evidence legislation from a Commonwealth perspective, the Australian Law Reform Commission has recently conducted two significant inquiries into the legal system — one relating to its adversarial nature (1997a), the other concerning the relationship between children and the legal process (1997b). It is envisaged that both these inquiries will offer the Federal Government some creative and far-reaching solutions to many of the existing problems alluded to throughout this paper. As one Commissioner has already remarked:

> ... [I]f children are to participate appropriately and effectively within legal processes, adult participants in these processes need to focus on and engage directly and respectfully with children. This is not to say that children should be encouraged to litigate or required to participate in such processes; only that they should not be dissuaded or excluded from such activities. It is particularly inapt to exclude or confine children's participation by reference to concerns about their maturity or judgement (Cronin 1997:5).

The time-honoured legal view of children's evidence as unreliable is no longer applicable in modern society. Explicit recognition of the difference between a child's competency on the one hand and the reliability of their evidence on the other must be emphasised in any attempts at challenging this conventional wisdom. The alarming number of child abuse notifications highlighted in this article, as well as some significant legislative changes, has meant that the number of children giving evidence has multiplied. As such, psychological research pertaining to children's competency[10] needs to be more readily accepted within the legal system as clear evidence of the need to change court procedures, allowing for greater admissibility of children's evidence.

The momentum for further reform as argued in this paper is not intended to influence the substance of a child's evidence, but rather the context in which it is presented in order to reduce level of stress and intimidation associated with the formal legal process. Further

10 For a useful summary of this research and its relevance for children in the legal system, see Spencer and Flin 1993

progress will only materialise if the legislature and reform agencies direct their energies towards the legal system rather than the individual child witness. If the legal system allows itself to be informed by other disciplines, it will ensure that attempts to meet Australia's international obligations such as exist under Articles 12 and 19 of the UN Convention on the Rights of the Child are not compromised. Inherent to this interdisciplinary reform strategy, several members of the judiciary have potential to become familiar with a child's linguistic and other psychological developments in order to play a more genuine role in protecting child witnesses from the excesses of the trial process revealed throughout this article.

Appendix A: Complexity of legal language

Typical Examples of Questions that Cause Difficulty for Child Witnesses (Cashmore 1995:36):

- **Legal References**
  You told His Worship ...
  No, I'll withdraw that ...
  I put it to you that ...

- **Specific and difficult vocabulary**
  You walked perpendicular to the road?
  It's pure fabrication, isn't it?
  You did that to taunt him?

- **Use of the negative**
  It's the case, is it not, that you didn't ...?
  Do you not dispute that?
  Are you saying none of that ever happened? [Child shakes head]. Does that mean it did happen or it didn't?

- **Ambiguous questions**
  How many times did you tell the policeman X did ...?
  How do you say he forced you to? I was forced to. [Repeated].
  How do you say he forced you to? I just said it.

- **Conceptually difficult**
  How long did he touch you? [Frequently answered]. For 5 minutes.

- **Challenging**
  It's all a pack of lies, isn't it?
  You don't like your step-father, do you, Mary? You've invented all this, haven't you Mary in order to get him out of the house?

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