Child Sexual Abuse Prosecutions and the Presentation of The Child's Story

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At the centre of every child sexual abuse prosecution is the story told by the child. The child's story, in the form of the initial disclosure of abuse, is usually the starting point of the investigation; and the child's story, in the form of the evidence he or she gives at trial, is usually the foundation of the prosecution case. In this article I want to examine the ways in which that story can be received and used, both before and at trial. In particular I want to examine the reforms which have recently been carried out to the law governing child sexual abuse prosecutions in all of the Australian jurisdictions, and to consider whether any further reforms are necessary. I intend to do this in light of what I consider to be the three fundamental objectives of any reforms to the law in this area: first, the general facilitation of child sexual abuse prosecutions; secondly, the promotion of accurate fact finding in child sexual abuse trials; and thirdly, the protection of the interests of the child at the centre of the allegations.

FACILITATING PROSECUTION

The case for facilitating child sexual abuse prosecutions is not a difficult one to make. Child sexual abuse is a crime which can have devastating long term consequences for its victims;[1] which is massively under-reported and therefore under-prosecuted;[2] and which is alarmingly common.[3] The fact that its

* Law School, University of Melbourne. This article is the outcome of a research project funded by a Special Initiatives Grant from the University of Melbourne. The chief benefit of the grant was in providing the services of two exceptional research assistants, Amanda Whiting and Brendan Reilly. Information important to the writing of this article was provided by Mr Mark Byrne, from the Protection and Care Branch of the Department of Human Services, Victoria; Ms Sally Castell-McGregor, Executive Officer of the Children's Interest Bureau, Adelaide; Professor Graham Davies, from the Psychology Department at the University of Leicester; Ms Helen Green, Executive Officer of the Crime Prevention Committee of the Parliament of Victoria; and the Honourable Kenneth Smith MLC, formerly Chairman of the Crime Prevention Committee of the Parliament of Victoria. I would also like to acknowledge the helpful comments made by the referee. The usual disclaimers apply.

1 See, inter alia, John Myers, *Evidence in Child Abuse and Neglect* (2nd ed, 1992), Volume I, 220–4.

2 The rate of non-reporting has been estimated, by a variety of Australian and international studies, at anywhere between 70% and 94% of sexual offences: Victoria, Crime Prevention Committee of the Parliament of Victoria, *Combating Child Sexual Assault: An Integrated Model* (Inquiry into Sexual Offences Against Children and Adults, First Report, 1995) 75.

3 The under-reporting of sexual offences means that the true incidence of child sexual abuse can only ever be estimated. One method is to multiply the reported number of offences by an amount designed to reflect the ratio of reported to non-reported offences. For example, one recent study found that in the 1992–93 financial year Victorian Community Policing Squad officers received 3561 sexual offence reports, of which 2514

perpetrators are overwhelmingly male[4] and its victims largely female[5] also suggests that protecting the accused at the expense of the complainant could be objected to on the grounds that it constitutes a form of institutionalised discrimination; nevertheless, I would argue that none of the reforms discussed or suggested in this article impinge on the fundamental right of the accused to a fair trial or increase the risk of wrongful conviction, albeit that they might reduce the chances of the accused being wrongly *acquitted*. There are, of course, many different ways of making it easier to conduct, and to successfully conduct, child sexual abuse prosecutions; in this part of the article, however, I will only note the facilitative effect which the pre-trial videotaping of a child's allegations of abuse can have.

Discouraging Recantation

The withdrawal of an abuse allegation is a common development in child sexual abuse prosecutions, particularly where, as is usually the case, the alleged abuser is well known to the child.[6] Sometimes recantation can result from a psychological process which has been described as follows:

> After the disclosure has been made by the victims, the guilt connected with their participation in the abuse may intensify over the ensuing months. The feelings of guilt and personal responsibility may become combined with feelings of loss, and grieving for the emotional warmth that the abuser provided. At that stage, it is difficult for the victim to appreciate that the warmth and emotional availability were provided at a price. The victims

involved victims aged 16 or less: Crime Prevention Committee, id 35–36. Using the range of estimated non-reporting rates referred to above (supra fn 2), the true incidence of sexual offences against children in Victoria may lie anywhere between 8300 and 50000 per year.

[4] See, for example, Victoria, Department of Justice, *Sentencing Statistics: Higher Criminal Courts, Victoria 1994*, Table 12: only two women were charged in Victoria's higher courts with offences which did involve, or which might conceivably have involved, child sexual abuse, and of these two one was acquitted. In the Victorian Magistrates' Courts 187 persons were sentenced for offences in the category 'Other sexual offences', the category into which most if not all child sexual abuse convictions would fall. All of them were male: Victoria, Department of Justice, *Sentencing Statistics: Magistrates' Courts, Victoria 1994*, Table CR 4.9.

[5] This is not intended to suggest that boys are never victims of child sexual abuse, but it does appear that girls are approximately three times as likely as boys to be the victims of a reported case of sexual abuse: Crime Prevention Committee, op cit (fn 2) 36; Graham Angus and Sue Woodward, *Child Abuse and Neglect: Australia 1993–94* (Canberra, Australian Institute of Health and Welfare, Child Welfare Series No 13, AGPS, 1995) 10; and Judy Cashmore, 'The Prosecution of Child Sexual Assault: A Survey of NSW DPP Solicitors' (1995) 28 *Australian and New Zealand Journal of Criminology* 32, 34.

[6] The Victorian Crime Prevention Committee found that less than 7% of the cases reported to the Community Policing Squad involved offenders who were unknown to the child: 31% involved a parent or step-parent, 18% involved another relative, 34% involved a family friend or acquaintance and 7% involved someone in a position of authority over the child, such as a school teacher or sports coach: Crime Prevention Committee, id 37–8. Cf Cashmore, id 34, whose study found that just over a quarter of offenders were unknown to the complainant but notes that this figure is much higher than that suggested by other studies, and speculates that it may be because cases involving non-family members are more likely to be prosecuted than those that do involve family members.

begin to feel that they caused the family's break-up, and perhaps the incarceration of the abuser. Retraction may be a frequent accompaniment at this stage.[7]

In other situations, familial pressure may be brought to bear on the child to withdraw the allegation. The existence of a video record of what the child originally said is likely to make it much more difficult for the child to repudiate the allegation. In addition, the videotape may assist in convincing a non-abusing parent that abuse has occurred, and so reduce the pressure on the child to recant by making the non-abusing parent more supportive of the child making the allegation.[8]

Promoting Guilty Pleas

Although the conviction rate for child sexual abuse offences[9] is broadly in line with those for other offences,[10] this conviction rate is strongly dependent on the rate of guilty pleas. In 1994, for example, 10 out of 11 of those convicted of child sexual abuse offences in the Victorian County Court had pleaded guilty; in the 21% of cases where the accused pleaded not guilty, a conviction was entered in only 36%.[11] The fact that only about a third of contested cases resulted in conviction, confirms the importance of guilty pleas to the rate of conviction. The importance of guilty pleas should not be surprising, of course,

[7] David Jones and Mary McQuiston, *Interviewing the Sexually Abused Child* (Royal College of Psychiatrists, 1985) 8.

[8] John Myers, 'Investigative Interviews of Children: Should they be Videotaped?' (1993) 7 *Notre Dame Journal of Law, Ethics and Public Policy* 371, 377; Karen McCarthy, *Balancing the Scales for Children: Future Directions for Child Abuse in New South Wales* (1993) 33.

[9] 'Child sexual abuse' is being used here as a generic term encompassing a variety of offences, the defining characteristics of which are that they involve sexual acts and are committed against children, who for convenience can be defined as those aged 16 or less. When determining the number of child sexual abuse prosecutions from such statistics it is important to note that there are at least two possible sources of error. First, some acts of child sexual abuse may not be counted; for example, if the accused is charged with rape then the fact that the complainant was a child will not appear from the statistics. Secondly, some cases where the complainant was not in fact a child might be counted; for example, I have counted incest cases as cases of child sexual abuse, but in some of these cases it is possible that the 'child' might actually be an adult.

[10] In 1994, 59% of those tried in the Victorian Magistrates' Courts for child sexual abuse offences were convicted: *Sentencing Statistics: Magistrates' Courts,* op cit (fn 4), Table CR 4. At 86%, the County Court conviction rates were significantly higher: *Sentencing Statistics: Higher Criminal Courts,* op cit (fn 4), Table 2. The County Court conviction rate is, however, boosted by the extensive pre-trial filtering of cases by the DPP: Crime Prevention Committee, op cit (fn 2) 45. A New South Wales study arrived at a figure between these two: of 263 cases prosecuted in higher courts between April 1991 and April 1992, a conviction was entered in 68%: Cashmore, op cit (fn 5) 37.

[11] This contrasts with a figure of 71% for contested armed robbery cases during the same period: *Sentencing Statistics: Higher Criminal Courts,* op cit (fn 4), Table 2. The rate of conviction in contested cases in New South Wales was very similar, 38% compared to 36%: Cashmore, op cit (fn 5) 37. This 38%, however, contrasts with an overall conviction rate in contested cases of approximately 45%: Cashmore, op cit (fn 5) 39. The difference between the overall conviction rates in the Victorian County Court and the New South Wales higher courts confirms the importance of guilty pleas: the explanation for the lower overall conviction rate in New South Wales — 68% compared to 86%, see infra (fn 12) — is not to be found in a different rate of conviction in contested cases, but in the lower rate of guilty pleas: 49% compared to 79% in Victoria.

given that in most child sexual abuse cases the only person able to give direct evidence of the crime will be the child complainant. The general paucity of evidence will inevitably make it difficult for the prosecution to satisfy the jury of guilt beyond reasonable doubt.

There seems little doubt that changes to the laws under which child sexual abuse offenders are prosecuted can have an impact on the rate of guilty pleas;[12] and there is some evidence to suggest that the viewing by the accused and his or her legal advisers of a video record of interview with the child may make a guilty plea more likely.[13] Perhaps this is because it finally convinces the abuser that the child is prepared to disclose what has happened. Given the extent to which the overall conviction rate in child sexual abuse cases is dependent on the rate of guilty pleas this is clearly a desirable effect. But guilty pleas are also desirable because they relieve the child of the need to testify in court and therefore reduce the stress associated with child sexual abuse proceedings and, depending on the time at which the plea is entered, enable the child to begin the recovery process sooner. Therefore, any measures which increase the rate of guilty pleas, also provide a means of meeting the third of the fundamental objectives, protecting the interests of the child.

[12] The effect may not always be positive. For example, the percentage of those pleading guilty in child sexual assault prosecutions in New South Wales has fallen dramatically over the last fifteen years. In 1982, 84% of accused persons pleaded guilty and 59% of those who did not were found guilty, resulting in an overall conviction rate of 92%. In 1988, the rate of guilty pleas had fallen to 55%, the conviction rate in contested cases had fallen to 34%, and the overall conviction rate had fallen to 41%. In 1992, the plea rate was roughly the same at 58%, but the rate of conviction in contested cases had risen to 43%, raising the overall conviction rate to 58%: Cashmore, op cit (fn 5) 40. Cashmore, op cit (fn 5) 48–9, suggests several possible reasons for the change in the rate of guilty pleas. First, the increasing community awareness of the problem of child sexual abuse, together with the introduction of mandatory reporting in New South Wales (and now Victoria), has resulted in a vast increase in the number of cases being processed by the authorities. While only a small proportion of the cases in which an allegation of abuse is substantiated actually result in a prosecution, there has nevertheless been a substantial increase in the number of cases prosecuted. Secondly, penalties for child sexual abuse have increased over the years, giving the accused a greater incentive to avoid conviction. Thirdly, changes to the law of evidence mean that it is now possible for the accused to be convicted on the unsworn evidence of a child whose allegation of abuse is not corroborated. The effect of the previous rules was that there was no point in prosecuting a case where the child was too young to give sworn evidence and there was no corroborating evidence. Such cases are probably now being prosecuted, but it may still be difficult to do so successfully. That being so, the accused is unlikely to enter a plea of guilty, and may successfully contest the charge at trial, resulting in a reduction in both the rate of guilty pleas and the rate of conviction in contested cases.

[13] See 'Videotaping: Device for Fighting Child Abuse' (April 1984) 70 *American Bar Association Journal* 36; Myers, op cit (fn 8) 377; J Spencer and Rhona Flin, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) 197–198; and Graham Davies, Clare Wilson, Rebecca Mitchell and John Milsom, *Videotaping Children's Evidence: An Evaluation* (UK, Home Office, 1995) 35.

PROMOTING ACCURATE FACT FINDING

If the accused does not plead guilty and the matter proceeds to trial, then the next fundamental objective is to ensure that the right verdict is reached. This objective is obviously not limited to child sexual abuse prosecutions: promoting accurate fact-finding is a fundamental objective of any evidence law reform. In this article I want to examine three ways of promoting this objective: first, ensuring that the child's story is heard at all; secondly, ensuring that the story is heard in its best form; and thirdly, ensuring that the tribunal of fact is properly placed to decide whether or not to believe the story.

Hearing the Child's Story

Given the fundamental importance of the child's story to the proceedings, it is obviously important that the jury get to hear that story. This might sound a ludicrously obvious proposition, but under the traditional common law rules, if the child was too young to testify, and none of their out of court statements fell within the scope of an exception to the hearsay rule, then the jury would have to decide whether or not a child had been abused without ever hearing what the child had to say on the matter.

Telling the Story at Trial

Although I argue below that at-trial testimony is not necessarily the best way of receiving a child's story, and that it is also often contrary to the child's best interests to have to testify at trial, it is nevertheless, clearly desirable that any unjustifiable barriers to the child being *allowed* to testify at trial should be removed. The same is true of barriers to a child being allowed to give *sworn* evidence: clearly, if the child complainant gives unsworn evidence while all other witnesses testify on oath, then their testimony may well be devalued by the tribunal of fact. At common law, there is some uncertainty about the test which must be satisfied before a child will be permitted to give sworn evidence. The traditional common law test requires a belief in divine punishment for lying on oath,[14] and courts in Queensland,[15] South Australia[16] and Western Australia[17] have held that this test is still to be applied despite the obvious objections which can be made to it in a secular age. On the other hand, there is English[18] and Tasmanian[19] authority to the effect that a child will be permitted to give sworn evidence if he or she has a merely intellectual understanding of the obligations imposed by an oath. The *Evidence Act* 1995

[14] *R* v *Brasier* (1779) 1 Leach 199; 168 ER 202.
[15] *R* v *Brown* [1977] Qd R 220.
[16] *R* v *Schlaefer* (1992) 57 SASR 423.
[17] *Domonic* v *R* (1985) 14 A Crim R 418.
[18] *R* v *Hayes* (1977) 64 Cr App R 194.
[19] *Attorney-General's Reference (No 2 of 1993)* (1994) 4 Tas R 26, 73 A Crim R 567.

(Cth) and its State equivalents (the 'uniform evidence legislation'),[20] prefers the more liberal line of authority, providing that a person — including a child — is competent to give evidence unless they are incapable of 'understanding that, in giving evidence, he or she is under an obligation to give truthful evidence'.[21]

In all Australian jurisdictions a child adjudged incompetent to give sworn evidence may instead give unsworn evidence, provided that they meet certain requirements. In most Australian jurisdictions the chief requirement is that the child understand or acknowledge that testifying in court places them under a duty to tell the truth;[22] in some jurisdictions the question is whether the judge considers the child to be sufficiently intelligent to be able to testify reliably; [23] in others the question is whether the judge considers the child capable of giving an intelligible account of the events in question; [24] while some jurisdictions have instead a requirement that the child be capable of responding rationally to questions about the event.[25] Just as the uniform evidence legislation liberalises the test for competency to give sworn evidence, so does it liberalise the test for a child to give unsworn evidence. Under the legislation a child will be permitted to give unsworn evidence if he or she understands the difference between telling the truth and a lie, is told by the court that it is important to tell the truth, and indicates that he or she will not lie.[26]

These reforms to the competency tests will, no doubt, enable some children who would in the past have been ruled incompetent to tell their story to the court, although this of course depends to a large extent on the way the tests are applied by the courts.[27] But the fact remains that no matter what test is applied, there will always be some child victims of sexual abuse who are too young to testify, and with these children the only way of ensuring that their story is heard is to admit their out-of-court statements.

[20] The Commonwealth Act applies to proceedings in all federal or ACT courts. New South Wales has also adopted the legislation: *Evidence Act* 1995 (NSW). The Scrutiny of Acts and Regulations Committee of the Parliament of Victoria has recommended that Victoria follow suit: see *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries* (Melbourne, Government Printer, October 1996). Only South Australia has indicated that it will *not* consider adopting the Act.

[21] *Evidence Act* 1995 (Cth and NSW), s 13(1).

[22] See *Evidence Act* 1958 (Vic), s 23(1)(b); *Evidence Act* 1929 (SA), s 12(2)(b); and *Oaths Act* 1939 (NT), s 25A.

[23] See *Evidence Act* 1977 (Qld), s 9(1); and *Evidence Act* 1906 (WA), s 106C.

[24] See *Evidence Act* 1929 (SA), s 12(2)(a)(ii); and *Evidence Act* 1910 (Tas), s 122C.

[25] See *Evidence Act* 1929 (SA), s 12(2)(a)(i); and *Evidence Act* 1958 (Vic), s 23(1)(b). See also *Evidence Act* 1995 (Cth and NSW), s 13(3).

[26] *Evidence Act* 1995 (Cth and NSW), s 13(2).

[27] See Marion Dixon, ' "Out of the Mouths of Babes . . ." — A Review of the Operation of the Acts Amendment (Evidence of Children) Act 1992' (1995) 25 *UWALR* 301, 303–6. For a discussion of the inappropriate ways in which judges sometimes determine questions of competence, see Jill Hunter and Kathryn Cronin, *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (1995) 299. Some of these problems might be ameliorated by s 13(7) of the uniform evidence legislation, which permits the court determining a question of competence to 'inform itself as it thinks fit'. This would presumably include consulting appropriate professionals such as psychologists or social workers about the child's capacity to tell the truth.

The Narrative Backdrop

Almost the first question that anyone responsible for deciding whether or not an allegation of child sexual abuse was true would want answered is this: how did the allegation of abuse come to be made? We would want to know, in other words, the circumstances in which the child first came to tell the story of abuse, and how that story was told. This is because the child's initial telling of their story is a crucial part of the overall story being told at the trial. In general, of course, there are only two ways in which an allegation of abuse can come to light: the child may, of his or her own initiative, tell someone that they have been abused; or someone might ask them if they have been abused. In the former case we would want to know the circumstances in which the disclosure was made and the exact words used by the child to make the disclosure. In the latter case, we would want to know both what it was that had led to the inquiry being made, and how the disclosure was actually elicited. It may be difficult to force this sort of information through a test of relevance; I do not wish to suggest, for example, that a spontaneously made disclosure is necessarily more likely to be true than one elicited through questioning. What I am suggesting, however, is that this is information about which we are naturally, and legitimately, curious, and that for that reason it should be admitted.

This argument is gaining increasing acceptance in Canada, where intermediate appellate courts have begun to allow the prosecution to lead evidence of how the events unfolded, including the fact that a complaint was made.[28] Disclosure is described as being:

> part of the narrative in the sense that it advances the story from offence to prosecution or explains why so little was done to terminate the abuse or bring the perpetrator to justice. Specifically, it appears to me to be part of the narrative of a complainant's testimony when she recounts the assaults, how they came to be terminated, and how the matter came to the attention of the police.[29]

Evidence admitted under this approach is not admitted, in exception to the hearsay rule, to prove that the abuse occurred.[30] Nor can it be used as a prior consistent statement supporting the complainant's credibility, although it 'may be supportive of the central allegation in the sense of creating a logical framework for its presentation'.[31] But although this approach does not permit the truthfulness of the complainant's evidence to 'be supported by demonstrating its consistency with the *content* of a prior statement',[32] the jury can use the fact that the complaint was made to assist them 'in understanding whether the *conduct* of the complainant was consistent or inconsistent with

[28] See, inter alia, *R* v *George* (1985) 23 CCC (3d) 42, 45 (British Columbia Court of Appeal, MacFarlane JA); *R* v *Owens* (1986) 33 CCC (3d) 275, 279 (Ontario Court of Appeal, Lacourcière JA); *R* v *Albert* (1993) 80 CCC (3d) 193, 195 (Ontario Court of Appeal); and *R* v *R(G)* (1993) 80 CCC (3d) 130, 136 (Ontario Court of Appeal, Doherty JA).

[29] *R* v *F(JE)* (1993) 85 CCC (3d) 457, 472 (Ontario Court of Appeal, Finlayson JA).

[30] Id 476.

[31] Id 474.

[32] *R* v *Ay* (1994) 93 CCC (3d) 456, 469 (British Columbia Court of Appeal, Wood JA, emphasis in original).

her evidence of what occurred, a circumstance relevant to her credibility as a witness'.[33] The chief purpose of the evidence, however, is to provide 'background to the story — to provide chronological cohesion and eliminate gaps which would divert the mind of the listener from the central issue'.[34]

The Canadian approach is to be applauded for its recognition that the tribunal of fact will only be in a position to properly understand and evaluate the allegations which are the subject of the charge if they are permitted to hear the full narrative backdrop to the making of those allegations. To this author, however, denying the jury access to the *content* of the complaint for fear of undermining the rule against prior consistent statements, while permitting the bare fact of a complaint to be used as *conduct* relevant to credibility seems little short of spurious; indeed, it could be argued that the fact of a complaint being made is only consistent with the specific allegation of abuse which is the subject of the charge if we first assume that the content of that complaint is broadly consistent with the testimony of the complainant at trial. Furthermore, in a child sexual abuse case the exact words used by the child when making his or her initial disclosure of abuse would seem to be highly relevant to the question of credibility. I will argue this point further below; for the moment I would simply note that the narrative need not necessarily be defined so as to exclude the actual words used by the child.

The Canadian courts have only so far had to consider the admissibility of *complaints* of abuse. Often, however, abuse is discovered as a result of adult-initiated inquiries; in such cases the principle which allows the admission of a complaint as part of the narrative ought also, it is submitted, to allow the admission of whatever it was that led to those inquiries being made. In some cases it might simply be the fact that the child's behaviour or disposition had suffered some marked change; in others, it might be the fact that the child was exhibiting behaviour known to be associated with child sexual abuse, such as unusually sexualised behaviour or behaviour demonstrating sexual knowledge beyond that usually expected of a child of that age. In *R* v *D(GN)*, for example, a day care worker observed a young girl in her care sitting on top of a large doll, apparently simulating sex with the doll by means of pelvic thrusts. The day care worker subsequently noticed a small bruise on the child's pelvic bone; the combination of the behaviour and the bruise aroused her concern, eventually leading to a disclosure by the child of sexual abuse.[35] In a case like this the 'narrative' surely includes the behaviour of the child which led to the inquiries being made, as well as the content of those inquiries and the answers to them.

Moreover, if an association between child sexual abuse and the behaviour which led to the inquiry can be demonstrated, then the fact that the child exhibited such behaviour presumably makes it more likely that he or she was in fact abused. In other words, the behaviour ought to be admitted not only as

[33] R v Ay (1994) 93 CCC (3d) 456, 469 (British Columbia Court of Appeal, Wood JA, emphasis in original); see also 471.
[34] *R* v *F(JE)* (1993) 85 CCC (3d) 457, 474 (Ontario Court of Appeal, Finlayson JA).
[35] *R* v *D(GN)* (1993) 81 CCC (3d) 65, 68; see also *R* v *R(D), R(H) and W(D)* (1995) 98 CCC (3d) 353.

part of the background to the allegations, but also as evidence from which the occurrence of the abuse can actually be inferred.[36] There is no infringement of the hearsay rule in such an inference, provided that the unusual behaviour or knowledge is merely used to establish that the child has been abused. At common law, the extension of the hearsay rule to implied assertions makes it difficult — although not impossible[37] — to use a child's statements or conduct to prove the identity of the abuser without infringing the hearsay rule. But under the uniform evidence legislation statements or conduct which only implicitly identify a person as the abuser should be admissible for that purpose because of the restriction of the hearsay rule to intentional representations.[38]

In *R* v *Caron*, for example, a child commented that a piece of licorice looked like the accused's penis.[39] Even under the uniform evidence legislation it would clearly be hearsay (not to mention irrelevant) to prove that the accused's penis really did resemble a piece of licorice. But at common law it would also be hearsay to use the statement to prove that which it impliedly asserts: that the child had seen the accused's penis, a fact for which, in the circumstances of the particular case, there was no innocent explanation. Under the uniform evidence legislation, however, the hearsay rule would not prevent the drawing of such an inference, assuming the requirement of relevance can be satisfied.[40] Similarly, if the child's original disclosure takes the

[36] See Myers, op cit (fn 1), Volume II, 91–6. I leave aside here the question of whether expert psychological evidence ought to be admissible to explain the significance of the behaviour to the jury: see, inter alia, *R* v *Ingles* (1994) 18 *Crim LJ* 172; Robert Katims, 'State v Katsam: A Clarification of Evidentiary Standards in Vermont Child Sexual Abuse Cases' (1987) 12 *Vermont Law Review* 485; Matthew Dulka, 'Raising the Standard for Expert Testimony: An Unwarranted Obstacle in Proving Claims of Child Sexual Abuse in Dependency Hearings' (1988) 18 *Golden Gate University Law Review* 443; Patrick Larson, 'The Admissibility of Expert Testimony on Child Sexual Abuse Accommodation Syndrome as Indicia of Abuse: Aiding the Prosecution in Meeting its Burden of Proof' (1989) 16 *Ohio Northern University Law Review* 81; Linda Anderson, '*United States* v *Azure*: Admissibility of Expert Testimony in Child Sexual Abuse Cases' (1989) 15 *Journal of Contemporary Law* 285; Linda Carter, 'Admissibility of Expert Testimony in Child Sexual Abuse Cases in California: Retire *Kelly-Frye* and Return to a Traditional Analysis'(1989) 22 *Loyola of Los Angeles Law Review* 1103; and Monique Cirelli, 'Expert Testimony in Child Sexual Abuse Cases: Helpful or Prejudicial? *People* v *Beckley*' (1991) 8 *Thomas M Cooley Law Review* 425.

[37] See Andrew Palmer, 'Hearsay: A Definition that Works' (1995) 14 *U Tas LR* 29, 54–61.

[38] Section 59(1) of the legislation states the hearsay rule as follows: 'Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person *intended* to assert by the representation' (emphasis added).

[39] *R* v *Caron* (1994) 94 CCC (3d) 466, 476.

[40] At the risk of pushing this example to the point of absurdity, if it could be proved by independent evidence that the accused's penis did in fact resemble a piece of licorice, then the fact that the child knew this would, absent some innocent explanation for how the child came to possess this knowledge, constitute an item of circumstantial evidence from which it could be inferred that the accused had indeed abused the child. Such a use of the statement would be permitted both at common law — see Palmer, op cit (fn 37) 45–6 — and under s 72 of the uniform evidence legislation, which provides that the hearsay rule 'does not apply to evidence of a representation made by a person that was a contemporaneous representation about the person's health, feelings, sensations, intentions, *knowledge* or state of mind'. Section 72 does not, presumably, permit the use of a person's 'knowledge' to prove the truth of what the person knew, because if it did then

form of a question, or a comment which reveals but does not directly assert that abuse is occurring, then under the uniform evidence legislation it would be admissible as original evidence because of the lack of any intention to assert. If, on the other hand, the child's initial disclosure amounts to a direct assertion of abuse then it will be difficult to evade the operation of the hearsay rule without the existence of an applicable exception.

Getting the Best Evidence

Accurate fact-finding will also be promoted if the jury have access to the best possible evidence about the abuse. The common law generally assumes that the best form of evidence is that given by a witness on oath in open court. Where the witness is a child, however, that assumption is probably not justified. First, it may be that what the child said when the abuse was first disclosed is actually more persuasive evidence of abuse than anything the child might say at the time of the trial; and secondly, it may be that the child's testimony can be improved if it is taken in a different form from that which is used for adult witnesses.

Initial Disclosure

An initial disclosure of abuse may be made in circumstances and language which render it inherently plausible. Indeed, in *State of Arizona* v *Robertson* the court suggested that the child's initial revelation of abuse may, because of the vivid and clear way in which it is expressed, be the most powerful evidence of abuse, more powerful even than the child's testimony in court.[41] By the time the child comes to testify at trial, on the other hand, age-appropriate descriptions of the alleged acts may have been replaced with language which may suggest the possibility of coaching.[42] Moreover, the story may through repeated telling have become stale, and a flat and emotionless recitation of events is unlikely to persuade a jury that the child is telling the truth. I argued above that the initial disclosure ought to be admitted as part of the background to the case. I would now argue that in some cases it ought to also be admissible as proof of its content, that is, in exception to the hearsay rule.

The cases where the initial disclosure of abuse ought to be admitted as proof of its truth are essentially those where the child's statement or statements seem sufficiently reliable that they ought to be admitted notwithstanding their character as hearsay. In the United States, many jurisdictions have

the hearsay rule would be effectively abrogated. Instead, the section appears to be intended to permit proof of the fact that a person knew something, where that knowledge is either a fact in issue, or a fact from which a relevant inference can be drawn.

41 *State of Arizona* v *Robertson* 735 P 2d 801, 812 (1987).

42 Spencer and Flin, op cit (fn 13), 196, for example, comment that 'When an eight-year-old child says, "And then he ejaculated over me", defence counsel will immediately ask, "Did your mummy teach you that word?", to which the answer will probably be yes — with the resulting suspicion that the child's knowledge of such things also comes from what her mother told her rather than from witnessing an indecent act. If when she first described the incident her words were "And then he kind of flicked white wee from his willy", a videotape would reveal that she originally used words appropriate to her age and understanding'.

created special exceptions for reliable hearsay in child sexual abuse cases.[43] While it might be thought desirable that Australian jurisdictions follow this lead, it is probably unnecessary. Section 65(2)(c) of the uniform evidence legislation already allows for the admission of hearsay statements 'made in circumstances that make it highly probably that the representation is reliable';[44] and since the judgment of Mason CJ in *Walton* v *R*,[45] the common law in Australia has been moving in the same direction.[46] How to actually go about assessing the reliability of the out-of-court statements of child sexual abuse victims is clearly a large and complex topic, and I can do no more here than point to some of the relevant literature,[47] including the rapidly growing number of Canadian judgments[48] which have had to grapple with the reliability of out-of-court statements of child sexual abuse victims since the Canadian Supreme Court's decisions in *R* v *Khan*[49] and *R* v *Smith*.[50]

A second approach, which has been adopted in four Australian jurisdictions, is to create a special exception to the hearsay rule for the prior statements of child witnesses.[51] Although the provisions vary in their details they share the following defining feature: the question upon which the admissibility of the statements turn is not one of reliability, but of whether the child is

[43] See Myers, op cit (fn 1), Volume II, 266–273; Jay C Howell, revised by Judith Drazen Schretter and Donna Castle Aspell, *Selected State Legislation: A Guide for Effective Laws to Protect Children* (3rd ed, National Center for Missing & Exploited Children, Department of Justice, USA, 1993), 86–7; Cynthia Hennings, 'Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Abuse Prosecutions' (1989) 16 *Ohio Northern University Law Review* 663, 672–3; Robert Mosteller, 'Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions' (1993) 4 *University of Illinois Law Review* 691, 696–700; and Kate Warner, 'Child Witnesses in Sexual Assault Cases' (1988) 12 *Crim LJ* 286, 294.

[44] Section 65 applies when the maker of the representation is unavailable to give evidence. If the maker of the representation is available, then s 66(2) of the legislation renders the representation admissible provided that 'when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation'.

[45] (1989) 166 CLR 283, 293.

[46] See, inter alia, Stephen Odgers, 'Walton v The Queen — Hearsay Revolution?' (1989) 13 *Crim LJ* 201, 214; Andrew Palmer, 'The Reliability-Based Approach to Hearsay' (1995) 17 *Sydney LR* 522; and Jill Hunter, 'Unreliable Memoirs and the Accused: Bending and Stretching Hearsay — Parts One and Two' (1994) 18 *Crim LJ* 8, 76.

[47] See, inter alia, Palmer, op cit (fn 46); Myers, op cit (fn 1), Volume II, 245–265; Günter Köhnken and Max Stellar, 'The Evaluation of the Credibility of Child Witness Statements in the German Procedural System' (1988) 13 *Issues in Criminological and Legal Psychology* 37; Gilles Renaud, 'A Thematic Review of "Principled Hearsay" in Child Sexual Abuse Cases' (1995) 37 *Criminal Law Quarterly* 277; and André Marin, 'How to Assess Reliability in Khan and K.G.B. Applications' (1996) 38 *Criminal Law Quarterly* 353.

[48] See, for example, *R* v *A(S)* (1992) 76 CCC (3d) 522; *R* v *D(GN)* (1993) 81 CCC (3d) 65, 81–2; *R* v *G (M)* (1994) 93 CCC (3d) 347; *R* v *Pearson* (1994) 95 CCC (3d) 365; *R* v *Sterling* (1995) 102 CCC (3d) 481; and *R* v *Rockey* (1995) 99 CCC (3d) 31.

[49] (1990) 59 CCC (3d) 92.

[50] (1992) 94 DLR (4th) 590. See PB Carter, 'Hearsay: Whether and Whither' (1993) 109 *LQR* 573.

[51] *Evidence Act* 1977 (Qld), s 93A; *Evidence Act* 1929 (SA), s 34ca; *Evidence Act* 1910 (Tas), s 122F; and *Evidence Act* 1906 (WA), s 106H. Unlike the provisions in the other three jurisdictions, the Queensland provisions are not restricted to particular types of proceeding but apply generally. The creation of some such provision has also been advocated by a committee of the Victorian Parliament: Crime Prevention Committee, op cit (fn 2) 186.

available to testify and can therefore be cross-examined by the defence.[52] Given that many such statements would already have been admissible, if the child testified, for the limited purpose of buttressing the child's credit under the 'recent complaint' exception to the rule against prior consistent statements, the chief effect of the provisions is to make such statements admissible as evidence of the facts in issue.[53] Similarly, s 60 of the uniform evidence legislation makes an exception to the hearsay rule for statements admitted for a non-hearsay purpose, such as the prior consistent and inconsistent statements of a witness admitted for the purpose of buttressing or impeaching a witness' credit.[54]

Although similar in effect, however, the various Australian provisions do vary in their detail.[55] In Queensland the statement must have been made by a child with 'personal knowledge of the matters dealt with by the statement'[56] and must be contained in a 'document', which includes a video recording.[57] It must either have been made 'soon after the occurrence of the fact' or 'to a person investigating the matter to which the proceeding relates before or soon after it becomes apparent to the person that the child is a potential witness in any proceeding'.[58] In Tasmania the statement must have been recorded 'in writing, electronically, or otherwise' and a copy must have been given to the defendant.[59] In Western Australia the statement must have been made before the commencement of proceedings, but it need not have been recorded in any way.[60] The defendant must, however, have been given a copy of the statement or informed of its details.[61] Finally, in South Australia the statement may only be admitted if the court considers it to have 'sufficient probative value to justify its admission'.[62]

Provided that the different conditions imposed by each Act are met, then — Queensland aside — all of these provisions theoretically allow for the

[52] *Evidence Act* 1977 (Qld), s 93A(1)(c); *Evidence Act* 1929 (SA), s 34ca(2); *Evidence Act* 1910 (Tas), s 122F(1)(c); and *Evidence Act* 1906 (WA), s 106H(1)(b).

[53] See *R* v *Corkin* (1989) 50 SASR 580.

[54] See Palmer, op cit (fn 46), 540–3. The admissibility of a witness' prior consistent and inconsistent statements under the legislation is determined by ss 108(3) and 106(c) respectively.

[55] Including the cut-off age for the child witness: in Queensland the child must have been under the age of 12 at the time the statement was made; in South Australia the child must be 12 or under at the time of the trial; in Tasmania, the child must be under the age of 17; and in Western Australia, the child must be under the age of 18.

[56] *Evidence Act* 1977 (Qld), s 93A(1)(a). The time at which the child must have had 'personal knowledge' is the time at which the statement was made. The fact that the child may be unable to recall the events at the time of trial does not prevent the admission of the statement: *R* v *Cowie, ex parte Attorney-General* [1994] 1 Qd R 326. Nor does it matter that there may be discrepancies between what the child said in the statement and what the child says at trial: *Aaron Shane Morris* (1995) 78 A Crim R 465, 471. In *Frederick Arthur Robinson* (1995) 80 A Crim R 358, 364, however, Fitzgerald P indicated that it might be appropriate for the judge to exclude in the exercise of discretion a s 93A statement in cases where the statement can not properly be tested.

[57] *Evidence Act* 1977 (Qld), s 5.

[58] *Evidence Act* 1977 (Qld), s 93A(1)(b).

[59] *Evidence Act* 1910 (Tas), s 122F(1).

[60] *Evidence Act* 1906 (WA), s 106H(3).

[61] *Evidence Act* 1906 (WA), s 106H(1)(a).

[62] *Evidence Act* 1929 (SA), s 34ca(1).

admission of the child's initial disclosure of abuse.[63] The problem with the Queensland provisions is that an initial disclosure of abuse subsequently recorded in documentary form may not meet the requirement that the statement be 'contained in a document'. All of the provisions should, however, allow for the admission of the child's first official statements or interviews. The advantage of having special exceptions for official statements is that the official statements or interviews could well be recorded on video, and video not only captures the words used by the child, but also the child's demeanour, their facial expressions and their gestures, all of which may be as important as the words themselves in assessing the credibility of the statement. But although these provisions share with the reliability-based approach the advantage of ensuring that the court may hear the exact words used by the child when the complaint was first made, their usefulness is limited by the fact that they only apply when the child actually testifies; they do nothing to ensure that the words of a child considered too young to testify can still be heard by the court.[64]

In cases where the child does testify, however, then there seems little to choose between the two approaches. Importantly, both would allow the child's initial complaint of abuse to be used for substantive purposes in cases where the child had forgotten the incident by the time of the trial,[65] where the child was no longer willing to discuss the matter,[66] and even in cases where the child had recanted.[67] Under the orthodox rule in cases where the child had forgotten the incident or was unwilling to talk about it, there would simply be no evidence from the child at all; while in cases where the child had recanted and was now effectively testifying for the defence, his or her prior statements could be used only to demonstrate that the child was not a credible witness when he or she denied that the abuse occurred. But the fact that a person is not a credible witness when they say one thing, is not evidence of the truth of its opposite. It merely means that there is again no evidence on the question. If the prior statements can be used substantively, however, then the fact that the child recants or forgets will not necessarily be fatal to the prosecution case: the tribunal of fact can choose to find that the child was telling the truth when he or she made the original allegation.

Alternative Arrangements for Children's Testimony

Testifying in the traditional common law trial can be a highly stressful and traumatic experience for children. Anything which can be done to reduce the levels of stress for children can be justified on two bases: first, that it will reduce the negative impact of the proceedings on the child; and secondly, that

[63] Although the profession may not yet have realised this: see Dixon, op cit (fn 27), 315.

[64] See, for example, *R* v *Khan* (1990) 59 CCC (3d) 92; and *R* v *P(J)* (1992) 74 CCC (3d) 276.

[65] See *Khan* v *College of Physicians and Surgeons of Ontario* (1992) 9 OR (3d) 641; and *R* v *R(D), R(H) and W(D)* (1995) 98 CCC (3d) 353, 389.

[66] See *R* v *S(KO)* (1991) 63 CCC (3d) 91.

[67] See *R* v *KGB* [1993] 1 SCR 740; and *U(FJ)* v *R* (1995) 101 CCC (3d) 97.

it may thereby improve the quality of the child's testimony. The duality of the justification for 'alternative arrangements' is reflected in the Victorian provisions which allow the use of such arrangements on the grounds that the witness is either likely to 'suffer severe emotional trauma' or is likely to 'be so intimidated or stressed as to be severely disadvantaged as a witness'.[68] My present concern is only with the second of these justifications. The main conclusions of one study, for example, were that 'current court room procedures militate against eliciting complete testimony from children' so that 'compared to a courtroom setting, the quality and reliability of children's testimony is significantly enhanced in a smaller, more intimate videotape environment'.[69] This accords with common sense: the formality and strangeness of courtroom proceedings, intended to impress participants with the importance of the occasion, merely seem likely to inhibit and confuse children. The highly public nature of courtroom proceedings also seems likely to inhibit full and frank disclosure given the private and embarrassing nature of many of the questions which a child must answer in a sexual abuse case. A relaxed child is more likely to be able to understand the questions being asked of them; more likely to be able to recall all of the details of the incident about which they are being questioned; and is more likely to be forthcoming with their answers.

There are essentially two ways of reducing the child's stress and so improving his or her testimony: first, the courtroom itself can be made into a less formal and intimidating environment; or secondly, the child can be permitted to testify from somewhere other than the court. There are provisions reflecting both approaches in the various Australian jurisdictions. In some jurisdictions the legislation confers a general power on the court to order whatever alternative arrangements it thinks appropriate, while also providing a non-exclusive list of the kinds of arrangements which a court might order.[70] In the other jurisdictions, the court's choice of alternative arrangements is restricted to those specified in the legislation. In New South Wales, the legislation now confers a 'right' on children to make use of the alternative arrangements. In almost all jurisdictions, the jury are to be directed that no adverse inference is to be drawn against the accused from the use of any of the alternative arrangements.[71] In terms of making the courtroom a less intimidating environment, courts in various Australian jurisdictions may exclude people from the court-

[68] *Evidence Act* 1958 (Vic), s 37C(2)(b).

[69] Paula E Hill and Samuel M Hill, 'Videotaping Children's Testimony: An Empirical View' (1985) *Michigan Law Review* 809, 816 and 809; see also Graham Davies and Elizabeth Noon, 'Video links: their impact on child witness trials' (1993) 20 *Issues in Criminological and Legal Psychology* 22, 24 discussing the findings of Davies and Noon, *An Evaluation of the Live Link for Child Witnesses* (London, Home Office, 1991); Judy Cashmore, 'The Use of Video Technology for Child Witnesses' (1990) 16 *Mon LR* 228, 232–3; *R* v *L(DO)* (1993) 85 CCC (3d) 289, 309 (Supreme Court of Canada, L'Heureux-Dubé J); *R* v *Toten* (1993) 83 CCC (3d) 5, 18 (Ontario Court of Appeal, Doherty JA); and *R* v *B(DC)* (1994) 91 CCC (3d) 357, 370 (Manitoba Court of Appeal, Philp JA).

[70] *Evidence Act* 1929 (SA), s 13(1); and *Evidence Act* 1958 (Vic), s 37C(2); *Crimes Act* (1900) NSW ss 405F–405FA.

[71] *Evidence (Closed-Circuit Television) Act* 1991 (ACT), s 6; *Crimes Act* 1900 (NSW), s 405; *Evidence Act* 1939 (NT), s 21A(3); *Evidence Act* 1929 (SA), s 13(7); *Evidence Act* 1958 (Vic), s 37C(4); and *Evidence Act* 1906 (WA), s 106P.

room while the child is testifying;[72] may direct counsel not to robe, or to remain seated while questioning the child;[73] or may permit the child to be accompanied by someone who can provide them with emotional support during their testimony.[74] One of the primary causes of stress for a child may be the fact that the alleged abuser is present while they are testifying. Several jurisdictions allow the court to remove this source of stress by ordering the use of screens to remove the accused from the child's field of vision.[75] In Western Australia, an unrepresented accused is also prohibited from directly cross-examining the child witness;[76] and in Queensland and Western Australia the court may order that the accused actually be removed from the court, and placed in a room to which the child's testimony is transmitted by closed-circuit television or 'live-link'.[77]

The other option is to remove the child from the court. This can be done by either receiving the child's testimony live, but from a place other than the courtroom, or by accepting the child's evidence in a pre-recorded form. There are now closed circuit television or 'live-link' provisions in all jurisdictions except for Queensland. The provisions do, however, vary in their application from jurisdiction to jurisdiction, in some applying to all child witnesses,[78] and in others only in prosecutions for sexual offences.[79] In some jurisdictions this is now the normal method for children in child sexual abuse cases to testify,[80] subject only to the child expressing a preference to testify from the courtroom itself.[81] In other jurisdictions, the child will testify like any other witness unless the court — on the application of the prosecution, the witness, or on its

[72] *Evidence Act* 1939 (NT), s 21A(2)(d); *Evidence Act* 1977 (Qld), s 21A(2)(b); and *Evidence Act* 1958 (Vic), s 37C(3)(f).

[73] *Evidence Act* 1958 (Vic), s 37C(3)(d) and (e).

[74] See *Crimes Act* 1900 (NSW) s 405CA; *Evidence Act* 1939 (NT), s 21A(2)(c); *Evidence Act* 1977 (Qld), s 21A(2)(d); *Evidence Act* 1929 (SA), s 13(2)(b); *Evidence Act* 1910 (Tas), s 122E; *Evidence Act* 1958 (Vic), s 37B; and *Evidence Act* 1906 (WA), s 106E. This power may also be implicit in s 5(3)(a) of the *Evidence (Closed-Circuit Television) Act* 1991 (ACT), which allows the court to specify who may be present with the child while they are testifying via closed-circuit television.

[75] *Crimes Act* 1900 (NSW), s 405F(3)(b); *Evidence Act* 1939 (NT), s 21A(2)(b); *Evidence Act* 1977 (Qld), s 21A(2)(a); *Evidence Act* 1929 (SA), s 13(2)(b); and *Evidence Act* 1958 (Vic), s 37C(3)(b).

[76] *Evidence Act* 1906 (WA), s 106G; see also *Crimes Act* 1900 (NSW) s 405FA.

[77] *Evidence Act* 1977 (Qld), s 21A(2)(a); and *Evidence Act* 1906 (WA), s 106N(2)(b).

[78] *Evidence (Closed-Circuit Television) Act* 1991 (ACT), s 4A(1); *Evidence Act* 1939 (NT), s 21A; and *Evidence Act* 1929 (SA), s 13(1) and (10)(a); and *Evidence Act* 1906 (WA), s 106N(1)(a), provided that the offence being prosecuted is listed in Schedule 7 of the Act, which contains a list of serious sexual and non-sexual offences. Note, however, that the age up to which the provisions apply varies from jurisdiction to jurisdiction.

[79] *Crimes Act 1900* (NSW), s 405D(1); *Evidence Act* 1910 (Tas), s 122A; and *Evidence Act* 1958 (Vic), s 37C(1).

[80] *Evidence (Closed-Circuit Television) Act* 1991 (ACT), s 4A(1); *Evidence Act* 1910 (Tas), s 122G(1); and *Evidence Act* 1906 (WA), s 106N(2)(a). In Western Australia the judge must order either that the child testify from another room via closed-circuit television, or that the accused be placed in another room to which the child's evidence is transmitted via closed-circuit television.

[81] *Evidence (Closed-Circuit Television) Act* 1991 (ACT), s 4A(2)(a); *Evidence Act* 1910 (Tas), s 122H(2); and *Evidence Act* 1906 (WA), s 106O. In the ACT it is also subject to the possibility that the proceedings will be unreasonably delayed, or that the court will be unable to ensure that the proceedings are fair: *Evidence (Closed-Circuit Television) Act* 1991 (ACT), s 4A(2)(b) and (c).

own motion — orders otherwise.[82] In exercising the discretion, the various provisions often direct the judge to take account of one or more of the following considerations: the possibility that the courtroom might provide an intimidating environment in which to testify;[83] the possibility that testifying in the court room itself might cause mental or emotional harm or distress to the child;[84] the possibility that the child testifying via closed-circuit television might promote better fact-finding;[85] and the possibility that it might be unfair to the accused.[86] The capacity of the live-link to improve the quality of children's evidence has been confirmed by an Australian Law Reform Commission study.[87]

The second way of allowing the child to testify from somewhere other than the courtroom is to admit the child's evidence in a pre-recorded form. There are now provisions allowing this in Queensland, Victoria and Western Australia. The great advantage of videotape over live-link, of course, is that the child's evidence can theoretically be taken early in the course of the proceedings. As we shall see below this has benefits in terms of protecting the interests of the child; but given the rate at which memory — particularly children's memory — deteriorates,[88] an early version of events may also contain important details liable to be forgotten by the time of trial.[89] In other words, the statement recorded in the video may be better evidence of what happened than the testimony of the child at a subsequent trial, even if that testimony is received by live-link.[90] An important issue in evaluating the provisions, therefore, is the extent to which they permit the video recording to be made early in the proceedings. The Queensland provisions are the sketchiest. They apply to

[82] *Crimes Act* 1900 (NSW), s 405D; *Evidence Act* 1939 (NT), s 21A(2)(a); *Evidence Act* 1929 (SA), s 13(2)(a); *Evidence Act* 1958 (Vic), s 37C(2) and (3)(a); and *Evidence Act* 1906 (WA), s106. Note, however, that in New South Wales the legislation confers a 'right' on a child witness to testify by closed-circuit television.

[83] *Evidence Act* 1929 (SA), s 13(1).

[84] *Crimes Act* 1900 (NSW), s 405D(3)(a); *Evidence Act* 1929 (SA), s 13(1); and *Evidence Act* 1906 (WA), s 106.

[85] *Crimes Act* 1900 (NSW), s 405D(3)(b); and *Evidence Act* 1906 (WA), s 106.

[86] *Evidence (Closed-Circuit Television) Act* 1991 (ACT), s 4A(2)(c); and *Evidence Act* 1929 (SA), s 13(3).

[87] Australian Law Reform Commission, *Children's Evidence: Closed Circuit TV* (ALRC 63, 1992), paras [7] and [16], summarising the findings of Judy Cashmore, *The use of closed circuit television for child witnesses in the ACT* (ALRC Children's Evidence: Research Paper 1, 1992). The relevant finding was that children who wish to testify via closed-circuit television and are permitted to do so make more effective witnesses than those who did not use the system even though they wanted to. Prosecutors may nevertheless, avoid the use of the live-link on the basis that the child's testimony is likely to have a greater impact on the jury if the child is emotionally distressed: see Judy Cashmore, 'The Perceptions of Child Witnesses and Their Parents Concerning the Court Process: Results of the DPP Survey of Child Witnesses and Their Parents' (unpublished paper, NSW Office of the DPP, 1993), discussed in Mark Aronson and Jill Hunter, *Litigation* (5th ed, 1995) 745–6. See also references, infra fn 102.

[88] Australian Law Reform Commission, *Evidence* (ALRC 26, 1985), Volume I, paras [664]-[667]; Cashmore, op cit (fn 69) 238; *R* v *Toten* (1993) 83 CCC (3d) 5, 18 (Ontario Court of Appeal, Doherty JA).

[89] David P Jones, 'The Evidence of a Three-Year-Old Child' [1987] *Crim LR* 677.

[90] For this reason, and because a fuller account is given, video-taped testimony was rated as better evidence than traditional testimony by child protection and court professionals in an English study: Davies et al, op cit (fn 13).

children under the age of 12, or to witnesses who, in the court's opinion, would be likely to suffer 'severe emotional trauma,' or to be 'so intimidated as to be disadvantaged as a witness' if required to testify in accordance with the usual rules and practice of the court.[91] Such a witness is referred to as a 'special witness'. The legislation then provides that:

> Where a special witness is to give or is giving evidence in any proceeding, the court may, of its motion or upon application made by a party to the proceeding, [order] . . . that a videotape of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the videotaped evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness. [92]

As the above provisions make clear, such a videotape can only be made by judicial order, and the absence of any provision allowing the making of such an order before the trial itself means that the video recording is unlikely to be made at the time when the child's memory of the events are freshest.[93]

The Victorian legislation — which only applies in sexual offence prosecutions — is also intended to create an alternative to traditional testimony. The legislation allows a child under 18 to give their evidence-in-chief in the form of an audio or video recording of them answering questions put by a specially trained police officer,[94] provided that a transcript of the recording is served on the accused or his or her advisers 14 days prior to the hearing; the accused and his or her advisers are given a reasonable opportunity to hear or view the recording; and the child attests at the trial to the truthfulness of the contents of the recording and is available for cross-examination.[95] Any video recording meeting these conditions will be admissible as evidence at the trial, subject only to the trial judge's (unguided) discretion to rule it inadmissible.[96] Unlike Queensland, however, it is clear that a video-recording can be made at the very earliest stages of the investigation, at a time when the child's memories of the events are most likely to be fresh and reliable.

Like Queensland, but unlike Victoria, the Western Australian legislation provides that a video recording to be used as evidence is to be made on the order of a judge; but unlike Queensland, the Western Australian legislation makes it clear that the prosecution may seek such an order at any time after the proceedings have been commenced.[97] The Western Australian legislation also departs from Victoria in permitting the court to use the video recording not only as a substitute for the child's evidence-in-chief alone,[98] but also as a

[91] *Evidence Act* 1977 (Qld), s 21A(1).
[92] *Evidence Act* 1977 (Qld), s 21A(2)(e).
[93] Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991), [4.38].
[94] *Evidence Act* 1958 (Vic), s 37B(2) *Evidence (Recorded Evidence) Regulations* 1994 (Vic), reg 5.
[95] *Evidence Act* 1958 (Vic), s 37B(2) and (3).
[96] *Evidence Act* 1958 (Vic), s 37B(4).
[97] *Evidence Act* 1906 (WA), s 106I(1).
[98] *Evidence Act* 1906 (WA), s 106I(1)(a) and s 106J.

substitute for the child's entire testimony.[99] In the former case, the child may still be cross-examined at the trial.[100] In the latter case, the examination and cross-examination of the child are both to be carried out at a 'pre-trial hearing'. This capacity of the Western Australian legislation to relieve the child of the need to even appear at the trial distinguishes the Western Australian legislation from its Victorian and Queensland counterparts. As will be discussed below, this has great advantages from the point of view of protecting the child's interest. It makes a great deal of sense from a strictly evidential point of view as well, however, because if it is desirable to capture the child's allegations while the events are still fresh in their memory, then it is presumably desirable to cross-examine them about those allegations at the same time. As one Canadian judge commented:

> The witness' recollection of the relevant events may not be the same at the time of trial as it was when she made her statement. Indeed, it would be entirely reasonable for those concerned about the child's welfare to encourage the child, once the statement was videotaped, to put the events out of her mind. The reliability of a recollection recounted long before the trial . . . cannot be judged when the opportunity of testing it arises only when the memory has faded.[101]

There are, then, two ways in which pre-recording can improve the quality of the child's evidence, only the first of which is shared with evidence transmitted into the courtroom by live-link. First, the child may perform better as a witness because he or she is allowed to perform in a less stressful environment; and secondly, the child's story may be captured while the events are still fresh in his or her memory. These advantages may, however, be counteracted to some extent by the fact that the testimony of a witness who appears in the courtroom only on a television screen appears to have less impact on a jury than the testimony of a witness who testifies from the courtroom itself.[102] In other words, although the child may be able to testify more coherently and completely about the events in question, their testimony may be given less weight than if they had testified in the traditional manner. In light of the additional advantages discussed below of the live-link and pre-recorded testimony, however, this is probably a trade-off worth making.

[99] *Evidence Act* 1906 (WA), s 106I(1)(b) and s 106K; It is these provisions, rather than those above (supra fn 98), which have most frequently been used: see Dixon, op cit (fn 27) 313.

[100] See *Evidence Act* 1906 (WA), s 106J(1)(b); Law Reform Commission of Western Australia, op cit (fn 93), para [4.29].

[101] *R* v *Laramee* (1991) 65 CCC (3d) 465, 487 (Manitoba Court of Appeal, Twaddle JA).

[102] See, inter alia, Davies and Noon (1991), op cit (fn 69) 135; Davies and Noon (1993), op cit (fn 69) 24; Davies et al, op cit (fn 13) 8, 13 and 42; Spencer and Flin, op cit (fn 13) 109–111; Gail Goodman, 'The Reliability of Children's Testimony', paper presented to the NATO Advanced Study Institute conference on The Child Witness in Context: Cognitive, Social and Legal Perspectives, Lucca, Italy, May 1992; David Ross, Steve Hopkins, Elaine Hanson, R Lindsay, Kirk Hazen and Tammie Eslinger, 'The Impact of Protective Shields and Videotape Testimony on Conviction Rates in a Simulated Trial of Child Sexual Abuse' (1994) 18 *Law and Human Behaviour* 533; and Crime Prevention Committee, op cit (fn 2) 199.

Deciding Whether to Believe the Story

Like many other sexual offences, the circumstances in which child sexual abuse is usually committed means that the jury's decision often boils down to the simple question of who to believe: the child complainant, or the accused. Even if there is expert medical or psychological evidence suggesting that the child probably has been abused, such evidence is usually incapable of identifying the perpetrator of the abuse, which will again mean that the jury's ultimate choice is still one about which of the two witnesses to believe. In child sexual abuse cases the question of the child's credibility is, therefore, a crucial one. Historically, the common law stacked the odds against the child being believed, with the judge being required to give a corroboration warning in respect of the unsworn evidence of children. Fortunately, this requirement has now been abolished in most Australian jurisdictions,[103] with some jurisdictions expressly prohibiting the giving of a warning which suggests that children form an unreliable class of witness.[104] Nevertheless, a courtroom is such an alien and stressful environment for a child that the juror's task of assessing the child's credibility may be almost impossible if they are restricted to what they see of the child in court. I have already argued that the child's initial disclosure of abuse ought to be admitted as part of the background narrative to the case, and sometimes as proof of its truth; I would now add that knowing the circumstances of how an allegation came to be made is also crucial to determining the child's credibility, a fact which has been recognised by Canadian courts.[105] In this part of the article I want to consider two further matters relevant to the manner in which a child's credibility should be assessed: first, the way in which the child was interviewed by investigators; and secondly, the way in which the child should be cross-examined at trial.

[103] *Evidence Act* 1995 (Cth and NSW), s 164; *Evidence Act* 1929 (SA), s 12a; *Evidence Act* 1910 (Tas), s 122D(1); *Evidence Act* 1906 (WA), s 106D. The requirement now survives only in Queensland, where the common law rule still applies (*R* v *CBR* [1992] 1 Qd R 637) and the Northern Territory: *Evidence Act* 1939 (NT), s 9C. An accused person in South Australia cannot, however, be convicted on the uncorroborated evidence of a child who did not satisfy the tests set out above; supra ffn 22–25. Although one of the main justifications for abolishing the warning requirement is that it might result in an increase in the rate of conviction, there is no evidence that it has had any such effect: see Cashmore, op cit (fn 5) 49; and Dixon, op cit (fn 27) 302–3.

[104] *Evidence Act* 1910 (Tas), s 122D(2); *Evidence Act* 1958 (Vic), s 23(2A); and *Evidence Act* 1906 (WA), s 106D. This is not intended to prevent the judge from giving a warning tailored to the specific facts of the case: see *Evidence Act* 1958 (Vic), s 23(2B).

[105] *R* v *B(DC)* (1994) 91 CCC (3d) 357, 373 (Manitoba Court of Appeal, Philp JA), 'Evidence of a child's voluntary and spontaneous account of sexual abuse may be highly relevant to the trial judge's difficult task of credibility finding'; and 381 (Twaddle JA), 'credibility may more readily be judged in the case of a child by considering the circumstances in which a complaint was first made.'

Recording the Investigation

It is often claimed in child sexual abuse cases that the child's memory may have been contaminated by the use of improperly leading or suggestive methods of questioning.[106] It actually appears that children are far less suggestible than used to be believed, so the fear of contamination is probably exaggerated. One study, for example, found that:

> children, at least by the age of 4 years on average, generally know that they were not physically or sexually abused when they were not. Moreover, they are able to assert this knowledge even under the force of suggestive questioning.[107]

Nevertheless, the fear of contamination during the investigative phase of the proceedings arguably means that the investigation, like the initial disclosure, should be considered to form part of the 'narrative' backdrop to the trial. What it undoubtedly means, however, is that the way in which the child was interviewed by police or other official investigators is crucial to a proper assessment of the credibility of those allegations.

If investigative interviews with the child are not adequately recorded then claims of contamination will be inherently difficult to either substantiate or rebut.[108] The existence of a video record of all such interviews, on the other hand, would either make it possible for the defence to show a foundation for the fear of contamination, or allow the prosecution to rebut any unfounded suggestions to that effect. Furthermore, the scrutiny to which interviews would be subjected as a result of video-recording should lead to an improvement in the quality of interviews and the elimination of any undesirable

[106] See, inter alia, Hollida Wakefield and Ralph Underwager, *Accusations of Child Sexual Abuse* (1988), 33; John Christiansen, 'The Testimony of Child Witnesses: Fact, Fantasy and the Influence of Pre-trial Interviews' (1987) 62 *Washington LR* 705, 707; Thomas Feher, 'The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?' (1988) 14 *American Journal of Criminal Law* 227; Jean Montoya, 'Something Not So Funny Happened on the Way to Conviction: The Pretrial Interrogation of Child Witnesses' (1993) 35 *Arizona LR* 926; *Anthony David Warren* (1994) 72 A Crim R 74, 83 (New South Wales Court of Criminal Appeal, Finlay J); *R* v *Toten* (1993) 83 CCC (3d) 5, 18 (Ontario Court of Appeal, Doherty JA); and *C* v *C* [1987] 1 FLR 321, discussed in Frank Bates, 'Child sexual abuse and the fact-finding process — some thoughts on recent developments' (1994) 1 *Canberra LR* 181.

[107] Gail Goodman, Leslie Rudy, Bette L Bottoms and Christine Aman, 'Children's concerns and memory: Issues of ecological validity in the study of children's eyewitness testimony' in Robyn Fivush and Judith A Hudson (eds), *Knowing and Remembering in Young Children* (1990), 256; see also 249, where the main theme of this research is declared to be that 'actions affecting a child's sense of well-being, safety, and social acceptance [such as child sexual abuse] are remembered remarkably well and that, by at least the age of four years, children are surprisingly resistant to suggestions about them'. See also Myers, op cit (fn 1), Volume I, 230–4. For a recent judicial discussion of the reliability of children's evidence, see *Frederick Arthur Robinson* (1995) 80 A Crim R 358, 364–8 (Queensland Court of Appeal, Fitzgerald P).

[108] The importance of video-recording in terms of providing a reliable independent record of the interviewing process has been affirmed in, inter alia, *R* v *Olscamp* (1994) 95 CCC (3d) 466, 469 (Ontario, Charron J) and *R* v *L(JW)* (1994) 94 CCC (3d) 263, 279 (Ontario Court of Appeal).

approaches.[109] Video-recorded interviews made for the purposes of the provisions discussed under the previous heading will, however, be unable to serve this purpose. This is because such interviews are not intended to record the investigative process but to act as a substitute for the testimony which would have been received from the child at trial. This means that the interview should conform to the normal rules of testimony as closely as possible.[110] Material not relevant to the specific charges being tried should, for example, be omitted from the video, even though that material might be highly relevant to the way in which the allegations were investigated.[111] The temptation when making a video-recorded interview, therefore, would presumably be to interview the child once in order to find out what questions to ask, and then to interview the child again for the camera. In other words, the video-taped interview is likely to be made *after* the interviews we are really interested in seeing.

The recording of investigative interviews also has a downside. First, it would be costly, needing sufficient interviewing suites equipped with video-recording equipment, possibly extending to multiple cameras so as to ensure that the child was always in view.[112] Secondly, for the sake of completeness, all therapeutic and counselling sessions undergone before the taking of the child's evidence ought to be recorded in the same way lest it be argued that they were the source of contamination. But as it will never be possible to ensure that all contact with the child, including contact with the non-abusing parent, is recorded, it will never be possible to completely eliminate the possibility of coaching or contamination anyway. Thirdly, there is a risk that the defence will blow any interviewing errors out of proportion.[113] Fourthly, the process of disclosure often occurs over an extended period of time, with the child gradually revealing more and more occasions upon which the abuse

[109] See Myers, op cit (fn 8) 375; and Spencer and Flin, op cit (fn 13) 170. For appropriate methods of interviewing child witnesses see Home Office *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (London, 1992). It is worth noting, however, that leading questions do actually have a legitimate role to play in the interview process: see Myers op cit (fn 1) Volume I, 234–6.

[110] Which is not to suggest that the interview need be conducted in formal surroundings or in a formal, and legalistic manner: see, for example, the comment of the Crime Prevention Committee, op cit (fn 2) 137, that it should not matter that during the interview the child might be 'sitting on the floor talking into a toy telephone'.

[111] For example, the comments in *Ronald Edward Ferguson* (1994) 75 A Crim R 31, 37–8 (Queensland Court of Appeal, Demack J).

[112] Crime Prevention Committee, op cit (fn 2) 137. It was, for example, the 'resource implications' of the Victorian Crime Prevention Committee's recommendations which led to their rejection by the Victorian Government: see Damon Johnston, ' "No" to child sex abuse overhaul', *Herald-Sun* (Melbourne), 4 December 1995, 3; Damon Johnston, 'Abuse measures threat', *Herald-Sun* (Melbourne), 5 December 1995, 19; Damon Johnston, 'Boost for child sex law urged', *Herald-Sun* (Melbourne), 5 April 1996, 16; and Danielle Talbot, 'Child assault report shelved: MLC', *Age* (Melbourne), 22 April 1996.

[113] Myers, op cit (fn 8) 384; Cashmore, op cit (fn 69) 239.

occurred, and more and more details of what happened when it did.[114] If all of these interviews are recorded and made available to the defence, however, then the child will almost inevitably be subjected to extensive cross-examination on the themes of inconsistency or fabrication, when such inconsistencies are largely irrelevant to the child's credibility.[115]

Because inconsistency is often irrelevant to credit, a judge would actually be justified in ruling out such a line of cross-examination; but the leeway traditionally accorded the defence suggests that any such ruling is unlikely. Alternatively, the judge could be required to instruct the jury that in the case of child sexual abuse inconsistency is not necessarily indicative of fabrication;[116] whether such a direction would actually be effective in rehabilitating the child's credibility is another matter. The temptation to the defence of using the interviews as a means of attacking the child's credibility during cross-examination might also be reduced if doing so made the interviews admissible. There is a strong case for such an approach. If a child's credibility is to be attacked on the basis, for example, that he or she only disclosed a particular incident of abuse at a late stage of the investigation, then the jury arguably ought to be placed in the position of seeing all of the interviews so that they can understand how the process of disclosure occurred. Denying the jury the chance to see the context in which the alleged inconsistency arose merely allows the defence to give it a significance which it may not deserve. Moreover, once admitted for a non-hearsay purpose, the statements made by the child during the interview might then be admissible for their truth.[117]

There are, then, arguments on both sides. I would suggest, however, that when the additional arguments in favour of recording investigative interviews[118] are taken into account, the balance clearly favours the adoption of such a goal.

Cross-examination

In the common law trial, cross-examination is generally considered to be the most important method of testing a witness' credibility. Indeed, Wigmore went so far as to claim that cross-examination 'is beyond any doubt the greatest legal engine ever invented for the discovery of truth', adding that it, and 'not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure'.[119] Whether or not this is true where adult witnesses are concerned, there is little doubt that

[114] Cashmore, op cit (fn 69) 239; Paul Stern, 'Videotaping Child Interviews: A Detriment To An Accurate Determination of Guilt' (1992) 7 *Journal of Interpersonal Violence* 278; and Clay Edwards, 'The Reliability of Out-of-Court Statements by Child Victims of Sexual Abuse: Evaluating Consistency via the Process of Disclosure' (1994–95) 33 *ULJFL* 685, 699.

[115] Myers, op cit (fn 8) 378–81.

[116] Cf *Crimes Act* 1958 (Vic), s 61(1)(b), which requires the judge to warn the jury that there may be good reasons why a victim of sexual assault may delay in complaining it, if the defence has raised delay in reporting as an issue relevant to the complainant's credibility.

[117] See supra, text accompanying ffn 51–62.

[118] See 'Minimising the Impact of the Investigation', infra.

[119] *Wigmore on Evidence* (1940, 3rd ed) para [1367].

the linguistic strategies usually employed in cross-examination are more likely to confuse or intimidate a child witness than to lead to the 'discovery of the truth'.[120] This does not mean that the defence should be prevented from testing and probing the child's evidence; but it does suggest that the cross-examination techniques employed in respect of adult witnesses provide an inappropriate means of doing so.

Some jurisdictions have recognised the fact that comprehension problems frequently arise in the examination of child witnesses. Thus in the Northern Territory, the court may disallow any question which is 'confusing, misleading or phrased in inappropriate language';[121] and in Western Australia the court may appoint someone to act as a 'communicator' for the child, it being the task of the communicator to communicate and explain to the child the questions put to him or her, and to communicate and explain to the court the evidence given by the child.[122] Similar provisions exist in South Africa, where the courts are empowered to appoint an 'intermediary' through whom the child's evidence is to be given.[123] In essence, the task of 'communicator' or 'intermediary' is to translate the questions asked by counsel into language comprehensible to a child; thus the South African intermediary is only required to 'convey the *general* purport of any question to the relevant witness'. The use of an intermediary can only be ordered, however, where the court considers that the ordinary method of testifying would expose the witness to 'undue mental stress of suffering'; in other words, the provision is concerned with the protection of the child's interests, rather than with promoting accurate fact-finding.

The Western Australian provisions, on the other hand, give no guidance to the judge as to when the use of a communicator might be ordered, other than in the title of the section itself: 'Assistance in communicating questions and evidence'. This rather suggests that the section is less concerned with protecting the child from distressing cross-examination than with ensuring that the child is not confused by the cross-examiner's questions. The use of an intermediary or communicator is probably justifiable on either basis; but if the justification proffered for interposing someone between child and cross-examiner is that it promotes the interests of the child, then it will almost inevitably be argued in opposition to such a measure that it threatens the interests of the accused by hampering effective cross-examination. If, on the

[120] See for example, Mark Brennan and Roslin Brennan, *Strange Language: Child Victims Under Cross-Examination* (2nd ed, Charles Sturt University, Riverina, 1988); Davies and Noon (1991), op cit (fn 69); Mark Brennan, 'The Battle for Credibility — Themes in the Cross-Examination of Child Victim Witnesses' [1994] VII(19) *International Journal for the Semiotics of Law* 51; Mark Brennan, 'The discourse of denial: Cross-examining child victim witnesses' (1995) 23 *Journal of Pragmatics* 71; and Crime Prevention Committee, op cit (fn 2) 206–7.

[121] *Evidence Act* 1939 (NT), s 21B. See also s 41(2)(a) of the uniform evidence legislation, which permits the court to take into account a witness' age when determining whether a question asked in cross-examination is, inter alia, misleading.

[122] See *Evidence Act* 1906 (WA), s 106F.

[123] *Criminal Procedure Act* 1977 (South Africa), s 170A. The reform was suggested by the South African Law Commission, *The Protection of Child Witnesses* (Project 71, 1991).

other hand, the proffered justification for the use of such a person is that it will ensure that the child's credibility is tested by more appropriate means, thus leading to better fact-finding, then it is very hard to oppose such a measure without conceding that the way in which children are cross-examined often has more to do with the obfuscation of the truth than its discovery.

PROTECTING THE CHILD

The third fundamental objective which needs to be taken into consideration is protecting the interests of the child. Sexual abuse can itself have dire long-term negative psychological consequences for its victims,[124] but 'the degree of psychic trauma is as much and perhaps more dependent on the way the child victim is treated after disclosure than at the time of the offence itself'.[125] Ensuring that the levels of psychic trauma are minimised would appear to require three things: first, minimising the impact of the investigation; secondly, minimising the child's involvement in the proceedings; and thirdly, minimising the trauma of testifying, if this turns out to be necessary.

Minimising the Impact of the Investigation

One of the primary causes of stress for children in the investigative phase of proceedings is the number of times a child may have to tell the story of their abuse. One American study, for example, found that a child may have to repeat their story up to 14 times.[126] Those wishing to interview the child might include police officers, social workers, lawyers, doctors or mental health professionals. Continually having to repeat a harrowing story may itself be a harrowing experience for children.[127] Video-recording clearly provides a solution to this problem, because once an initial interview with the child has been conducted anyone else wishing to hear what the child had to say could simply view the videotape.[128] There are also evidential benefits to minimising the number of pre-trial interviews. First, the process of repetition might diminish the quality of any testimony the child might eventually have to give by

[124] Myers, op ciot (fn 1) 219–24.

[125] Brennan (1995), op cit (fn 120) 72. See also L Schultz, 'The Child Sex Victim: Social, Psychological and Legal Perspectives' (1973) 52 *Child Welfare* 147; Judy Cashmore and Kay Bussey, 'Disclosure of Child Sexual Abuse: Issues from A Child-Oriented Perspective' (1988) 23 *Australian Journal of Social Issues* 13, 17–18; and DK Runyan, MD Everson, GA Edelsohn, WM Hunter and ML Coulter, 'Impact of Legal Intervention on Sexually Abused Children' (1988) 113 *Journal of Paediatrics* 647–53.

[126] J Bulkey and H Davidson, *Child Sexual Abuse: Legal Issues and Approaches* (American Bar Association, Washington, 1981), cited in Cashmore and Bussey, id 18.

[127] Spencer and Flin, op cit (fn 13) 171; McCarthy, op cit (fn 8) 31; and Crime Prevention Committee, op cit (fn 2) 158–9.

[128] Myers, op cit (fn 8) 373; Nancy Walker Perry and Bradley McAuliff, 'The Use of Videotaped Child Testimony: Public Policy Implications' (1993) 7 *Notre Dame Journal of Law, Ethics and Public Policy* 387, 403.

making the story stale; and secondly, multiple interviewing also increases the risk of contamination, or the prospect of it being alleged.[129]

Minimising the Child's Involvement in the Legal Proceedings

In any child sexual abuse prosecution there is a basic conflict between the interests of the prosecution and the interests of the child. From the child's point of view, the sooner the process of recovery from the abuse and the aftermath of its disclosure begins the better; but from the prosecution's point of view the process of recovery should be delayed until after the child's evidence has been taken. While the child's interests might dictate, for example, that the abuse be put out of mind, or even forgotten, as quickly as possible this would clearly be inimical to the interests of effective prosecution. Similarly, while therapy or counselling may be of benefit to the child, the approaches adopted in — and appropriate to — therapy or counselling, may open the door to allegations of contamination. In a therapeutic context, for example, it may be appropriate for the therapist or counsellor to start from the premise that abuse has actually occurred, to use leading questions to elicit a disclosure of abuse, and to be persistent when the child refuses to disclose.[130]

The fact that the child has undergone therapy to assist him or her to recover from the effects of the abuse may even be used to justify the exclusion of the child's evidence at trial. In *H*, for example, the trial judge refused to allow the child to testify because she had received hypnotherapy. The therapy was considered necessary by the child's parents because she had been exhibiting a variety of anxiety symptoms thought to have resulted from the abuse. Even though the therapist avoided the use of leading questions, the mere fact that he had asked her what had happened before placing her under hypnosis, and had then repeated the question when she was under hypnosis would, the defence expert argued, have indicated to her that he approved of her first answer. This raised the risk, argued the defence expert and accepted the judge, that:

> her beliefs about the facts might have become more firmly fixed in her mind and her confidence increased, so that she may no longer be willing to make concessions of uncertainty or possible misinterpretation that she might have made at an earlier stage.[131]

[129] For example, *H* (1989) 44 A Crim R 345; and *R* v *Toten* (1993) 83 CCC (3d) 5, 18 (Ontario Court of Appeal, Doherty JA).

[130] Eileen Vizard, 'Interviewing Young, Sexually Abused Children — Assessment Techniques' (1987) 17 *Family Law* 28; Moira Rayner, 'The Right to Remain Silent: The Interrogation of Children' (1989) 15 *Mon LR* 30, 35; James Michie Jr, 'Victims of Child Sexual Abuse in the Courtroom: New Utah Rules and Their Constitutional Implications' (1989) 15 *Journal of Contemporary Law* 81, 99–102.

[131] *H* (1989) 44 A Crim R 345, 350 (Supreme Court of South Australia, Cox J). For other decisions about the effect of hypnotherapy on the reliability of a witness' — albeit an adult witness' — testimony, see *R* v *George Frederick Thorne* (unreported judgment, Victorian Court of Criminal Appeal, 9 June 1995) and *Roughley* v *R; Marshall* v *R; Haywood* v *R* (unreported judgment, Tasmanian Court of Criminal Appeal, 22 February 1995).

The need to avoid such a ruling may mean that the interests of the prosecution require that the process of recovery be delayed until after the child's evidence has been taken.[132] But given that the gap between disclosure and trial might be anything up to a year, this could clearly require that the child's life be placed on hold for an unacceptably lengthy period.[133] This conflict can be resolved, however, if the child's evidence is taken at an early stage in the proceedings, so that the child can then be excused from testifying at the trial itself. If the child's evidence can be received in the form of a pre-recorded interview then clearly this will be possible; but the child's involvement in the proceedings will only be able to cease if the pre-recorded interview can be used as a substitute for the child's entire testimony, including cross-examination. This is where the Western Australian videotaping provisions are superior to the Victorian ones. In Western Australia, as has already been noted, a videotaped preliminary hearing can be used as a substitute for the child's entire at-trial testimony, so that the child need not even attend the trial; in Victoria, on the other hand, the child must still be available for cross-examination. I have already argued that if cross-examination is to be effective in testing the child's evidence then it ought, like his or her evidence in chief, to be conducted at as early a stage of the proceedings as possible. There now appears another reason why cross-examination ought to be carried out at that time: in order to allow the child to begin the process of recovery as soon as possible. If the child must still be available for cross-examination at the time of the trial then it is at least arguable that they might as well give their evidence-in-chief at the time of the trial as well.[134]

Another method of meeting the aim of minimising the child's involvement in the proceedings, is to exempt him or her from the need to testify at the committal. The general adoption in Australian jurisdictions of the 'paper' committal system, means that child victims of sexual abuse ought not to have to enter a courtroom before the trial itself, if then;[135] unless, that is, the defence are entitled to demand that the child attend the committal in order to be cross-examined. In South Australia, there is a strong presumption against granting the defence leave to require the production of a witness who is a child under 12 or the victim of an alleged sexual offence.[136] In Victoria, on the other hand, the defence has the right to require the attendance of such a witness at trial, unless the court is satisfied that it would be 'frivolous, vexatious or oppressive' to require the witness to attend.[137] This is unfortunate.

[132] *R* v *L(DO)* (1993) 85 CCC (3d) 289, 308 (Supreme Court of Canada, L'Heureux-Dubé J).

[133] Crime Prevention Committee, op cit (fn 2) 188–91.

[134] *R* v *Laramee* (1991) 65 CCC (3d) 465, 489 (Manitoba Court of Appeal, Twaddle JA).

[135] *Justices Act* (NSW), ss 48–48I; *Justices Act* 1921 (SA), s 106; *Magistrates' Court Act* 1989 (Vic), Schedule 5; *Justices Act* (WA), ss 101A-101F. In Victoria, a paper committal is mandatory in sexual offence prosecutions: *Magistrates' Court Act* 1989 (Vic), Schedule 5, cl 15(5). In South Australia and Victoria the child's statement may also be presented in the form of a video-recorded interview: *Magistrates' Court Act* 1989 (Vic), Schedule 5, cl 1(1AA); *Justices Act* 1921 (SA), s 104(3)(b)(ii).

[136] *Justices Act* 1921 (SA), s 106(3).

[137] *Magistrates' Court Act* 1989 (Vic), Schedule 5, cl 3.

Magistrates are often less experienced than the lawyers appearing before them; they are therefore less likely than are judges to ensure that defence counsel does not attempt to bully or intimidate a child witness. Committals also lack another potential constraint on defence tactics: the fear of alienating a jury. This means that the questioning tactics used by defence counsel at the committal may be far more upsetting to the child than those used at the trial itself.[138] If cross-examination had already been conducted at a video-recorded pre-trial hearing, however, then there could obviously be no legitimate reason for requiring the child to attend the committal for further cross-examination.

Minimising the Trauma of Testifying

It is now generally recognised that testifying in the traditional common law court can be a traumatic experience for children.[139] I have already discussed the many alternative arrangements which Australian courts can now order when children testify, and argued that these can be justified on the grounds that by reducing the stress associated with testifying they may enable children to perform better as witnesses; but by reducing the stress of testifying these arrangements are also likely to reduce the trauma associated with testifying. The fact that the use of these alternative arrangements has such an effect has been confirmed by several studies;[140] nevertheless, anecdotal evidence suggests that the legal profession has not yet accepted that their use ought to be the norm in child sexual abuse cases.[141]

Whether at committal or trial, cross-examination is undoubtedly the most traumatic aspect of the courtroom experience.[142] This reinforces the fact that video-recording provisions — such as those in Victoria — which require that the child be available for cross-examination at trial, are only partly able to meet their goal of reducing the stress and trauma associated with testifying. As one Canadian Supreme Court judge commented in a slightly different context, 'where trauma to the child is at issue, there would be little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination'.[143] I also noted above that the usefulness of cross-examination as a method of testing a child's credibility could probably be

[138] See Crime Prevention Committee, op cit (fn 2) 191–3.

[139] See, inter alia, Cashmore, op cit (fn 69) 231–232; Spencer and Flin, op cit (fn 13) 81–82.

[140] See, for example, Davies et al, op cit (fn 13) 9, 14; and Australian Law Reform Commission, op cit (fn 87) paras [7] and [8].

[141] For example, Crime Prevention Committee, op cit (fn 2) 182–3.

[142] For example, South African Law Commission, op cit (fn 123) 21–3; Crime Prevention Committee, op cit (fn 2) 191–193.

[143] *R* v *Khan* (1990) 59 CCC (3d) 92, 105 (Supreme Court of Canada, McLachlin J). Indeed, it might even be argued that cross-examination would be less traumatic if the child has had the opportunity to acclimatise him or herself to the courtroom environment by first giving their evidence in chief; but cf Davies et al, op cit (fn 13) 33, which made 'a comparison between the mood and anxiety at cross-examination of those children who had their videotape shown and those who had appeared live on the link. It was found that the two groups were not significantly different. This result should be treated with caution as the majority of witnesses did not appear to have positive feelings during cross-examination regardless of whether they had been "warmed-up" or not'.

improved if a 'communicator' or 'intermediary' was interposed between child and cross-examiner;[144] I would now argue that such a measure can also be justified on the grounds that it could greatly reduce the trauma of undergoing cross-examination. It is particularly likely to do so if the child is unable to hear the cross-examiner. If, for example, the child and 'communicator' or 'intermediary' are placed in a room connected to the court by closed-circuit television, and only the communicator or intermediary is able to hear what is said in the courtroom, then the child could be most effectively shielded from bullying or intimidatory tactics, while still having his or her credibility tested.

CONCLUSION

It should be obvious from the above analysis that further significant reform is necessary in most, if not all, Australian jurisdictions. Victoria provides a convenient example. The current Victorian provisions are, of course, a notable improvement on the pre-existing law. First, there are provisions designed to make testifying a less stressful experience for a child witness. The trauma of testifying could, however, be further reduced if cross-examination were conducted through a 'communicator' or 'intermediary', as is currently permitted in Western Australia and South Africa. This would also be likely, according to the arguments outlined earlier in this article, to make cross-examination a more appropriate test of the child's credibility and so promote accurate fact-finding.

Secondly, there are provisions which allow a video-recorded interview to be used as a substitute for the child's evidence-in-chief. The major deficiency of these provisions, however, is that the video-recorded interview is only admissible if the child is available for cross-examination. This requirement can be objected to on both fact-finding and child-protection grounds. As far as fact-finding is concerned, if the video-recording provisions are based on the idea that the best evidence will be obtained if the child's story is captured while the events are still fresh in his or her mind, then surely it is also arguable that the best time to test the child's story is also while the events are still fresh in his or her mind.

The Western Australian provisions, which allow for a child to be cross-examined early in the proceedings, are therefore to be preferred to the Victorian ones. But cross-examining the child early in the proceedings also has significant advantages when looked at from the point of view of protecting the interests of the child. If the child must attend the trial (and also, perhaps, the committal) in order to be cross-examined then they will not be able to move on from the abuse until the trial, and any consequent appeals and retrials are completed. This may significantly hinder the process of recovery. If cross-examination is conducted early in the proceedings, on the other hand, then the child will be able to cease their involvement in the proceedings altogether,

[144] See 'Cross-examination', supra.

which may clearly assist the process of recovery. At the moment this will only happen if the accused enters an early plea of guilty.

Thirdly, there is currently no provision for investigative interviews to be video-recorded. The availability of such a record of the investigation would allow the tribunal of fact to satisfy itself about the validity of any allegations that the child's memory may have been contaminated by improper questioning. It would thus remove one of the most commonly raised doubts about the legitimacy of child abuse convictions. Recording such interviews would also reduce the number of pre-trial interviews which a child would have to be subjected to, because once an initial interview was conducted other interested professionals could simply view the videotape rather than interviewing the child themselves.

Fourthly, there is currently no provision in Victoria for receiving the child's initial disclosure of abuse, unless — and this is unlikely — it falls within an existing exception to the hearsay rule. That disclosure, and the circumstances in which it was made, ought to be admitted into evidence for several reasons and for a variety of purposes. First, because it provides part of the narrative backdrop to the case. Secondly, because it is essential to a proper assessment of the child's credibility. Thirdly, because it may, in some situations, bear such indicia of reliability that it constitutes the best evidence of abuse, more probative than anything the child might subsequently say.

Hearsay exceptions in Queensland, South Australia, Tasmania, Western Australia and under the uniform evidence legislation, for the prior statements of a witness may allow this to happen, but only if the child actually testifies at the trial. Yet it is precisely in those cases where the child is considered too young to testify that the need for the evidence of the initial disclosure may be greatest. The existence of a reliability-based exception to the hearsay rule at common law and under the uniform evidence legislation, and the possibility that Australian courts could follow the 'narrative' approach pioneered by Canadian courts possibly mean that the initial disclosure of abuse could be admitted in cases where the child did not testify without the need for any statutory reform. Given the likely conservatism of the courts, however, statutory reform might be preferable, and should take the form of a special exception to the hearsay rule applicable only in sexual abuse cases. Any such exception should apply whether or not the child testifies.

The adoption of recommendations such as these would, it is submitted, ensure that the court received the best possible evidence from the child, thereby promoting accurate fact-finding; place the tribunal of fact in a position to make an informed decision about the credibility of the allegations; and remove the need for the child to continue his or her involvement in the proceedings up until the time of the trial, thus allowing the child to begin the processes of therapy and recovery at a much earlier time.