CHILD WITNESSES IN THE
WESTERN AUSTRALIAN CRIMINAL COURTS

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Abstract

In 1992, following reports by the Child Sexual Abuse Task Force chaired by Carmen Lawrence and a report by the Law Reform Commission of Western Australia on the evidence of children and other vulnerable witnesses, the Western Australian government introduced a wide ranging package of legislative change. Since then, those changes have been supported by the creation of the Child Witness Service and its Reference Group, the introduction into courts across the State of appropriate technology for the pre-recording of children’s evidence, the giving of evidence by closed circuit television and long range video conferencing linkups, and by other supportive measures including judicial and legal professional education, and judicial guidelines on the taking of children’s evidence. A review of experience of child complainants of sexual abuse in the criminal justice system in New South Wales, Queensland and Western Australia by Dr Christine Eastwood and Professor Wendy Patton has found that the child complainant’s experiences in Western Australia are significantly better than those in the other States surveyed. There is interest in the Western Australian position elsewhere in Australia as well. More recently, steps which have directly or indirectly impacted upon child sexual abuse issues include the abolition of committal hearings. Steps are proposed towards the introduction of joint video interviewing of children on first disclosure. An inter-departmental committee has been established to recommend further changes in both service delivery and legislative provisions. The government has taken the first steps towards the implementation of the Gordon Report on child abuse and domestic violence in Aboriginal communities entitled “Putting the Picture Together”. This paper will attempt to provide a broad overview of the last decade’s justice system developments in Western Australia.

Speaker’s Profile

Judge Hal Jackson has been a Judge of the District Court of Western Australia since 1986. He was the first President of the Children’s Court of Western Australia from 1989 to 1993, a Board member of the National Children’s and Youth Law Centre from its inception in 1993 until 2001, and chairs both the Youth Legal Service and the Child Witness Service Reference Group in Perth. He is a former President of the Law Society of Western Australia and of the Law Reform Commission of Western Australia, and was a Consultant to the Australian Law Reform Commission and HREOC report “Seen and Heard: Priority for Children in the Legal Process”.

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Apologies

Let me first commiserate with conference organisers who have to find themes and name sessions. The brochure for this Conference places me in a session entitled “Family Law, the Medical Model and Child Protection”. Actually, as the abstract reprinted above suggests, my paper is not on any of these three. Rather it is an attempt to provide an overview of the response of the criminal justice system in Western Australia to the problems posed by child witnesses over the last 15 years. The blame lies with me in not giving the abstract a title. I trust you have not been misled into attending.

Let me also deal with the fact that the Conference will draw delegates probably from each State and territory of Australia and perhaps also from overseas. It is sometimes said that federations provide opportunities for the component jurisdictions to experiment on the one hand or to adopt the proven experiments of others on the other hand, without committing the whole nation to leaps in the dark which may be of no particular merit. It is true, however, at least in the Australian federation, that we often live within our component part blissfully ignorant of developments elsewhere. I plead guilty to not having even a stumbling acquaintance with developments other than in my own State in this field. Having said that much I am, however, aware that there are such developments.

Children’s evidence has been a matter of very considerable concern, research, report and reform both in Australia and elsewhere over the last 20 years. The concerns arose out of the many legal and emotional barriers to the proper reception of children’s evidence and the myths surrounding their reliability, memory and capacity to recount events. The literature is large, perhaps vast, and still growing and covers a large number of issues. I append a very select bibliography of some of the more important and accessible literature.

Indeed in the recent past I am aware, for example, that in Victoria the Victorian Law Reform Commission has issued a discussion paper on Sexual Offences: Law and Procedure which is in significant measure concerned with sexual offences against children and young people (Chapter 6) and Court procedure and evidence and alternative responses to the trial process (Chapters 8 & 9). In New South Wales the Legislative Council Standing Committee on Law and Justice issued a report in November 2002 on Child Sexual Assault Prosecutions. In Queensland the Queensland Law Reform Commission as part of its reference on The Receipt of Evidence by Queensland courts issued a report in December 2000 on The Evidence of Children. So this has been an area of considerable concern and enquiry.

Whilst I do not pretend to have sufficient knowledge of the comparative position elsewhere, however, my impression from looking at such documents and various personal contacts is that Western Australia has enjoyed some developments which delegates from elsewhere at least in Australia may be interested in.

There have been some attempts to study developments across jurisdictions. The 2002 report of Dr Eastwood and Professor Patton on The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System which compared the position in Queensland, New South Wales and Western Australia received some national attention, and indeed is the subject of a paper by Dr Eastwood at this Conference.

Perhaps our position, therefore, will be of some interest.
Background

Looking back over the last decade in Western Australia, four layers of change are evident. These can be analysed as:

(i) Legislative change;
(ii) Judicial and professional support;
(iii) Technological support; and
(iv) Child witness support.

Each is important and they must react sympathetically with each other.

The starting point in Western Australia is the amendments to the Evidence Act and other Acts made in 1992 by the Acts Amendment (Evidence of Children and Others) Act, following a number of the recommendations of the Child Sexual Abuse Taskforce Report of 1987 and the report of the Law Reform Commission of Western Australia in 1991. Further amendments to the Evidence Act were made by provisions included in Part 6 of the Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992 which came into force in December 1992 and by the Acts Amendment (Evidence) Act 2000 which came into force on 3 January 2001. The Evidence Act was reprinted as at 4 January 2001 so that that reprint is currently up to date.

Before dealing with those legislative changes, it should be noted though that they were but part of a wider range of changes including amendments to the substantive criminal law put in place by the Acts Amendment (Sexual Offences) Act 1992. The amendments are consistent with modern social and scientific knowledge in the areas dealt with.

The 1992 reforms were, in many cases, not limited to matters involving children only. For example, there was a strengthening of definitions of consent and of jury directions relating to delay in complaint, as well as further reforms concerning sexual reputation, sexual disposition and sexual experience and publication of complainant’s names.

The 1992 changes and their implementation required ongoing support from successive governments and the legal profession led by the judiciary.

Government funding for the Child Witness Service and for the installation of the technology systems necessary for the use of closed circuit television, the pre-recording of children’s evidence and the taking of evidence by video link is vital. Rachel Manley will speak about the Child Witness Service at this Conference. In March, the State government announced further funding for the Service as a response to the Gordon report to allow employment of an Aboriginal worker.

Guidelines have been adopted by the judges of both the Supreme Court and the District Court. The Judges’ Guidelines are lengthy and detailed. Because practice has evolved, some of the statutory provisions are now being used routinely, others rarely, if ever. We are presently reviewing the Guidelines to bring them up to date.

There have then been difficulties and setbacks but generally, looked at 10 years on, the progress has been very considerable. On the whole, a good deal of progress has been made.
The Acts Amendment (Evidence of Children and Others) Act 1992

Let me then turn to the 1992 legislative changes contained in a separate part of the Evidence Act headed Evidence of Children and Special Witnesses in sections 106A to 106T. The changes have, of course, been considered in a variety of decisions to which I will also briefly turn.

1. Corroboration

Historically, the law required corroboration in the proof of certain offences or of the evidence of certain classes of persons including children then regarded as unreliable. The 1992 amendments set out to change the situation.

By a combination of provisions, the Evidence Act now provides:

“No requirement for warning as to conviction on uncorroborated evidence of one witness

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

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

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

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

“Particular form of corroboration warning not to be given

106D. In any proceeding on indictment for an offence in which evidence is given by a child, the Judge is not to warn the jury, or suggest to the jury in any way, that it is unsafe to convict on the uncorroborated evidence of that child because children are classified by the law as unreliable witnesses.”

The result is that since 1992 a person may be convicted on the uncorroborated evidence of a child, sworn or unsworn. However, the question of whether and when a corroboration warning should be given remains a matter of hot debate. The recent High Court of Australia decision, Doggett v R [2001] HCA 46 shows that a Longman warning may be required even where evidence is corroborated.

2. Reception of the evidence of children

A new regime was introduced to deal with the sworn and unsworn evidence of children. Now, by sections 106B and 106C, the matter is dealt with as follows:

Sworn evidence of children

106B. (1) A child who is under the age of 12 years may in any proceeding, if the child is competent under subsection (2), give evidence on oath under section 97 (3) or after making a solemn affirmation under section 97(4).
(2) A child who is under the age of 12 years is competent to take an oath or make a solemn affirmation if in the opinion of the Court or person acting judicially the child understands that -

(a) the giving of evidence is a serious matter; and
(b) he or she in giving evidence has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

Unsworn evidence of children

106C. A child under the age of 12 years who is not competent to give evidence under section 106B may give evidence without taking any oath or making a solemn affirmation if the Court or person acting judicially forms the opinion, before the evidence is given, that the child is able to give an intelligible account of events which he or she has observed or experienced."

Marion Dixon summarised the effects of the changes in her “Brief” article in 1993 as follows:

“The effect of these provisions is:

(i) to treat children 12 years and over as equivalent to adults for the purposes of competency;
(ii) to allow a child under 12 years to take the oath without requiring (as was previously the case) that he or she believe in God or in a divine sanction for telling a lie;
(iii) to permit a child under 12 who does not wish to take the oath, but who is competent to do so, to make a solemn affirmation under section 97(4) of the Evidence Act 1906 in the same way as an adult;
(iv) to permit a child under 12 to give unsworn evidence if he or she does not appear to understand ‘that the giving of evidence is a serious matter’ and/or the special obligation to tell the truth in giving evidence.

The purpose of section 106C is to permit a child as young as perhaps 3 or 4 years of age to give evidence, provided that he or she is able to give an intelligible account of what he or she has observed or experienced.”

The provisions of section 106B and 106C have given rise to their own body of case law. Marion Dixon commented on cases to 1995 in her article published in the University of Western Australia Law Review in December 1995.

In R v Stevenson [2000] WAR 92, Pidgeon J draws out the differences between section 106B and section 106C:

(1) There is no requirement for a trial judge in every case to undertake questioning of a child to determine whether the child is competent to give sworn evidence under s 106B of the Evidence Act because in the case of a sufficiently young child it will be obvious that the child does not have the capacity to understand that the giving of evidence is a serious matter and that in giving evidence there is an obligation to tell the truth over and above the ordinary duty to tell the truth.

(2) The determination that is required to be made pursuant to s 106C of the Evidence Act will normally require only a few questions to be asked from which it will be able to be ascertained whether the child can give an intelligible account of events. These questions should not be directed to the issue of whether the child understands that the giving of evidence is a serious matter or the duty of speaking the truth, neither of which are relevant to the inquiry required by s 106C.
(3) Once a trial judge has reached the stage of finding that the child is able to give an intelligible account of events that the child has observed or experienced, that finding cannot be displaced by cross-examination of the child. Answers given in cross-examination that may impugn the truthfulness or accuracy of the child are matters for the jury in evaluating the evidence and determining whether it should be accepted but do not go to the question of the competence of the child to give evidence.”

There is Court of Criminal Appeal authority that questions of competency are to be dealt with in front of the jury, the view reflected in Judges’ Guidelines 3.8.3 where the child’s evidence is taken by pre-recording: *Lau* (1991) 58 A Crim R 390 confirmed in *Hoogwerf* (1992) 63 A Crim R 302 and *Revesz* (1996) 88 A Crim R 253 notwithstanding a contrary view taken, for example, in Queensland and Tasmania.

For an interesting example of the proposition that the inquiry as to competence is made prior to pre-recording the child’s evidence, see *Stevenson* (2000) 23 WAR 92.

3. Removing the physical and emotional barriers to the giving of evidence by children

A number of the provisions enacted in 1992 are designed to remove physical and emotional barriers to the giving of evidence by children inherent in the intimidatory nature of the adversarial process and the often intimidating physical conditions of the court and the courthouse.

It is in some of these areas that the Judges’ Guidelines have operated. The preface to the Guidelines includes the following:

“The courts and those people involved in the administration of justice have for a long time been conscious of the fact that a number of victims of crime, especially when they are young children, have been reluctant to come forward by reason of the ordeal of giving evidence in open court or by reason of their fear of again having to face the person whom they claim to have been the attacker.

It is desirable, so far as justice permits, to achieve some uniformity and, at the same time, to ensure that the most efficient use is made of the options and equipment available. To this end, the Judges have adopted the following guidelines which, it is proposed, should be followed generally without taking away the Judge’s discretion in any particular case. The guidelines aim to avoid distress to the witness by keeping the witness informed, both by full explanation prior to the proceedings and by keeping the witness fully informed during the proceedings. The guidelines have regard to making the determination as to which of the options available are to be used. When this is decided, the guidelines also indicate the suggested means of using the equipment effectively and uniformly.”

Section 106A contains a number of definitions for the purposes of these other provisions and for a new schedule which was added to the *Evidence Act* as Schedule 7. Schedule 7 is important as defining the circumstances in which a number of the other provisions will come into operation.

Marion Dixon in “Brief” soon after the legislation commenced, summarised the matter thus:

“Schedule 7 Proceedings

Many of the amendments to the *Evidence Act 1906 (WA)* which alter the rules governing the manner in which child witnesses may give evidence are limited in their application to ‘Schedule 7 Proceedings’. This is because they are directed to child witnesses who are alleged to be victims of sexual or other physical abuse. The purpose of these amendments to
the ordinary procedures for the giving of evidence is to avoid the additional trauma to the
child witness of (i) coming face to face with the alleged abuser who may have threatened the
child with further violence if he or she ‘ tells ’ ; and (ii) telling an embarrassing or painful story
in open court in the presence of the jury and public and in the intimidating atmosphere of a
traditional courtroom designed for adversarial proceedings in the old style.

Schedule 7 Proceedings are therefore defined (in Schedule 7 of the amended Evidence Act
1906-1992). There are broadly-speaking 2 kinds of Schedule 7 proceedings:

(i) an application under the Child Welfare Act 1947 for a declaration that a child is in need
of care and protection; and

(ii) criminal proceedings in which:

(a) the alleged offence is one of those set out in Part B or Part C of the Schedule
(relating chiefly to sexual offences and other offences causing physical harm); and

(b) the offence is alleged to have been committed, attempted or proposed upon a child
under 16 at the time the complaint was made (or in the case of an indictment under
s 579 of the Criminal Code on the day on which the indictment was presented).

In the case of Part C Proceedings the accused is a person who is:

(a) a parent, step-parent, grandparent, step-grandparent, brother, sister, step-brother, step-
sister, uncle, aunt, nephew or niece of the complainant and a child of any uncle or aunt
of the complainant;

(b) a person who is or was, at the time when the offence was committed, living in the same
household as the complainant; or

(c) a person who at any time had the care of, or exercised authority over, the child in the
household on a regular basis.

The relationship under (a) include those of the half-blood.”

In reading the following provisions, it is important to remember these qualifying criteria. However,
note also the availability of special witness orders under (vii) below.

(i) Support persons

Section 106E gives a child witness under 16 years of age the right to have a support person seated
near to him or her while he or she is giving evidence, provided that the particular support person has
been approved by the court and is not a witness or party to the proceeding.

In practice, application is made sometimes in writing and sometimes orally, usually as part of the
wider question of how and when the child’s evidence is to be taken but I have not known it to be
refused. Often, the Child Witness Service supplies the support person or it may be a relative or
friend.

(ii) Child communicators

Section 106F makes it possible for counsel to seek the assistance of an appropriately qualified
person in communicating with a child witness who may have difficulty in understanding questions
or in framing answers which satisfy the questioner, in a sense somewhat similar to that of a foreign-
language interpreter. In 1993, Marion Dixon wrote:
“He or she will be appointed by the court and take an oath that he or she will faithfully perform his or her appointed functions. It is desirable that counsel calling a young witness should anticipate the possibility of difficulties in communication and apply to the court at the pre-trial hearing to decide on the mode of trial for the appointment of a child communicator.”

In fact, the provision has been little, if ever, used. No recognised training course for child communicators exists.

(iii) Use of an intermediary in cross-examination by an unrepresented accused

Section 106G provides that an unrepresented accused in a criminal trial may not directly cross-examine a child witness under 16 years of age. The accused’s questions will be put to the Judge or another person approved by the court and that person is to repeat the question accurately to the child.

This provision has come to be used a number of times. Marion Dixon’s view was that:

“Given the undesirability of the Judge’s being seen to be asking questions of a witness on behalf of an accused person, it seems likely that an independent person will be assigned this task. At the time of writing the indications are that the Judge’s Associate may be regarded as the appropriate person to perform the role of intermediary.”

Guideline 7 so recommends.

However, that has not occurred to my knowledge and, on the one occasion I have had to use the section, I asked the accused to write his questions down and then did my best to ask the child the gist of them myself. The accused seemed content but I found it an unsatisfactory experience.

(iv) Admission of a child’s statement made to another person

Section 106H allows the admission of a relevant statement in what is called a “Schedule 7 proceeding”.

A “relevant” statement is defined as one which:
(a) relates to a matter in issue in the proceeding; and
(b) was made by the proceedings commenced.

To be admissible the statement may be recorded, in writing or electronically, but need not be. However, the defendant is entitled to be served with a copy of the statement if it has been recorded or, if it has not been recorded, details of the statement. In addition, the child who made the statement must be available for cross-examination by the defence.

The provision was amended by the Acts Amendment (Evidence) Act 2000 which is now incorporated in the reprint of the Evidence Act published on 4 January 2001 by the new provisions of sub-section (2) to (2c) as follows:

“(2) If a relevant statement is to be admitted, evidence of the making and content of the affected child’s statement shall be given by the person to whom the affected child made the statement.

(2a) Subsection (1) does not affect the operation of section 106G.
(2b) A written statement by a person to whom an affected child made a relevant statement is admissible under section 69(2) of the Justices Act 1902 if the requirements of that subsection are complied with.

(2c) A relevant statement recorded on video-tape is admissible to the same extent as if it were given orally in the proceeding in accordance with the usual rules and practice of the Court concerned.’’

Guideline 1.8 says:

“1.8 ADMISSION OF HEARSAY EVIDENCE (UNDER S106H)

This section gives the Judge the discretion to admit into evidence any relevant evidence of the child even though it may be hearsay. It is admitted to complete the picture. This may work to the benefit of the accused person as well as that of the complainant. For example it may avoid the sort of thing that happened in the case of Sparks v The Queen [1964] AC 964 where the court refused to admit the hearsay statement of a child to her mother an hour and a half after the girl had been assaulted that ‘It was a coloured boy.’ A white man was convicted.”

The provisions would allow the admission of a child’s complaint, made at an early stage to (say) the police or a social worker in the form of an interview, to be admitted as part of the evidence, subject to the provisions of the section.

The provision has, at least in criminal trials, been little used but is used in other forms of proceeding. However, one case in which Hammond CJ successfully made an order under section 106H which came before the Court of Criminal Appeal is Bennie v R [1999] WASCA 238, delivered 5 November 1999.

(v) Pre-recording of a child’s evidence

Sections 106I to 106MB then deal with the important innovation of pre-recording a child’s evidence. I will not set out the provisions here. The use of this technique has become much more frequent in Western Australia than anywhere else in the nation at least. Its importance is accentuated by the use which can be made of it to avoid, for the child, some of the delay and consequential trauma and possible memory issues inherent in lengthy trial delays. It has incidentally had the effect that, by the time the trial proper subsequently commences, both prosecution and defence know precisely what evidence the child will give and this may affect the charges proceeded with, the Crown opening etc. and allows objectionable evidence to be pre-edited.

In practice, section 106I(1)(b) is used. I have not known of an order being made under section 106I(1)(a). The difference is that, with subsection (1)(b), the whole of the child’s evidence (including cross-examination and re-examination) is taken at the special pre-recording hearing and the child is not present at the trial proper. The procedural directions are thus given under section 106K and not section 106J.

In pre-recording the child’s evidence, the Judge and counsel wear usual robes.

Because of Child Witness Service preparation, the child will have sat in court and been instructed on who wears what and their roles. The Judge is neutral.

My practice is to explain on tape for the information of the eventual jury:

- why, where and when the pre-recording is being made;
- that the Judge and counsel may not be at trial the same persons as at the pre-recording;
explain presence and role of Sheriff Officer and support person; and

I then have them bring the child into the special witness room, which is not the Court, so that the jury sees the child’s size and demeanour.

The Judge gives a warning under section 106P that this is routine procedure and no adverse inferences may be drawn.

The camera permits use of long shots eg. when child is asked to take oath or read statement, or close-ups.

Silly interjections, questions and comments, as well as inadmissible evidence etc. can be edited out before trial.

I always try to suppress objections during the child’s evidence as they can be debated, and, if necessary, the tape edited later.

Editing of the recording is done under section 106M. There are statutory provisions relating to the control and custody of videotapes and offences are created for their misuse. In practice, after the videotape is made, it is stored by the court for use at trial and, after being played at trial, is not tendered as an exhibit, but treated as if it is oral evidence. In this, it differs from the practice where an out of court statement is tendered as an exhibit as with police confessional tapes. A different view prevails in England.

The taking of pre-recorded evidence has certain advantages from the prosecution point of view. The prosecution can, if necessary, amend the indictment and adjust its opening address to accord with the evidence known to have been given by the child.

(vi) Use of closed circuit television and screening arrangements

The alternative to pre-recording the child’s evidence provided by the 1992 amendments were the provisions of sections 106N to 106P. The preconditions to use of the provisions are set out in section 106N(1), that is, that the proceedings are Schedule 7 proceedings and that the provisions operate only to the extent that an order that has not been made under section 106K for pre-recording of the child’s evidence under section 106I. Provision is also made in section 106O for the court to order, but only on the application of the prosecutor that the child is able and wishes to give evidence in the presence of the defendant, that section 106N does not apply. I have not had to deal with such an application.

Note that, unlike many other jurisdictions, the use of closed circuit television therefore becomes, in effect, compulsory in the event the child’s evidence has not been pre-recorded and facilities are available. Facilities are being built into all new major court buildings and are already extended to many of the older ones, although not yet all. By:

“(3a) Where arrangements are made under subsection (2) (a) or (b) the affected child’s evidence is to be recorded on video-tape.”

This is to enable the evidence to be available on appeal or re-trial as to which see the provisions of section 106T referred to below.
**Screens**

Then the section makes provision for the remaining situations in which closed circuit television facilities are not available:

“(4) Where the necessary facilities and equipment referred to in subsection (2) are not available, a screen, one-way glass or other device is to be so placed in relation to the affected child while he or she is giving evidence that -

(a) the affected child cannot see the defendant; but

(b) the judge, the jury (in the case of proceedings on indictment), the defendant and his or her counsel can see the affected child.

(5) Where arrangements are made under subsection (4) and where the necessary facilities are available to do so, the affected child’s evidence is to be recorded on video-tape.”

Guidelines for the use of screens are numbered 8(1) to 8(8).

By section 106P:

“Where in any proceeding on indictment evidence of an affected child is given in a manner described in section 106N(2) or (4), the judge is to instruct the jury that the procedure is a routine practice of the court and that they should not draw any inference as to the defendant’s guilty from the use of the procedure.”

Because of the widespread use of pre-recording or of live CCTV, screens are not now much used, but may be used in remote places.

**Identification of the defendant by a child**

In addition, section 106Q deals with cases in which it is necessary there be identification of the defendant by a child:

“Where evidence of an affected child is given in a manner described in section 106N(2) or (4), and the identification of the defendant is an issue, the affected child is not to be required to be in the presence of the defendant for that purpose -

(a) for any longer than is necessary for that purpose; and

(b) before the affected child’s evidence (including cross-examination and re-examination) is completed.”

I have not had to deal with such a matter but Guideline 2.1.31 provides:

“It is strongly suggested that methods other than the presence of the child in court to identify an accused be considered.

The requirement that a child must still enter the court following the use of CCTV undermines the value of the use of such methods of giving evidence and increases the trauma for the child. It may be possible for the child to be shown an image of the courtroom that includes the accused whilst in the Remote Room. The child could then indicate the accused by describing items of clothing, or his/her location in the court.”
(vii) Special witnesses

Section 106R provides for the use of these same protective techniques in the case of other witnesses declared to be special witnesses. In 1993, Marion Dixon pointed out that:

“Most of the special provisions for the giving of evidence by children cover only ‘affected children’ who are defined in section 106A of the amended Evidence Act 1906. Excluded by this definition from the routine operation of the protective measures are:

(i) children 16 years and over on the day the complaint was made or, in the case of an indictment under s.579 of the Criminal Code, on the day on which the indictment was presented;

(ii) children who are victims of Part C offences committed by strangers (i.e. by persons other than close family members, persons living in the same household as the child when the offence was committed, or persons who had care of, or exercised authority over, the child in the household on a regular basis); and

(iii) children who are witnesses in proceedings other than those of the kind set out in Parts B and C of Schedule 7 of the Evidence Act.

This does not mean that such children can never have the benefit of the use of CCTV, etc. It means, however, that in order for the child concerned to be permitted to give evidence by one of the alternative arrangements, the court will have to declare the child to be a ‘special witness’ under section 106R. This section allows a Judge to make an order declaring a person a ‘special witness’ and entitled to the benefit of one or more of the alternative arrangements where the Court is of the opinion that, if the person is not treated as a special witness, he or she would by reason of a list of factors (which include the age of the witness) be likely either:

- to suffer severe emotional trauma; or
- to be so intimidated or distressed as to be unable to give evidence satisfactorily.”

By section 106S, the Act provides that where the giving of evidence by a person or a matter affecting a person as a witness is likely to require the making of an order or the giving of directions under sections 106E(2), 106F(1), 106J, 106K, 106O, or 106R, the party who is to call that person as a witness is to apply for a special hearing for the purpose of having all such matters dealt with before the proceeding. I have to say that this provision is not always complied with. Often, applications are made at the last minute. Not many, though, are refused.

Guidelines 4.1 to 4.5 deal with this issue, which in practice is virtually identical to other applications except that the application is more likely to be contested.

(viii) Preliminary hearings (committals)

In addition, the 1992 legislation amended the Justices Act to limit the circumstances in which children are called and may be cross-examined at preliminary hearings by inserting section 69(2a), which provided that the statement of an “affected child” witness relied upon at a preliminary hearing may be in the form of a video tape or audio tape and the affected child is not to be called as a witness unless there are “special circumstances that justify the complainant being so called”.

Following the report of the Law Reform Commission of Western Australia in its Review of The Criminal and Civil Justice System in Western Australia the government has abolished preliminary hearings or committal proceedings as they are often known.
(ix)  **Section 106T**

Finally, by amendments added by the *Acts Amendment (Evidence) Act 2000*, section 106T provides that:

“(1) Evidence of an affected child recorded on video-tape under section 106J, 106K or 106N in relation to a Schedule 7 proceeding is admissible in any hearing in relation to that proceeding to the same extent as if it were given orally in the hearing in accordance with the usual rules and practice of the Court concerned.”

By subsection (2), a similar provision applies to evidence of a special witness recorded on videotape under sections 106K or 106N.

By subsection (3), a judge of a Court before which it is proposed to adduce video-taped evidence under subsection (1) or (2) in a hearing may order that the affected child or special witness, as the case may be, attend the Court for the purposes of giving further evidence in clarification of the video-taped evidence.

By subsection (4), the making of an order under subsection (3) does not prevent the making of an application under section 106I or of an order under section 106J, 106K, 106N or 106R(1)(b) in relation to the giving of the further evidence.

By subsection (5), “‘hearing’, in relation to a proceeding, means the trial or hearing of the proceeding or a retrial or rehearing of the proceeding.”

(x)  **Closure of courts in matters affecting child witnesses**

The only matter arising out of the *Act Amendment (Sexual Offences) Act 1992* which I will mention in this paper is the amendments to section 635A of the *Criminal Code* to clarify the situation concerning closure of courts and prohibition of publicity. In fact, the press have been scrupulous in avoiding identifying information relating to children in my experience.

Section 635A now provides:

“(1) Unless expressly provided otherwise, the court-room or place of hearing where a trial or other criminal proceeding is conducted is an open and public court to which all persons may have access so far as is practicable.

(2) If satisfied that it is necessary for the proper administration of justice to do so, a court may -

(a) order any or all persons or any class of persons to be excluded from the court-room or place of hearing during the whole or any part of the trial or other criminal proceeding;

(b) make an order prohibiting the publication outside the court-room or place of hearing of the whole or any part of the evidence or proceedings;

(c) make an order prohibiting the publication outside the court-room or place of hearing of the whole or any part of the evidence of proceedings except in accordance with the directions by the court.

(3) On an application by the prosecution or an accused person a court may order any person who may be called as a witness in the trial or other criminal proceeding to leave the court-room or place of hearing and to remain outside and beyond the hearing of the court until called to give evidence.
Some General Comments

Let me make some comments of a general nature about the use of some of the new technologies which make these provisions, in my view, desirable. Although the facilities are now widely available geographically, they are not yet universal. Sometimes, problems can be resolved by use of video link facilities not necessarily from court to court, but using other facilities such as may be available at TAFE colleges and the like. Sometimes, pre-recordings may have to be made by first bringing the child to a town where facilities are available.

It is important to remember the primary purposes of the legislation and also that many cases can now be brought to court which once were not. Sometimes, one hears reference to other practical problems such as that of the jury not being shown the size of the child or told of the child’s growth, physical and mental, since the event in question. Sometimes, one even hears reference to the fact that the new techniques by reducing distress makes the task of the Crown and jury harder.

We have, especially in the early days of their use, had some problems with sound and some with picture quality etc. But those problems are now largely resolved.

Devices such as CCTV and pre-recording children’s evidence cannot, of course, prevent children “freezing”. The single oral process of giving evidence no doubt has advantages, but where child sexual abuse is involved, it can be a poor means for conveying the truth. In my view, the rules about allowing evidence of prior consistent statements should be altered. The prospect of videotaped child complaint interviews may be one answer.

Nor is the system yet perfect, eg:

- Physically, there is, as yet, no separate adult vulnerable witness facility. Adults use the Child Witness Service facilities.
- There are still no CCTV/pre-record facilities in some small circuit towns.

More Recent Developments

Although neither space nor the primary focus of this paper permits much reflection on future developments it will be of interest perhaps to note that following both certain recommendations of the Law Reform Commission of Western Australia in its Review of the Criminal and Civil Justice System in Western Australia and of an Interdepartmental Committee on Sexual Assault the present Attorney General has issued a press release advising that he is considering allowing multiple charges involving more than one victim of child abuse to be dealt with at the same trial. Such a change would involve of course legislative amendment to the effect of the decisions of the High Court of Australia in cases such as Hoch. My understanding is that changes have been made already in Victoria and Queensland. No draft of the legislation proposed in Western Australia has to my knowledge yet been released.

I do not, I think, need to include in this paper a discussion of the Report of the Enquiry into the Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities in Western Australia, known as the Gordon report. The report is extremely lengthy and involves numerous recommendations but they are mostly of an administrative type. An overview of the report was published in the National Child Protection Clearing House Newsletter Volume 10, No 2 Summer 2002. Its recommendations have already been the subject of government announcement of the appointment of additional child protection workers in remote areas, appointment of an Aboriginal staff member to the Child Witness Service, the establishment of a Child Death Review Committee and a Child Death Register, additional
remote police stations and police officers including specialist domestic violence officers in regional areas and other administrative developments involving considerable expenditure. Other expenditures were also approved to extend community education services and offender rehabilitation and monitoring. The report also dealt with issues of mandatory reporting, in which area Western Australia is something of an exception.

Similarly many of the concerns of the Interdepartmental Committee referred to above are with administrative matters. The report of the Committee does include recommendations in the justice area but given its present status I am not in a position to discuss any recommendations other than those which have been the subject of governmental announcement at this stage.

**Gaps in the Protective Framework**

Notwithstanding that, I think there are a number of comments that should be made illustrating that the Western Australian position is not yet as complete as one might hope it would be. Amongst the areas still, in my view, requiring attention are the following:

A number of the major problem areas in fact arise either out of our general principles of criminal law or evidence or in the context of other amendments to the *Evidence Act* or to the *Criminal Code*, all of which apply both to adults and children. Examples include the areas of recent complaint and the provisions of section 36BD of the *Evidence Act*, questions relating to propensity and relationship evidence, the corroboration warning the subject of the High Court decision in Longman, and so on. I take the view that such more general issues lie outside the scope of this paper.

Legislative amendments are required to the existing domestic violence legislation to prevent the calling of children under the age of say 16 years in person to give evidence in such matters. That is not to suggest that I would prevent the admission of statements made by such children into evidence without the calling of the child concerned.

Legislative action is needed to confer absolute confidentiality on the files and notes of agencies involved in the investigation of and therapeutic resolution of child abuse complaints in certain situations including the files and notes of bodies such as the Sexual Assault Referral Centre and of the Department of Family and Children Services at least save where a Judge is satisfied that such files and notes actually (rather than potentially) contain material of a valid forensic purpose going to the question of proof or otherwise of the allegation against the accused.

Further consideration should be given to the admissibility of expert evidence in relation to certain aspects of child sexual abuse and the responses of children thereto.

Reform of the provisions in relation to the offence of having a sexual relationship with a child under the age of 16 years is needed to avoid the need for the child to identify three or more individual acts in such detail that the jury can be unanimously of the view that each of those individual and particularised acts is proved beyond a reasonable doubt.

Footnote

I have brought with me to the Conference a copy of the relevant Western Australian Legislation and also video taped pre-recorded evidence of children in matters which I have conducted and if there are persons who would wish to obtain a copy of the Legislation or to view on a confidential basis the pre-recordings that I have brought I would be happy to make those materials available.

Select Bibliography

Western Australia


General


Dr C Eastwood and Professor W Paton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System*, 2002.


