'Out of the Mouths of Babes...' – A Review of the Operation of the Acts Amendment (Evidence of Children) Act 1992

★

MARION DIXON†

This article examines the operation of the 1992 amendments to the Evidence Act 1906 (WA), which introduced closed-circuit television, screens and video-taped pre-trial hearings into Western Australian courts. Comment is also made on the implementation of a new competency test and on the abolition of corroboration requirements and warnings for child witnesses.

The past five years have seen major changes in the criminal justice system to accommodate the giving of evidence by children in cases of sexual and physical abuse. The Acts Amendment (Evidence of Children and Others) Act 1992 (WA) was based on the recommendations of the Law Reform Commission of Western Australia[1] ('the Commission') and introduced a new competency test; abolished corroboration requirements and warnings for child witnesses; provided for the use of closed-circuit television, screens and video-taped evidence; and legislated for support persons, child communicators and the cross-examination of child complainants by unrepresented accused. In addition, the Justices Act 1902 (WA) was amended to limit the circumstances in which children can be called to give evidence and subjected to cross-examination at preliminary hearings.

---

† BA, Dip Ed, LLB (Cape); LLM (S Africa). The author was a consultant to the WA Law Reform Commission in the preparation of its *Discussion Paper* and *Report on the Evidence of Children and Other Vulnerable Witnesses*; a member of the Supreme Court Committee chaired by Mr Justice Pidgeon which prepared *Guidelines for the Use of CCTV, Screens and Video-taped Evidence*; and a member of the Steering Group for the Ministry of Justice's *Evaluation of the Use of CCTV and Screens*.

1. WALRC *Report on the Evidence of Children and Other Vulnerable Witnesses* (Perth, 1991).

All of these changes have now been in operation for some time, the amending Act having taken effect on 16 November 1992. This article seeks to review and comment on the operation of the amendments thus far and refers to relevant cases.

CORROBORATION

Section 7 of the amending Act repealed the whole of section 101 of the Evidence Act 1906 (WA), abolishing the previously existing requirement of corroboration of the unsworn evidence of a child under 12. In addition, a section was introduced precluding judges from warning juries of the unreliability of the evidence of young children as a class of witnesses.[2]

What has been the effect of these changes? In the first place, prosecutions are now possible in cases where previously they were not. It is now the case that a conviction may be sought on the simple unsworn evidence of a child complainant who alleges physical or sexual abuse, whereas previously a conviction was not possible in those circumstances.

When the abolition of corroboration requirements was first mooted by the Commission,[3] it was because these requirements, combined with a strict test for competency to take the oath, meant that prosecution of cases of alleged sexual abuse of children under 12 was often impossible. Response from some quarters was that eliminating corroboration requirements would inevitably lead to convictions not substantiated by the evidence.[4] Responses from the wider public supported the change. In recommending in its subsequent report the abolition of all corroboration requirements and corroboration warnings based on the age of the witness, the Commission pointed out that the effect of such a move would not necessarily mean that a conviction would ensue in every case, merely that it would be possible in an appropriate case.[5]

A study of the transcripts shows that, in 26 cases of alleged sexual abuse involving child complaints under the age of 12 heard in the Supreme Court under the new legislation between November 1993 and September 1995, the accused was found guilty on one or more charges in only 11 cases. In all but one of those cases the child gave evidence on oath or affirmation. There was only one case where the child's unsworn and uncorroborated evidence gave rise to a conviction.

What is one to make of these figures? It is not possible to exclude the impact (if any) upon conviction rates of the use of closed-circuit television

2. Evidence Act 1906 (WA) s 106D.
3. WALRC *Discussion Paper on the Evidence of Children and Other Vulnerable Witnesses* (Perth, 1991) 19-20, 35-36, 67.
4. Report supra n 1, ¶ 2.50 and n 70, p 27.
5. Id, 27-28, 32, 87.

in all of these trials. However, a possible interpretation (and perhaps the most likely explanation) of the statistics is that juries remain cautious about convicting on the uncorroborated evidence of a single witness. If this *is* the explanation, then the abolition of corroboration requirements and warnings in respect of children has worked as the Commission expected and can reasonably be described as having achieved its aims.

COMPETENCY

The traditional approach to child witnesses was to apply to them the same standards of competency as applied to adults. This meant that the child had to be able to swear an oath on the Bible, for under the common law '[n]o testimony whatever can be legally received except upon oath'.[6]

In order to be permitted to take the oath the child had therefore to demonstrate to the court that he or she possessed 'a sufficient knowledge of the nature and consequences of an oath'.[7] That requirement has been held to mean that the child must believe in the existence of a God who will punish him/her, in this world or the next, for lying under oath.[8]

Though this requirement dates from 1779, when it was not uncommon for adults to believe in witches and fairies, modern courts have continued to require children to meet it. Any exception to that common law requirement has been by way of statute.

Prior to the passing of the amending Act, children under the age of 12 who did not know about the existence of God could give only unsworn evidence, under section 101 of the Evidence Act — and that evidence, of course, required corroboration.[9]

The test contained in section 101(1) of the Evidence Act for the giving of unsworn evidence required that the child be possessed 'of sufficient intelligence to justify the reception of the evidence' and that he/she understand the duty of speaking the truth. This test was criticised by the Commission as too restrictive, because it generally prevented the evidence of very young children from being received by the Court. Experience elsewhere had suggested that a test based on the ability of the child to understand the duty to tell the truth was unworkable as far as very young children are concerned.[10]

Somewhat ironically, children 12 years old and over were, as a matter of practice, treated like adults and, though theoretically required to believe

---

6. *R v Brasier* (1779) 1 Leach 199.
7. *Cheers v Porter* (1931) 46 CLR 521; Dixon J, 530-531.
8. *A-G v Bradlaugh* (1885) 14 QBD 667.
9. Evidence Act 1906 (WA) s 101(2) (repealed).
10. Report supra n 1, ¶¶ 2.21, 2.33.

in God, etc, were permitted to take the oath without any inquiry as to their religious beliefs.

The reforms contained in the amending Act were designed to remove these anomalies, which have been seen as discriminating against children, and to facilitate the giving of evidence by children under 12 who might not be able to articulate their understanding of the distinction between truth and lies, but who nevertheless had something relevant to tell the court.[11] The question of what weight should be attributed to such evidence would be a matter for the jury, properly instructed by the judge.

A difficult question facing the Commission was whether to retain the distinction between sworn and unsworn evidence. Despite a trend in several jurisdictions for abolition of the distinction as far as children are concerned, there was support in the Western Australian legal profession for retention of sworn evidence on the basis that juries and magistrates might regard unsworn evidence as inherently less reliable than that given on oath.[12] The Commission therefore recommended the retention of the distinction between sworn and unsworn evidence, but at the same time recommended a modification of the competency test so that it would no longer be necessary for children under 12 to profess belief in God, or in a divine sanction for telling a lie, before being permitted to take the oath, so that wherever possible the evidence should be given sworn or on affirmation.[13]

In seeking an appropriate test for competency to give sworn evidence, the Commission was influenced by the modern English common law rule laid down in *R v Hayes*.[14] The relevant section of the Evidence Act follows fairly closely the spirit of Bridge LJ's dictum in that case which reads:

> It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.[15]

The new section 106B reads:

(1) A child who is under the age of 12 years may in any proceeding, if the child is competent under subsection (2), give evidence on oath under

11. Id, ¶¶ 2.32-2.35.
12. Id, ¶¶ 2.7-2.9.
13. Id, ¶¶ 2.10, 2.15. Under the common law, the right to affirm applied to witnesses who, while they qualified to swear an oath because they believed in God and in a divine sanction for lying under oath, had a religious objection to swearing an oath on the Bible: see dictum of Dixon J in *Cheers v Porter* supra n 7, 533.
14. [1977] 2 All ER 288.
15. Id, 291.

section 97(3) or after making a solemn affirmation under section 97(4).

(2) A child who is under the age of 12 years is competent to take an oath or make a solemn affirmation if in the opinion of the Court or person acting judicially the child understands that: (a) the giving of evidence is a serious matter; and (b) he or she in giving evidence has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

The effect of this section is: (i) to eliminate religious belief as a basis for a child's competency to take the oath, so that an inquiry as to religious belief is no longer appropriate; and (ii) to focus instead on a child's understanding of the duty to tell the truth, in particular the duty to tell the truth in court.

Unfortunately, it seems from transcripts that the new competency requirements have induced some nervousness in judges, with wide variations in the style and content of competency inquiries. These vary from the over-zealous (37 questions) to the incomplete (three questions). In some cases a child has been sworn without any inquiry; and in other cases the judge has (inappropriately) questioned the witness about his/her religious beliefs.[16] That competency remains a vexed question is evident from a recent decision of the Court of Criminal Appeal in Western Australia in *R v V*,[17] setting aside a conviction and ordering a re-trial on the sole ground that the nine year old complainant in the case gave her evidence unsworn without the trial judge's having first determined that she was not competent to take the oath.

When the witness was called, the judge questioned the complainant in the following short exchange:

> [T], do you know what it is to tell the truth? ..... Yes.
> Do you know that it is especially important to tell the truth today? ..... Yes.
> Where do you go to school? .... Waroona District High [sic] School in Waroona.
> I see, and do you like that? ..... Yes.

His Honour then said: 'I think that contents me. Thank you. There is no need to swear the witness'.[18]

Rowland J (with whom Franklyn and Walsh JJ concurred) held that the failure to make a finding that the child was not competent to give evidence

16. The danger of venturing into an inquiry about belief in God is demonstrated by the following exchange between a judge and an 8 year old witness in *R v H* WA Sup Ct file no 140/1994 (13 Dec 1994):
    Q. E, do you know who God is? .... Yes.
    Q. How would you describe God? Well, I would describe him as a tree, I think.
    Q. Beg your pardon? .... A tree, I think.
    Q. A tree? .... Yes.
17. *R v V* WA Ct of Crim App File No 88/1995 (8 Aug 1995).
18. Id, 3.

on oath before allowing her to give unsworn evidence was 'not really a miscarriage of justice' in terms of section 689(1) of the Criminal Code (WA), but went to 'the basic nature of the trial itself which, unless the Act is complied with, requires the witness to give evidence on oath or affirmation'. The authority cited for this point is *R v Lau*,[19] another decision of the Western Australian Court of Criminal Appeal.

Given the seriousness of an error of this kind, it is disappointing that the Court of Criminal Appeal in *V's* case did not take the opportunity to indicate what a proper assessment for competency to take the oath now requires. It is also questionable whether *Lau* is good authority for the view expressed in *V's* case, namely, that failure to make a finding that the child was not competent under section 106B to take the oath before allowing her to give unsworn evidence under section 106C is an appealable error. I shall deal with each of these points in turn.

THE PROPER ASSESSMENT OF COMPETENCY

1. Competency to swear an oath under section 106B

The first leg of the competency test requires the child to understand that the giving of evidence is a serious matter. Because it is rare for a young child to have a full appreciation of the effect of court proceedings, it is obvious that this requirement cannot reasonably be met by an unaided explanation on the part of the child that the effect of his/her evidence may be that the defendant will be convicted of the charges and go to prison. Nor can the child be expected to know that a person of the age of criminal responsibility could be charged with perjury if he/she lied on oath. It is suggested that an appropriate explanation by the judge may be sufficient compliance with this provision if the child says afterwards, in answer to a question, that he/she understands those things and knows that it is especially important to 'tell the truth here today'.

The second leg requires that the child understand that in giving evidence there is an obligation to tell the truth which is stronger than the 'ordinary duty' to tell the truth. This part of the competency enquiry requires the judicial officer to address the child's understanding of truth and lies. This is not a question to be approached in abstract or general terms, for even adults may have difficulty in explaining as a generality what is meant by truth. More appropriate is questioning which allows a child to demonstrate an understanding of the distinction between truth and lies. The following is a suggested format for determining competency under the new section 106B.

(i) Find out two simple facts about the child on which to base the next

19. (1991) 58 A Crim R 390.

questions about truth (eg, the child's age and grade at school, favourite television programme or food, names of siblings).

(ii) Using that information, ask two questions of the child to establish his/her ability to understand truth/lie distinction. The correct answer to one question should be 'true' and to the other 'false' or 'not true' or 'a lie'. The reason for two questions is to demonstrate understanding, not just the tendency to answer 'yes'.

(iii) Establish the child's understanding that events in court are important or serious.

(iv) Ask the child what will happen if he/she does not tell the truth in court today. Any answer which indicates that someone may be punished — either the accused or the child — should be sufficient. If the child says he/she does not know what will happen, it seems that the requirement of the legislation will be satisfied if the judge explains to the child that 'someone may get into trouble' and asks the child if she/he understands that.

(v) Establish the child's intention to tell the truth today.[20]

While the primary aim of the questions on competency should be to determine the child's ability to answer questions truthfully, at the same time the examination on competency also needs to do the following:

- avoid tiring the child;
- use questions other than those which will be asked by counsel;
- avoid undermining or building the child's credibility in the eyes of the jury;
- avoid making the child feel inadequate because of the inability to answer questions or because of possible embarrassment about the answers to certain kinds of questions (eg, no friends, being behind at school, not understanding).[21]

It may be suggested that there is an oddity in requiring a person who has no proven belief in the existence of an omnipotent deity to 'swear by Almighty God'. However, this is the position with regard to adult witnesses. For those judges to whom this poses a difficulty, the appropriate solution would appear to be to explain to the child (once competence has been established) that he/she may take the oath (which is a promise to tell the truth) by doing so 'on the Bible' or in the everyday way without the Bible. It might be advisable for the judge to explain further that either way is

---

20. In *R v U* WA Sup Ct File No 229/1994 (26 Apr 1995) 12-13, the trial judge used this approach and was able to establish the 10 year old witness's understanding of the difference between truth and lies, despite her inability to explain what the difference was in abstract terms.

21. I am indebted to Ms Celia O'Grady for her assistance in the preparation of this suggested format for determining competency under s 106B.

acceptable, but that people who believe in God often like to make their promise 'on the Bible'. If the child appears to be puzzled, then the better solution may be to have the child affirm. However, it is an act of respect towards the child to give him/her a choice, if at all possible.

2. Giving unsworn evidence under section 106C

Where the judge is not satisfied by the child's answers to questions directed at determining competency under section 106B (and some children as young as five or six may qualify to swear an oath if questioned appropriately), the child may still be permitted to give evidence unsworn under section 106C. Here the test is intended to allow children as young as three or four to give evidence where they have something relevant to tell the court.[22] The section requires only that the child be able 'to give an intelligible account of events they have seen or experienced'.[23] Any normal child of school-going age should be able to qualify on this test, as well as articulate younger children. A few simple questions about the child's siblings, favourite games or food should establish this.

It is important to note here that no legal consequences follow from the child's giving sworn evidence as opposed to unsworn evidence. In either case a conviction can follow from the uncorroborated evidence of the child. The judge is not required to comment (although he/she may do so) on the manner in which the evidence was given and received, nor is the jury required to take that into account in deciding what weight and credibility ought to be given to the witness's evidence — although the jury may choose to do so. In this respect section 106C differs from section 100A relating to the giving of unsworn evidence by an adult or a child over 12.

3. Appealable error

The question here is whether the failure to determine a child's competency to swear an oath under section 106B before permitting him/her to give unsworn evidence under section 106C is an error which, although not a 'miscarriage of justice' for the purposes of section 689(1) of the Criminal Code, nevertheless 'goes to the basic nature of the trial itself' and therefore justifies the setting aside of the conviction and the ordering of a new trial.

In *Lau*, on which Rowland J relied for his decision in *V's* case, the failure to inquire properly into the competency to take the oath of the 18 year old complainant (who had Down's syndrome) was an error of law which

22. Report supra n 1, ¶ 2.34.
23. Evidence Act 1906 (WA) s 106C

itself justified the quashing of the conviction.[24]

This decision is readily understandable when one recognises that in *Lau* the complainant's evidence could not have been admitted at all unless she met the requirement of understanding the duty to speak the truth, etc, and from the transcript it was doubtful whether she could have met that requirement if properly questioned. In that case her evidence was not properly received.

In *V's* case, on the other hand, there seems little doubt that the nine year old complainant was competent to give unsworn evidence. The exchange between the trial judge and the complainant before she gave evidence was probably adequate to establish her ability under section 106C to 'give an intelligible account of what she had observed or experienced'. That seems to have been what was in the mind of the trial judge when he said: 'I think that contents me. Thank you. There is no need to swear the witness'.[25]

Unless it can be shown that the complainant's evidence on oath was likely to have differed materially from her unsworn evidence, I suggest that the complainant's evidence was properly admitted, even if it was given unsworn rather than sworn. It is hard to see how, then, the trial judge's error could be said to 'go to the basic nature of the trial itself', as was the case in *Lau*, especially when her subsequent evidence demonstrated clearly that the witness must have qualified to give evidence under section 106C. Unfortunately the Court of Criminal Appeal does not appear to have scrutinised the child's evidence with this in mind.[26]

Knowing a re-trial is most unlikely where a young complainant is concerned, one cannot but wish there had been a fuller discussion of these issues by the Court of Criminal Appeal in *V's* case.

It is perhaps worth noting that the transcripts show that judges receive very little assistance from counsel in determining matters relating to the new procedures for the giving of evidence by children. There seems to be a lack of understanding of the workings of procedural law affecting children among many counsel appearing in the Supreme Court. An example of this would appear to be the insistence by both sets of counsel in *R v W*[27] that the competency inquiry should be conducted in the absence of the jury. In the light of *Lau*,[28] this is clearly wrong.

---

24. *Lau* supra n 19; Seaman J, 398; Murray J, 405; Owen J, 421.
25. *R v V* supra n 17, 3.
26. It may be of interest here that in *R v Hampshire* [1995] 2 All ER 1019 the English Court of Appeal appeared to adopt a less restrictive approach in considering whether a 'material irregularity' had occurred where a child witness was tested for competency after, rather than before, her evidence was received. However, differences in the English and WA legislation have also to be taken into account.
27. WA Sup Ct File No 177/1993 (4 Mar 1994).
28. Supra n 19.

CLOSED-CIRCUIT TELEVISION OR SCREENING ARRANGEMENTS

Perhaps the most obvious change wrought by the 1992 amendments to the Evidence Act has been the use of closed-circuit television (CCTV) or screens to facilitate the giving of evidence by children and other vulnerable witnesses. As far as child victims of alleged sexual abuse are concerned, there is effectively a presumption in favour of the use of CCTV (or, where CCTV facilities are not available, a screen) to allow the witness to give evidence without having to be in the presence of the defendant — or even in the courtroom. Section 106N(2) of the Evidence Act now provides that:

> Where the necessary facilities and equipment are available one of the following arrangements is to be made by the judge for the giving of evidence by the affected child — (a) he or she is to give evidence outside the courtroom but within the court precincts, and the evidence is to be transmitted to the courtroom by means of closed circuit television; or (b) while he or she is giving evidence the defendant is to be held in a room apart from the courtroom and the evidence is to be transmitted to that room by means of closed circuit television.

Where the CCTV facilities and equipment are not available, section 106N(4) provides that a screen, one-way glass or other device has to be used so that while giving evidence the child witness cannot see the defendant, but the judge, the jury (where applicable), the defendant and his/her counsel can see the child.

In order for CCTV or a screen *not* to be used the trial judge has to be satisfied that the child witness is 'able and wishes to give evidence in the presence of the defendant in the courtroom, or other room in which the proceedings are being held'.[29]

A period of approximately six months passed from proclamation of the amending Act on 16 November 1992 before the first trial took place under the new legislation. During that time a Guidelines Committee was established by the Chief Justice under the Chairmanship of His Honour Mr Justice Pidgeon. That committee[30] included technical personnel, and the

---

29. S 106O. Thus there is no need to determine whether the child qualifies to be a 'special witness' under s 106R. This latter provision applies to witnesses *other* than 'affected children' — ie, to adults and children over 16, to child witnesses who are not complainants, etc. For a discussion of the operation of s 106R: see M Dixon 'Special Witnesses: What's So Special About Them?' (1995) 22(5) *Brief* 5-8.

30. Members of the committee throughout its task were: Mr Justice Pidgeon (Chairperson), Mr Justice Wallwork, Ms Marion Dixon and Mr Tony Wilmot. Other members during

judicial guidelines produced therefore set out in some detail the equipment and procedures thought appropriate for the use of CCTV and screens, and for the treatment of child witnesses in 'schedule 7 proceedings' to which the new procedures applied.[31] The Commission also recommended to the

different stages of the committee's work have been Mr Wayne Briscoe, Mr Peter Mitchell and Ms Celia O'Grady. For the special task of preparing guidelines for the pre-trial recording of evidence, a much enlarged sub-committee was established which included, in addition to the original committee members: Ms Shannon Bellet, Judge Hal Jackson, Mr Peter Mitchell, Ms Celia O'Grady, Ms Alison Robbins, Ms Evelyn Vickers and Ms Julie Wager.

31. These guidelines are now obtainable on request from the WA Law Society.

Attorney-General that an evaluation of the operation of CCTV and screens was desirable, and a suitably qualified member of the Strategic and Specialist Services Branch of the Ministry of Justice was assigned the task of developing a research project to evaluate the new procedures, with the assistance of a Steering Group with representatives from the DPP's office, ACCCA,[32] the Guidelines Committee and the Information and Technology branch of the Ministry of Justice. The Evaluation Report[33] was completed in June 1995 and provides some very useful insights into the operation of CCTV and screens in the courts.

Among the novel aspects of the research project was an anonymous survey of jurors to establish their responses to the use of CCTV. This was especially interesting because of fears widely expressed amongst members of the legal profession prior to the introduction of the legislation that the use of CCTV or screens would be prejudicial, either to defendants because of (i) the perceived likelihood that children would find it easier to lie successfully over CCTV; or (ii) the likelihood that television would have a glamorising effect on the child's image and so enhance his/her credibility with the jury; or to the prosecution case because (a) juries would be deprived of the impact of the child's live appearance in court; and (b) counsel would find it harder to establish rapport with the witness over CCTV.

A complete analysis of the results of the evaluation in relation to CCTV and screens is not possible here, but the following findings from the as yet unpublished report are of interest:[34]

- Most counsel and all judges who had used CCTV and/or screens and who made comments thought CCTV and removable screens were fair to the accused.
- None of the child witnesses interviewed who used CCTV regretted doing so, and all who used it would recommend it to other witnesses. Many witnesses who had given evidence in the courtroom, with or without a removable screen, would have used CCTV if it had been offered.
- Most jurors understood why CCTV and removable screens were used, most accepted those reasons and most said they did not believe the presence of the equipment had made it more difficult to reach a verdict.
- CCTV is generally preferred to removable screens, though some counsel preferred screens.

In broad terms, the use of CCTV and screens as routine procedures in criminal trials involving child witnesses could be said to have earned wide acceptance by participants in the criminal justice system or to have improved the situation of the child witness. The routine use of CCTV or screens

32. Advisory and Co-ordinating Committee on Child Abuse (closed in June 1995).
33. Ministry of Justice *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in WA* (Perth, June 1995).
34. Id, Executive Summary ¶ 3.2 (cited with permission of the Attorney-General).

seems to have been an important element in that acceptance.[35]

VIDEO-TAPED EVIDENCE

The amending Act provides for the admission of video-taped evidence in three ways:

- Under section 106H an electronically-recorded 'statement' by the child may be admitted in any 'schedule 7 proceeding' if it is relevant and provided the child is available at trial for cross-examination by the defendant.
- Under section 106I(1)(a) the child's evidence-in-chief may be taken, in whole or in part, and presented to the court in the form of a video-taped recording if the prosecutor seeks and obtains an order to that effect.
- Under section 106I(1)(b) the prosecutor may apply for the whole of the child's evidence (ie, examination and cross-examination) to be taken at a video-taped pre-trial hearing.

The first type of video-taped evidence would include a video-taped interview of the kind admissible in England under the Criminal Justice Act 1991 (UK).[36] As far as I am aware, no application has thus far been made in Western Australia for the admission of evidence of this nature nor for the admission of a video-tape of the child's evidence-in-chief under section 106I(1)(a). However, in a number of cases the whole of the child's evidence has been presented to the jury at trial in the form of a video-tape made at a pre-trial hearing in accordance with section 106I(1)(b).

The evaluation conducted by the Ministry of Justice was not required to examine this last procedure, but offers some comment on the way it has worked.[37] The relevant sections of the legislation seem to envisage that the video-taped pre-trial hearing would take place along lines recommended by the Commission,[38] which adopted the suggestions of the Home Office Committee in England, chaired by Mr Justice Pigot.[39] This would mean that the hearing would take place in an informal setting in a 'round-table' or 'conference-style' arrangement, with the only persons present being the judge, the child and his/her support person and counsel. The defendant would observe the proceedings by CCTV from another room.

When the first video-taped pre-trial hearing took place in Western Australia, the necessary special equipment and facilities for a 'Pigot-style'

35. Cf the experience in the ACT, where the discretion to use CCTV or not has caused problems: see ALRC *The Use of CCTV for Child Witnesses in the ACT* Research Paper 1 (Oct 1992) ¶¶ 7.70-7.71.
36. S 54.
37. Id, ¶ 4.3 (pp 32-33).
38. Cf Evidence Act 1906 (WA) s 106I(1)(b) and Report supra n 1, ¶ 4.40.
39. UK Home Office *Report of the Advisory Group on Video Evidence* (London: HMSO, 1989).

hearing were not yet available and the trial judge granted permission, with the consent of the defence, for the pre-trial hearing to take place using the courtroom equipped with CCTV facilities, with the child giving her evidence by CCTV from the remote room and the defendant present in the courtroom with the judge and counsel.[40] In hindsight this procedure was seen by the Guidelines Committee to be an improvement on the 'Pigot-style' of pre-trial hearing since it avoided the extremely stressful situation of the child having to sit in close proximity to defence counsel.[41] I understand that an amendment to section 106K(3)(e) is now pending which will give legislative authority for this variant of the video-taped pre-trial hearing.

Evaluation of the presentation of video-taped evidence of this kind is premature at this stage, since its use has been confined to a handful of trials. However, it may be worth noting that at the time of writing there have been seven cases in which the child complainant's evidence has been presented to the jury in this way, and five have resulted in a conviction. There was one acquittal and in one case a hung jury.[42]

Advantages of this method of presenting a child's evidence would appear to include:

- The ability to take a young child's evidence while it is still relatively fresh.
- The child can, at an earlier stage, put the events behind him/her and get on with life.
- Any counselling or therapy that may be necessary, but which has to be postponed in order to avoid tainting the child's evidence, can begin at an earlier stage.
- Where an appeal against conviction is successful and a new trial ordered, the child's evidence may be able to be presented in the form of the same video-tape and the child may not need to appear at all at the re-trial. (One should observe here that, in the event that a new defence counsel opposes the use of the video-tape on the ground that he/she wishes to ask the child witness additional questions, the trial judge may allow those additional questions to be dealt with at a second pre-trial hearing convened for the purpose.[43] This would avoid the possible tactical advantage to the defence of the child's having to be put through the ordeal of another trial — a prospect that may mean a re-trial becomes impossible where the child witness is very young or particularly traumatised.)
- Inadmissible evidence may be excluded ahead of time by appropriate judicially-approved editing of the video tape.[44]

40. Information supplied to the Steering Group, of which the author was a member.
41. The author has been a member of the Guidelines Committee.
42. Information supplied to the writer from Supreme Court records.
43. S 106K(5).
44. Such editing is impliedly authorised by s 106M of the amended Evidence Act.

ADMISSION OF CHILD'S PRIOR STATEMENTS

Among the problems considered by the Commission was the inadmissibility of a child's complaint of sexual or physical abuse unless the complaint fell within one of the existing exceptions to the rule against hearsay, in particular the exception which allows a 'recent complaint' to be admitted.[45] Complaints of sexual abuse of children by family members are rarely made immediately after the event, and therefore evidence of complaints was generally excluded despite its potential relevance. The Commission recommended that legislation be passed to allow the admission of evidence of a child's out-of-court statement (ie, complaint) provided that (i) the defence had notice of the statement; and (ii) the child was available for cross-examination about the statement.[46] The amending Act introduced section 106H of the Evidence Act, which allows any relevant statement (whether recorded, either in writing or electronically, or not) to be admitted at the discretion of the trial judge under the conditions mentioned above.

A 'relevant statement' is defined to mean 'a statement that (a) relates to any matter in issue in the proceeding; and (b) was made by the affected child to another person before the proceeding was commenced'.[47]

It does not yet seem to be widely recognised that at least one purpose of section 106H was to allow evidence to be admitted of a child's complaint to another person where under the common law it would ordinarily be excluded as hearsay if not 'fresh', etc. In *R v D*,[48] objection was raised to evidence of the 11 year old complainant's complaint to another person eight months after the event, and the legal argument proceeded and the matter was decided without reference to section 106H(1); and in *M v R*[49] the Western Australian Court of Criminal Appeal made no reference to section 106H in upholding the admissibility of a complainant's statement to a schoolfriend made a few days after the event complained of.

Another aspect of section 106H is its relevance to the taking of evidence at preliminary hearings or committal proceedings by way of written statements. The Commission observed that it was undesirable for a child witness to be subjected to being cross-examined at both committal proceedings and at trial[50] and recommended that courts should be empowered to allow the child's evidence to be received at a preliminary hearing in the form of a previously made written statement, audio tape or video tape; and that where such a statement is admitted the child complainant should not be

45. Report supra n 1, ch 3, 33-36.
46. Id, ¶ 3.33.
47. S 106H(3).
48. WA Sup Ct File No 15/1994 (10 Aug 1994).
49. WA Ct of Crim Appeal File No 254/1994 (8 June 1995).
50. Report supra n 1, 43-44.

called or summoned to appear 'unless the magistrate is satisfied that because of the special circumstances of the case, there is good cause for oral examination of the complainant'.[51]

An amendment to section 69 of the Justices Act 1902 is made by Part 3 of the amending Act to give effect to this recommendation, inserting section 69(2a), which provides that: (i) the statement of an 'affected child' witness relied upon at a preliminary hearing may be in the form of a video tape or audio tape; and (ii) the affected child is not to be called as a witness unless there are 'special circumstances that justify the complainant being so called'.

To prevent this section from being undermined by the right of cross-examination provided for in section 106H(1)(b), it is expressly provided that the operation of section 69 of the Justices Act 1902 is not affected by section 106H(1).[52] Nevertheless, in *Angus v Di Lallo*[53] the appellant appealed against a magistrate's ruling refusing a right of cross-examination at a preliminary hearing to a defendant in a sexual abuse case involving a child complainant.

Pidgeon J, in a careful examination of the purpose, meaning and effect of the relevant provisions, held that the defence's right of cross-examination of a child whose statement was admitted under section 106H(1) was not intended to override section 69(2)(a) of the Justices Act 1902, and the appeal failed.

CONCLUSION

For reasons of space, issues not canvassed in this article include the use of support persons and child communicators, cross-examination of a child witness by an unrepresented accused, and identification of the defendant where the child's evidence is given by CCTV, a screen or video tape.

However, in general it seems fair to say that the reforms contained in the Acts Amendment (Evidence of Children and Others) Act 1992 have been successfully implemented in Western Australian courts. That there remain some areas in need of improvement is hardly surprising, given the breadth of the reforms and the new demands they make upon both judges and counsel. However, apart from the expansion of CCTV facilities to more courts, most of the shortcomings seem to be within the power of judges and counsel themselves to remedy by greater understanding of the legislation, its aims and meaning.

---

51. Id, ¶ 3.38.
52. Evidence Act 1906 (WA) s 106(H)(2).
53. (1993) 11 WAR 93.

* The photograph printed at p 311 supra was first published on the front cover of the WA Law Society's journal *Brief* (June 1995) and is reproduced with the Society's permission. — Ed.