THE RIGHT TO REMAIN SILENT: THE INTERROGATION OF CHILDREN†

MOIRA RAYNER*

INTRODUCTION

It is the wish of all reasonable people to protect children from being the victims of crime and unfit parenting, and from victimisation by the legal system. The underlying theme of this article is that our concern begins too late. The best protection is prevention. We see the state committing fewer of its resources to preventive child and family services and emphasising protective, corrective and punitive programmes. If state welfare agencies cannot, on the available evidence, guarantee or even assure a degree of probability that intervention is likely to provide an appropriate remedy for the particular child, we should hesitate to require that children participate in what could be a re-abuse, this time by the State.

A RIGHT TO RESPECT

The child's right to respect is easily misrepresented and misunderstood. It does not mean a child does not have the right to be protected but that he or she has the right not to be overprotected. It does not mean that the child is a pseudo adult burdened with the full range of adult responsibilities, but that he or she has the right to know what the choices and their consequences are or may be, and in appropriate cases to make, and learn by, his or her own mistakes. The right to respect means, too, the right to impart a confidence and have it respected. It might be described as the right to be taken seriously.[1]

Acceptance of this basic right underlies most good parenting practices, of course. Courts adopting a *parens patriae* role[2] should logically adopt a

† An edited version of a paper delivered at The Australian Institute of Criminology seminar, Children as Witnesses, in Canberra, 3-5 May, 1988.

* LL.B. (Hons) (Western Australia). Chairman of the Law Reform Commission of Western Australia. The views expressed in this article are personal views and are not the views of the Law Reform Commission of Western Australia.

[1] See article by P.E. Veerman, "Janusz Korczak and the Rights of the Child" (1987) *Concern (Journal of the National Children's Bureau)* 7.

[2] *R.* v. *Gyngall* [1893] 2Q.B. 232, 239, Lord Esher, M.R.: "It [wardship] was a parental jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent." The "welfare" principle underlies wardship and care proceedings and is meant to infuse the criminal process where children are victims of crime, too.

similar understanding. Where welfare and law enforcement agencies are involved, and where their involvement may result in intervention in the life of the child and the family, they too should adopt a "consultation and respect" approach.

At all stages of decision-making, if a child can express a preference[3] the child's view should be sought, and heard. Sometimes it will not be possible to do, or refrain from doing, what a child would want but it seems that otherwise well-intentioned adults fail to put the same energy into finding out how the child perceives his or her situation as they are prepared to invest in investigation and planning for the "best interests" of the child.

Beyond but arising from consultation there will also come a point where the child who is "mature" has the right to make decisions for him/herself, if the child wants to.[4] The right to choose is not an obligation, and capacity to make choices and give or withhold consent depends on being able to make a voluntary choice between available alternatives. A child who is emotionally or otherwise dependent on an adult abuser is unlikely to be able to do other than assent to continuing abuse or act on threats or inducements to deny it. A child who knows that if the child discloses the abuse he or she will be separated from or punished by the family, or lose all contact with a delinquent but important parent or that an important person will not be helped to "get better" but must be imprisoned, also has no real choice. A child who does not know the full facts and implications of the situation cannot make an "informed" or real choice at all. Whatever the level of understanding, however, children have the right, and welfare and law enforcement and other legal authorities the responsibility, to give them the opportunity of expressing a view and have it taken seriously. A mature child has the right to say "no" just as a rape victim has the right to refuse to make a complaint, knowing what is likely to happen to her during the prosecution process. It falls to the adults involved to look for and understand the level of comprehension and maturity of each child, in each case.

What children say and do has a legal significance in a number of different ways. First, if they are thought to be the victims of behaviour which is an offence or calls for intervention to protect the child, and secondly when they may be witnesses to other events in civil or criminal proceedings. In the latter case this may be because their wishes and views are made legally relevant[5] or because they saw or heard something which must be proved in legal proceedings. Most child witnesses are victims in one sense or another before they get near a courtroom.

[3] The phrase used by Hollis J. in the unreported wardship case of the Family Division of the High Court sitting at Leeds on 30 July 1987, described only as *"Re Cleveland County Council and Others"*, see also "Lessons from Cleveland: Hear the Child Before the Whistle Blows", (1987) 42 *Childright (U.K.) (Journal of the Children's Legal Centre, London)* 8.

[4] *Gillick* v. *West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] A.C. 112.

[5] For example, under Section 64 (1) (b) of the *Family Law Act* 1975 (Cth.) where a court must "consider" the wishes of a child in relation to custody, guardianship, access or "in relation to any other matter relevant to the proceedings" and give those wishes "such weight as the court considers appropriate in the circumstances . . ."

THE VICTIM

Victims are asked to repeat their stories over and over again. The timing or sequence of the repetitions is affected by the way in which the child's "victimhood" was established and whether the child is a manifest victim (e.g. from injuries or first-hand observations of the infliction of injury by an adult witness), a self-disclosed victim, or a suspected victim.

A disclosure is often made to another child or to an adult who has no training in responding to the disclosure and isn't expecting it, and in an informal setting. One or more re-interviews follow once the implications of the first are appreciated. They may or may not be carried out by a professionally trained person. Their purpose is usually the confirmation of the complaint, with or without expressions of belief or support, but sometimes an attempt to invalidate it.

What happens next could be interviews with police, a medical practitioner, or other authority figures for investigative purposes. There may follow more interviews intended to produce a statement on which the authority figure will decide to prosecute or to investigate further, or recorded to be used as evidence in its own right (such as a deposition) or as part of the brief to counsel for prosecution or protective action on behalf of the child. This last stage is properly called the "forensic" statement.

There is another, what is loosely called a "therapeutic" purpose in talking to children. This was highlighted during the Cleveland Child Abuse Inquiry where "therapeutic" techniques were used in interviewing children to obtain confirmation of sexual abuse, specifically anal penetration, which had been "diagnosed" by medical practitioners on a single medical symptom, but of which there was little or no other evidence.

DISCLOSURE WORK

"Disclosure work" describes specialised interview techniques used with known or suspected victims of child sexual abuse. In Great Britain the techniques have been developed particularly in the child abuse clinic of the Great Ormond Street Hospital for Sick Children in London. The technique involves the use of "anatomically correct" or sexually explicit dolls or drawings, leading and hypothetical questions, and videotapes. Sometimes the interviews are observed by an unseen observer, sometimes with others – supportive adults or other therapists – present. In Cleveland and elsewhere some of those who used these techniques may not have been adequately or appropriately trained in the use of the aids. The videotapes are used as an aid for the therapists and have been produced in evidence in care, wardship and criminal proceedings. They have not, of course, been used as if they were a child's evidence in chief but on at least one occasion they have been used as the basis for the cross-examination of a teen-aged child in criminal proceed-

ings.[6] They are also used in wardship proceedings as part of the record of interview upon which a therapist has come to a conclusion.

Disclosure work is a rapidly developing science or art. The technique and the manner in which it is applied are clearly highly relevant when the disclosures so made or implied are the basis of a professional opinion that abuse has occurred.[7] However judges in the Family Division of the High Court in England criticised the techniques heavily in a series of wardship cases during 1986 and 1987. One of them, Latey J.,[8] summarised the problems as follows:

> "One of the therapeutic tasks of the clinic – probably the most important – is to get a child who has been sexually abused to unburden himself or herself, to talk about it. As Dr. Vizard said, the importance of this is at the very heart of the matter. If a child has been sexually abused, and goes on bottling it up, the consequences later in life are likely to be very serious indeed . . . But, in the case of children who 'clam up', it inevitably requires a persistence of questions, many leading and suggestive to the child of the answers to give, to break down the barrier. It is here, as I think, that the dilemma arises in the minority of cases which come to the courts.
>
> "There is 'an interface', as it has been described, between the needs of clinical therapeutic methods and the needs of the courts in legal proceedings. In doing what has been found so far to be best to meet the needs of the former, methods may be necessary which defeat or do not best meet the needs of the latter."

Latey J. suggested that there be a clear distinction between those cases where, from extant external evidence, abuse is already established, and those where there is a "constellation" of alerting symptoms. In the second category he suggested that video recordings should always be made because:

> "the precise questions, the oral answers (if there are any), the gestures and body movements, the vocal inflection and intonation, may all play an important part in interpretation."[9]

In the second category he suggested a difference in interviewing technique, because of the distinctly different forensic and evidential purposes of the two.

"Disclosure work" usually happens in the context of medical examination to confirm or establish whether sexual abuse has taken place. Often there is a need to obtain consent to that medical treatment. Usually the custodial parent will, of course, consent on behalf of the child but there are times when the consent will not be sought or if sought will be refused because either the child has named or there is reason to suspect that a parent or family member

[6] In the trial of a number of family members for sexual offences against children reported in *The Times*, 10 October 1987.

[7] A useful description of the technique appears in an article by Dr. E. Vizard, "Interviewing Young, Sexually Abused Children – Assessment Techniques" (1987) 17 Fam.L. 28.

[8] *In Re M. (A Minor) (Child Abuse: Evidence)* [1987] 1 F.L.R. 293, 294. The editors of the Family Law Reports published a special issue (Number 4) of the Reports dealing specifically with the evidential problems of sexual abuse and in particular the problems arising from the use of disclosure work for forensic purposes, in wardship proceedings.

[9] Ibid. p.295.

is the perpetrator. In *Gillick*'s case[10] the House of Lords suggested that the Department of Health and Social Security guidelines permitting doctors to treat children without parental consent were valid insofar as they were restricted to "mature" children, or children of sufficient maturity and intelligence to understand the nature and implications of the proposed treatment.

> "[T]he legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with the right of control and ends with little more than advice."[11]

If children under a statutory age of capacity, or the age of majority, are able to give and withhold consent to medical treatment if they are "of sufficient maturity and intelligence to understand the nature and implications of the decision" (which appears to be something less than full "maturity" in the dictionary sense of completely intellectually and physically developed), then any doctor should satisfy him/herself of the child's capacity to consent before undertaking any form of treatment. This is especially appropriate where the treatment is intrusive, as medical examinations to determine sexual penetration may be, and disclosure work certainly appears. An adult has a right to refuse psychotherapy and other forms of treatment, and it would appear that a child has the same right if the *Gillick* preconditions are proved – even if a parent has a coexistent right.[12] The Official Solicitor, in his submission to the Cleveland Inquiry, recognised that "the reality is that young children have little say in the matter of medical examination. If the adult responsible for them arranges a medical examination then, short of screaming or struggling, there is little the child can do but go along with it."[13]

Child abuse is an "elusive truth" and of course it is difficult to balance the need to protect the child with the serious risks of making a wrong accusation of abuse which may result in the removal of a child from a non-abusing home. It is well documented that abused children may be under enormous pressure not to disclose, but also that many of them have some understanding of the really likely outcomes of disclosure and prefer to come to terms with it in their own way: Esther Rantzen, the Chairman of Child-Line[14] reported in 1987 that the great majority – more than 80% of child-

[10] Supra footnote 4.

[11] Lord Denning M.R. in *Hewer* v. *Bryant* [1970] 1 Q.B. 357, 369 approved by Lord Fraser in *Gillick* at p.172.

[12] See *J* v. *Lieschke* (1987) 69 A.L.R. 647, 649 where Wilson J. seems to suggest that parental rights over a mature child's power to decide to make a decision are unenforceable. It would seem inappropriate to recognise a greater common law power in medical practitioners than parents have, to impose treatment on a patient without consent. It may be commented that the courts seem relatively easily persuaded that children are sufficiently mature to decide whether or not to make statements to police without being "overborne" (see *Peters*, (1987) 23 *A. Crim. R.* 451, where a 15 year old boy's confession made in the absence of any adult was admitted into evidence).

[13] (1988) 45 *Childright (U.K.) (Journal of the Children's Legal Centre, London)* 8.

[14] A confidential emergency telephone line for abused children which has been operating in the U.K. for 18 months. As a result that service has developed a second, non-crisis line for

ren calling the confidential service – do not wish any action to be taken on their disclosure for fear of consequences including removal from the home and blaming of the victim by the remaining family.

But the child victim's testimony is often the most important evidence for the prosecution, especially where there is limited or no physical corroborating evidence of the abuse. One way to seek to provide that evidence is through the evidence of experts who have examined the child and formed an opinion based on that examination. The expert opinion based on a child's alleged reports of abuse may be adduced as primary or corroborative evidence of a need to invoke the protective jurisdiction.

The serious criticism of disclosure work arises from the nature of the assumptions made by those carrying it out. Because of its origins as a therapeutic technique for children known to have been abused the interview is predicated on an assumption that abuse has taken place. Its use as a diagnostic instead of a therapeutic technique has led to real criticism. Some practitioners drew conclusions from answers to hypothetical and leading questions which an objective or other observer was unable to draw. There was at times a considerable degree of pressure on a child leading to a risk that a child would say something had happened which had not, i.e. that the truth was not necessarily elicited. Some practitioners discussed allegations with the child beforehand, some lacked the skills to ask the "right" questions with a necessary degree of exactness. Complaints during the Cleveland Inquiry alleged that the anatomically explicit dolls had been used in a suggestive or leading way by people unskilled in their use, leading to a "sexualisation" of the child and a diminished probability that the disclosure was a true one.[15] (Recently, a Californian court of appeal held that testimony based in part on the information imparted and the demeanour and conduct of the child with the use of anatomically correct dolls was no different from other forms of scientific evidence and could not be adduced until it was proved that the method was sufficiently reliable.)[16]

Latey J.[17] suggested that it was essential that a video-recording be made of the child's disclosure, to allow a judge to evaluate the effect of the questioning and the child's responses.[18]

VIDEO-RECORDING OF DISCLOSURE WORK

Video-taping of disclosure work has both a therapeutic and a forensic purpose. It will be used by therapists working with the child, to help the child

children who may and do need ongoing counselling and support in their situation, which may lead to consent to, or the need (because of a serious threat to the child's life) to, intervene.

[15] See [1987] 1 F.L.R. 269, 346 (Special Edition No. 4).

[16] See *In re Amber B*, referred to in T. Demchak, "Court Limits Testimony on Anatomically Correct Dolls", in *Youth Law News*, May-June 1987, 4.

[17] *In Re M. (A Minor)*, supra, footnote 8.

[18] Video technology can also be used to enable the child witness and an alleged perpetrator to be physically separated while the child gives evidence, and to record a child's evidence in chief. These are dealt with subsequently in this paper in the context of procedural protections for child witnesses.

come to terms with its experiences. It may have other benefits including reducing the number of interviews suffered by a child. One writer claims the first interview results, in most cases, in the fullest disclosure;[19] this is debatable. It may persuade disbelieving family members and increase the likelihood of family support to the victim, help in encouraging or extracting confessions from perpetrators – reducing the number of criminal trials, and creating a permanent record of a child's allegations. Such recording is immediate in its impact, saves the interviewer from being distracted by taking notes and may be of help in dealing with the accommodation syndrome.

Video-recording may also have forensic uses beyond use in a courtroom as primary evidence, for example where it may be produced in care proceedings (as Latey J. suggested) to substantiate an expert's opinion, much as records of interview made at the time may be called for to substantiate the content and results of an interview.

In this respect there are doubts about the wisdom of relying on such records. Vizard[20] identified a number of issues, particularly relating to the quality of the recording of the interview, and its capacity to be thoroughly misinterpreted by judges, or misused by lawyers. This last aspect should give cause to pause and re-examine our enthusiasm for innovation, or at the very least ensure that its introduction is exactly managed. It would not be helpful, in our adversarial system, to extend the opportunities by which the evidence of children, direct or indirect, can be invalidated.

On the one hand it is a useful record of assessment process for later reference; it can be used for training purposes (which surely raises confidentiality issues)[21] and the tapes may be helpful in research.

On the other hand the demeanour of a child may be inadequately preserved on film (this is not, after all, a documentary – the need for unobtrusive recording requires a more or less fixed camera). The quality of the film becomes of paramount importance. If it cannot be relied upon as a complete record – nuances, whispers and glances may be missed by the camera but picked up by the interviewer – its use as an evidentiary tool must be truly double-edged. It should not be viewed without interpretation by the interviewer, in which case it is not an objective record, as some would posit, and could be actively misleading viewed on its own. Dr. Vizard says many of the criticisms levelled at such recordings in the High Court were based on extremely poor quality video-recordings.

These video-recordings may become available to opposing lawyers and used for, possibly "unfair", cross-examination of the witness who takes part in them. If the interviews, as well as the recording, is flawed, a competent lawyer

[19] T. Schwass, "The Use of Video Technology in Proving Sexual Abuse", unpublished paper delivered to the Sixth International Congress on Child Abuse and Neglect, Sydney, August 1986.

[20] Op. cit.

[21] A social worker to whom the author spoke in November 1987 in London said that she had been confronted with a video of disclosure work performed on the child of a friend, at a training session in Great Ormond Street Hospital for Sick Children. The consent of neither child nor parents had apparently been obtained to this use.

would have little difficulty in demolishing the reliability of the findings based upon them. Expert witnesses are renowned for wishing to avoid such public humiliations and may avoid using the available technology. Children who make statements recorded in this way may be cross-examined about inconsistencies in them with evidence in court proceedings. The recordings may not minimise courtroom stress, but exacerbate it. And there are other drawbacks, not the least of which is that the existence of such permanent records means a real risk that they may be viewed by others for a variety of purposes, misunderstood and misrepresented, or their contents discussed by "trainees" or inexperienced or hostile witnesses.

Finally, the use of a technique based on an assumption about the benefits of disclosure and the fact of its occurrence means that children may be led into giving answers to questions which may not be true and may lead to a false identification of perpetrators or inaccurate or incorrect allegations of abuse.

THE RELIABILITY OF CHILD WITNESSES

Before looking at more specific proposals it is necessary to refer briefly to the "reliability" of children's statements, that is, as truth of the facts contained or referred to in them. It is no longer as fashionable to assume that children (especially girls) either fantasize or maliciously invent accusations of sexual misconduct[22], though the old prejudices are there, barely hidden, from the early history of attitudes towards children's evidence.[23] In some situations children are no better nor worse witnesses than adults, neither of whom can easily "speak the truth, the whole truth and nothing but the truth". Research shows that children's testimony may, on occasions, be quantitatively, but rarely qualitatively, inferior to that of adults.[24] The state of knowledge about children's abilities as witnesses, is imperfect. There is ongoing research, experimentation and debate about appropriate techniques for obtaining accurate evidence, the effect on children's memories of their state of development, the effect of traumatic or particularly emotional-laden events, the effect of different degrees of involvement, children's reactions to witnessing or being a victim of violence or other crime, the effect of repeated questioning (and its manner and content) and the degree to which children may be suggestible.[25]

[22] See The Law Reform Commission of Tasmania Discussion Paper No. 1, *Child Witnesses in Sexual Assault* (Kate Warner) (October 1987), 15 and Law Reform Commission of Victoria Discussion paper No.12, *Sexual Offences against Children* (March 1988) 45.

[23] See G.S. Goodman "Children's Testimony in Historical Perspective" (1984) 40 *Journal of Social Issues* 9.

[24] G. Davies et al, "The Reliability of Children's Testimony" (1986) 11 *International Legal Practitioner* 81-108.

[25] See G.S. Goodman, "The Child Witness: Conclusions and Future Directions for Research and Legal Practice" (1984) *Journal of Social Issues* 157-175; see Goodman, Aman and Hirschman, "Child Sexual and Physical Abuse: Children's Testimony" in S.J. Ceci, M.P. Toglia and D.F. Ross (eds) *Children's Eyewitness Memory* (New York, Springer-Verlay, 1987).

But there is a common, and commonsense, agreement among writers like Goodman, Davies, Dent and others, about questioning procedures, aids, cues and prompts. Their *appropriate* use may improve the quality of recollection and communication.[26] But as Davies points out, research which establishes this arises from experiments where it was known, beforehand, what had occurred.[27] This is not the case where abuse is suspected, nor in legal proceedings where the determiner of fact (judge, magistrate or jury) is presumed to be ignorant of the whole matter. That factor must affect the questions and the environment in which they are asked. Davies states that:

> "The spontaneous accounts of even the youngest of children tend to be accurate and these may be filled out through skilful questioning."

and

> "Children are not uniquely suggestible, though their more limited, fragmented recall of events may leave them more open to suggestion than adults in circumstances which involve adult knowledge."[28]

though he considers that the power of suggestion is likely to be limited to recall of detail not the main facts, and the effects of such suggestion are in many cases transitory.

Other writers acknowledge that children's evidence can be significantly influenced by the authority that the child assumes the questioner to possess, and his or her assumptions,[29] by inappropriate questions and by exceeding a child's attention span. Some propose that when "suggestion" is suspected the attention should shift from the child to the suspected perpetrator[30] which may certainly be appropriate, but what if the influence came from the interviewer? Others acknowledge that methods intended to reduce trauma for the child might in fact adversely influence the reliability of their evidence in court (e.g. role-playing may cause a child to modify their statements because of the response they get, or because a child may gain some sort of insight or fear in the process).[31] If it is good practice during the investigation to keep an open mind, what risks are run by utilising a highly persuasive therapeutic technique during the interview stage which is predicated on an assumption about a particular event? Knowing that these approaches will affect the child's disclosures and possibly invalidate them, should they be used at all?[32]

[26] Jones and Krugman, "Can a Three-Year-Old Child Bear Witness to Her Sexual Assault and Attempted Murder?" (1986) 10 *Child Abuse and Neglect* 253, 256.

[27] Supra footnote 24. See also H. Dent and G.M. Stephenson, "An Experimental Study of the Effectiveness of Different Techniques of Questioning Child Witnesses" (1979) 18 *British Journal of Social and Clinical Psychology* 41.

[28] Supra footnote 24, p. 100.

[29] See e.g. A. Yates, "Should Young Children Testify in Cases of Sexual Assault?" (1987) 144 *Am. J. Psychiatry* 476.

[30] See e.g. M. de Young, "A Conceptual Model for Judging the Truthfulness of a Young Child's Allegation of Sexual Abuse" (1986) 56 *Amer. J. Orthopsychiat.* 550.

[31] H. Bauer, "Preparation of the Sexually Abused Child for Court Testimony" (1983) 11 *Bull. Am. Acad. Psychiatry law* 287.

[32] Jones and McGraw, "Reliable and Fictitious Accounts of Sexual Abuse by Children" (1987) 2 *Journal of Interpersonal Violence* 27, 42.

Davies, Flin and Baxter concluded:

> "It appears that children of below ten years furnish spontaneous accounts of events which are more fragmentary and selective than those of older children or adults. However, some research does imply that the gap may be narrowed, if not entirely eliminated by careful questioning, though the dangers of presuppositions leading interrogators to elicit the answers they expect are manifest. Suggestion is most likely to occur in complex situations involving events unfamiliar to the child."[33]

This seems to be descriptive both of some disclosure work practices and some courtroom examination and cross-examination procedures.

The picture depicted so far may not be entirely black. The Bexley Experiment in the United Kingdom has achieved a recognisable degree of success, and has not suffered the drawbacks feared for Australian legal systems unfamiliar with the degree of social work intervention familiar to the British community. Its final Report[34] specifically warns interviewers to avoid suggestions and techniques which might pressure a child to a particular answer and promotes a clear distinction between the identified and suspected abuse of children. If the warning has been effective this may be attributable to the high degree of commitment and co-operation between police and social workers, the one learning from the other about the needs of the legal and care systems respectively. A similar commitment of resources and co-operation between welfare and law enforcement agencies is needed before any similar success can be predicted.[35]

THE PROTECTION OF CHILDREN IN COURT

To this point the emphasis has been on the protection of children's rights in the first, investigative stage. The underlying assumption is that immense damage can be done to the child's credibility and to the child personally by well-meaning adults who wish to protect them from harm. Underlying this is the principle that if a child does not wish to make a complaint, or to co-operate as "clinical object" in medical investigations of whatever kind, after being fully informed of the possible outcomes, that child may and should be entitled to withdraw. In this part it is assumed that the legal process is properly under way in care, criminal or custodial proceedings.

Protections range from imposing restrictive bail conditions or keeping alleged perpetrators in custody until the matter has been disposed of; injunctions or similar "restraining" or "intervention" orders made in summary jurisdictions by magistrates; apprehension of the child or care/protection orders

[33] G. Davies, R. Flin and J. Baxter, "The Child Witness" (1986) 25 *The Howard Journal* 81, 93, 96.

[34] Child Sexual Abuse Joint Investigative Programme [Bexley Experiment], 1987.

[35] When I visited the project in 1987 I was told that the video-tapes were retained by police, and so far had not been produced in any court proceedings. One might wonder whether this represents a degree of co-option of local legal practitioners defending alleged perpetrators or delinquent parents, which might not survive a translation to the Australian judicial rodeo.

in favour of a state welfare authority often accompanied by removal of the child from the home; and procedural and evidentiary protections to children whose evidence is in some way required for the purpose of court proceedings. The latter are addressed in this part.

Reforms which have been proposed include:

(a) amending the law of evidence about the admissibility of children's out-of-court statements;
(b) providing specially for the admission of video-taped testimony;
(c) providing for closed-circuit video evidence;
(d) changing the laws about the competence of child witnesses;
(e) amending the laws which in some cases require the corroboration of the statements of child witnesses;[36]
(f) providing conduct rules for the fair treatment of child witnesses by legal counsel; and
(g) altering the standard layout of a courtroom to diminish the formality and (assumed) intimidating atmosphere of it.

1. Is the Courtroom a Necessary Trauma?

The first three and the last suggestion have the common aim of facilitating the child victim's giving evidence. This is particularly important in criminal cases because the law assumes that an accused has the right to confront the accuser. In some cases children have not been able to speak at all. Though there is anecdotal evidence of these events it appears that trauma is commonly *attributed* to the presence of the accused, and to the unaccustomed formality and publicity of the experience, with little empirical evidence of the latter.[37] With inadequate evidence to establish the validity of this assumption, and at least a suspicion that the trauma is occasioned before the courtroom by the interrogation and examination process, perhaps exacerbated by familial response to the allegations and sometimes removal from the family, it might be questioned whether some of the suggestions which follow ought to be adopted.

Generally the child witness is the victim of an offence though sometimes the child will be the witness of an offence against another, often a sexual offence. There really is a risk of wrongful conviction and there are a very few documented occasions where children have told convincing stories which are not true. One reason can be that, over time, the child's story has been told so often that it has become either rehearsed or unreal to the child. There are, however, also grave risks of unjust acquittals, and the damage to a child victim who is not believed in this context must be considerable. The strain of retelling a story, particularly of a sexual encounter, on many occasions to sceptical strangers must be there in some form.

[36] I do not propose to deal with items (d) and (e) which are properly dealt with in the context of reforming laws about sexual offences against children, some of which require corroboration of children's evidence.

[37] Supra footnote 33, pp.86.

Some have suggested that the child should not give evidence in the courtroom at all. One way of doing this is to exclude the child altogether and allow evidence (other than as to the facts) to be given by a surrogate witness. In Israel since 1955 a "child examiner" (usually a social worker) gives evidence as a result of their examination of the child who is not called without their consent. It is difficult to conceive such a suggestion being accepted in Australia today even though such witnesses are claimed to be more successful than "the most experienced police interrogators" in getting information out of the child.[38] The video-recording of that evidence is seen as an alternative means of achieving a similar result.

2. The Rule Against Hearsay

The hearsay rule generally excludes from evidence any statement offered to prove the truth of the matter contained in the statement if it was made out of court. It is designed to ensure that statements are made under oath by a witness who is available to be cross-examined and to have their evidence tested for reliability.[39]

There are many exceptions to the rule. They include statements made in the course of treatment to a medical practitioner, spontaneous or emotional statements made as part of the *res gestae*, and prior consistent statements of a witness. They are sometimes admitted in care and custodial proceedings under legislative provisions which specifically permit the giving of what would normally be considered "hearsay" evidence.[40] (This does not, of course, mean there is an open season and any evidence at all can be led in this way.)

There are already a number of situations where the criminal courts receive "prepackaged" evidence. If a witness is too ill, out of the jurisdiction, dead, or was prevented from coming to court, evidence given by deposition in criminal proceedings may be admissible. A "dying declaration" may be admitted when the statement is made by someone who is convinced that he or she is going to die.

Permitting a child's evidence in chief to be given by means of video technology does at least offer a possibility that the child will be interrogated less

[38] G. Williams, "Child Witnesses" in P. Smith (ed), *Criminal Law, Essays in Honour of J.C. Smith* (London, Butterworths, 1987), pp.188, 193. See, however, Davies, Flin and Baxter, *The Child Witness* op. cit. p.94, where similar procedures have been used in Scandinavian and German inquisitorial systems, using psychologists trained to detect evidence of fabrication and deception. In fact the court counsellor who makes a Family Report to a Family Court is a surrogate witness.

[39] For example, in *R* v. *B* [1987] 1 N.Z.L.R. 362 the Crown sought to lead evidence from a child psychologist who had interviewed an intellectually limited 12 year old child and carried out a number of psychological tests. Though the expertise of the witness was not under attack, since the whole purpose of calling her evidence was to enhance the complainant as a witness of truth by the use of tests, the evidence was inadmissible because it was both hearsay evidence which asserted the truth of what the complainant told the psychologist and because it involved a judgment by the psychologist on the complainant's credibility which was a matter for the jury alone.

[40] E.g. Section 30(3) of the *Child Welfare Act* 1947 (W.A.) which provides that in care proceedings "(a) the court shall admit in evidence any statement, whether oral or otherwise, voluntarily expressed or necessarily implied and whether made in the presence of a party to those proceedings or not;".

often. There are a number of ways of doing this. One involves taping a victim's testimony during committal proceedings, or for use in the committal proceedings which may be used later at the trial. If it is recorded during court proceedings this may be in the courtroom or out, or with or without closed-circuit video-link facilities, to avoid the need for a child to confront the accused. Another method may not require recording at all, but allows the child to give evidence outside the courtroom during the trial with the closed-circuit facilities transmitting the live testimony in the courtroom. A variation of this would exclude the accused during the child's evidence, while the accused watches the proceedings from outside the courtroom.[41]

3. Video-Taping Evidence: Procedural Safeguards

If there is to be a special rule about the admission of children's out-of-court statements generally then special consideration needs to be given to the conditions under which they should be admitted. The National Legal Resource Center for Child Advocacy and Protection made some proposals as follows:[42]

Hearsay Exception for Child Victim's Out-of-Court Statement of Abuse

(A) An out-of-court statement made by a child under [eleven] years of age at the time of the proceeding concerning an act that is a material element of the offense[s] of [sexual abuse], [physical abuse or battery], [other specified offenses] that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of sections B through F are met.

(B) An out-of-court statement may be admitted as provided in section A if:
  (1) the child testifies at the proceeding, or testifies by means of videotaped deposition (in accordance with . . .) or closed-circuit television (in accordance with . . .), and at the time of such testimony is subject to cross-examination about the out-of-court statement; or
  (2) (a) the child is found by the court to be unavailable to testify on any of these grounds:
    (i) the child's death;
    (ii) the child's absence from the jurisdiction;
    (iii) the child's total failure of memory;
    (iv) the child's persistent refusal to testify despite judicial requests to do so;
    (v) the child's physical or mental disability;
    (vi) the existence of a privilege involving the child;

[41] Amendments to the *Child Welfare Act* 1947 (W.A.) by the *Child Welfare Amendment Act (No. 2)*, No. 127 of 1987, (not yet proclaimed), ss. 8, 11 (adding clauses 23A to 23C). See also the Home Office paper, *The Use of Video Technology at Trials of Alleged Child Abusers*, 8 May, 1987 which led to proposed amendments to the *Criminal Justice Act*, clause 22. (*Criminal Justice Bill* 1987).

[42] *Protecting Child Victim/Witnesses: Sample, Laws and Materials,* National Legal Resource Centre for Child Advocacy and Protection, 5.

(vii) the child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or

(viii) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of videotaped deposition or closed-circuit television;

and

(b) the child's out-of-court statement is shown to possess particularised guarantees of trustworthiness.

(C) A finding of unavailability under section B(2)(a)(viii) must be supported by expert testimony.

(D) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

(E) In determining whether a statement possesses particularised guarantees of trustworthiness under section B(2), the court may consider, but is not limited to, the following factors:

(1) the child's personal knowledge of the event;
(2) the age and maturity of the child;
(3) certainty that the statement was made, including the credibility of the person testifying about the statement;
(4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
(5) the timing of the child's statement;
(6) whether more than one person heard the statement;
(7) whether the child was suffering pain or distress when making the statement;
(8) the nature and duration of any alleged abuse;
(9) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;
(10) whether the statement has a "ring of verity", has internal consistency or coherence, and uses terminology appropriate to the child's age;
(11) whether the statement is spontaneous or directly responsive to questions;
(12) whether the statement is suggestive due to improperly leading questions;
(13) whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

(F) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

There are some difficulties with the "particularized guarantees of trustworthiness" referred to. They are vague, subjective, and necessarily impose a considerable degree of responsibility for the admissibility upon the expert testifying. There are similar difficulties with the use of "scientific" means of detecting evidence of deception by witness statement analysis used in some inquisitorial systems.[43] Since a child's evidence may lead to criminal conviction or the removal of a child from its home it is crucial that we learn how to ensure that a child's evidence is reliable. If adults were in the habit of listening to children this might be less difficult.

There are, of course, problems with any approach which excludes the direct evidence of any witness from the court. There is already a suggestion that children perceive "television" as a different reality, and that perhaps a generation of jurors accustomed to "The People's Court" might have different expectations of the actors on the small screen than they would of live theatre. Poor "delivery" and poor technical quality may distort or fail to convey the tone of the evidence, especially of the child's demeanour, and may affect the court's assessment of the witness's credibility. Some U.S. states have made it a precondition to the use of video technology that some expert opinion first establish that the child is not available to give evidence due to traumatization.[44] Others make it obligatory in any case at all, to minimize the prejudicial effect on any jury of the accused's exclusion.[45]

Glanville Williams[46] suggested the statement to be video-taped could be made without undue stress to the adversarial system with a number of commonsense safeguards. For example, the interview could take place with the accused sitting with his or her lawyer behind a one-way mirror; the interviewer could be wearing a "bee", a miniature microphone by which the defendant's lawyer could suggest supplementary questions. If the accused were not able to be present at the time he/she might be entitled to a subsequent supplementary interview using the same interviewer. It ought to be possible to call the child in any event, to give evidence, at the discretion of the judge. Though this will expose the child to giving further evidence the likelihood must be reduced by, for example, refusing to permit it if the accused declined the opportunity of asking questions during the original interview. If the child were available to give evidence personally he points out that there would be no major difficulty in criminal cases about admitting the video interview as a piece of additional evidence where the child also gives evidence to the court in person. Previous statements are admissible, at present, as a complaint where it was made "recently" (at the first available opportunity, which is often not the case where children have been sexually abused): if the child were to "freeze" in court at present the tape would not be admissible at all,[47] and

[43] Supra footnote 33, p.92.
[44] Supra footnote 42, pp.21-29.
[45] Sections 23A-23C *Child Welfare Amendment Act, (No. 2)* 1987 (W.A.).
[46] "Videotaping Children's Evidence", *New Law Journal* 1987 January 30 (108), February 6 (131), April 10 (351), April 17 (369). See also J.R. Spencer, "Child Witnesses, Video Technology and the Law of Evidence" (1987) *Criminal Law Review* 76.
[47] See *Wallwork* (1958) 42 Cr.App.R 153 – a five year old child giving evidence of incest against her father.

the law would not presently allow the tapes to be admissible where the child was too young to give evidence.

Video-recording of statements made by children (taken in therapy sessions rather than with the intention of substituting for the attendance of the child who is capable of giving evidence) have been used in wardship and family law proceedings[48] because courts have accepted a general discretion to admit it in the interests of the welfare of the child. They have been used in some criminal proceedings.[49] If they are to be used as evidence there must be substantial safeguards in the training of those who do the interviewing, including their sensitisation to the need to avoid leading questions and the requirements of the law of evidence. These records may be either deliberately or accidentally disclosed, to investigating police, trainee therapists and social workers, possibly to defence counsel in criminal trials and to opposing counsel in care or custodial proceedings.[50]

4. Other Ways

Allowing video-taped statements made by children as either the whole or a part of evidence they would otherwise have been required to give in person would require a statutory amendment to the rule against hearsay. Whether this is actually required if commonsense steps are taken, which are already possible under the existing procedural rules and within judicial discretions, is in my opinion yet to be proved. If, however, the proposal is accepted it should obviously be extended to sexually assaulted women or women who are victims of domestic violence, and other vulnerable witnesses.

Though the reduction of formality in courtrooms may also be a "good thing" (not just for children) in fact there is a move away from this; the Family Court of Australia has recently retreated to the security of wigs and gowns, in the belief that this will add to its stature in the eyes of the community, particularly the dissatisfied litigant. In the context of children's courts there has been a move from informal and discretionary systems to more traditional court processes within which the participants seem more inclined to respect children's rights to "due process" and natural justice. Is the elaborate (and expensive) provision of video technology, or attempting to tinker drastically with the rights of the accused, likely to be successful, and even if they come to pass, likely to be more effective and less risky than other common sense steps?

[48] In *Re M. (A Minor)* Supra footnote 8.

[49] In a trial of a number of accused charged with sexual abuse reported in *The Independent*, 10 October 1987, a videotape of a hospital interview with two children said to have been abused by their father and grandfather was used. It was stopped whenever defence counsel wanted to cross-examine the fourteen year old girl over differences between the tape and the evidence she gave in the witness box. It was introduced by Waley Q.C., the judge, at the request of counsel for the defendant grandfather, an indication that the videotaped recording can be a sword, not a shield for a child witness.

[50] See *In re S (Minors) (Wardship: Police Investigation)* [1987] Fam. 199 where a welfare authority's records were made available by the court to police.

SUMMARY

Though there is limited empirical evidence that a child is traumatized specifically by the courtroom experience there is evidence that children who have been the subject of welfare and/or police investigation as victims of inter-familial crime or neglect are traumatized by the experience. That we are now asked to "believe the child" who complains of sexual abuse is a belated recognition that children do tell the truth, spontaneously, and that insensitive or disbelieving questioning or responses to children may damage them.

Given that one outcome of research into the reliability of children as witnesses shows that their spontaneous utterances tend to be, within their communication and knowledge limits, reliable and that this can be adversely affected by the assumptions and apparent authority of an interrogator, there seems to be a need for immediate reform of the way in which we respond when they may be at risk, or harmed already. There is a strong argument that the overall number of interrogations must be reduced. The means of doing this are not so clear. Co-operative and prompt investigation is an obvious avenue. The Bexley Experiment joint programme actually minimises the need for repeated questioning and examination once either agency has been involved. The sharing of expertise between agencies must be valuable on general principles. But it cannot be done on the cheap nor without substantial commitment from all agencies, and from government.

The first and foremost rule must be that the child should, if at all possible be fully informed of the plans to involve, and the likely results of intervention by, welfare and police authorities. The child must have a guaranteed right to be consulted and have their views respected. A "mature" child, in the *Gillick* sense (one who has sufficient intelligence and understanding to comprehend the nature and consequences of the decision), has the right to refuse to co-operate, that is, it may refuse to be medically examined or subjected to intrusive questioning aimed at establishing the commission of an offence or grounds for care proceedings.

Costly and elaborate technological solutions are not necessarily a high priority: there is already evidence that the outcome of permitting therapeutic interview methods to be recorded and the results admitted as part of a case might be unfair to children, partly because of the manner in which interviews have been conducted with children and partly because of the traditional licence given to counsel for an accused in the way in which the defence case may be managed.

There is merit in stretching to the full the present discretions and flexibilities in the legal system to ameliorate any perceived deficiencies in court procedures. There is no legal reason why an officer of the court, specially trained to do so, should not be responsible for familiarising child witnesses with the courts and the processes before they must appear. A special prosecutor could be available who has ongoing contact with a child victim or witness so they feel they have a friend in court. They can be kept fully informed by that person at every stage of the proceedings. A support person may be in court with the child, in the witness box if the judge thinks it appropriate.

Judges and counsel can take off their wigs without losing their aplomb: a judge may arrange a courtroom in an informal way and ensure that witness, counsel and judicial officer all sit on the same level. And a judge has the power to allow evidence to be given from behind a screen (it is comparatively common in terrorist and underworld trials) or to screen the accused from the child's view while the witness gives evidence. Judges have always had the right to restrain badgering or improper conduct by counsel to a witness. If these discretions are not being used now we need to address that problem. It may simply be that not all courts appreciate the outcomes of research about the value of the evidence of children who have been properly treated during the investigative process.

Before any new technological means are introduced to protect the witness in court it is fundamentally important that every step is taken to protect misuse of that technology. If it requires legislation to limit the use of records, that should be addressed before it is begun.

The evidence given at the Cleveland Child Abuse Inquiry showed what chaos can be brought about by systems intended to protect children under stress. In that process a great disservice was done to the medical practitioners and social workers who acted as best they might within their professional boundaries. Those limits may have been too narrow, the services under-resourced and the size of the problem just too great to be handled. But in the process a greater injustice was done to some, at least, of the children – those who were found certainly not abused – and to the parents of those children. We stand to repeat those errors unless a co-ordinated national approach is adopted. But before all else the response must be based on listening to the child, and offering a flexible range of options. Children quite reasonably fear the cure to be worse than the disease. And the approach must be based on the inalienable right of a child to consultation and respect.