

THE LEGISLATION CHANGED, WHAT ABOUT THE REALITY?

JUDITH OLIVER¹

Following the disclosure of sexual abuse it should be the right of every child to ‘have their day’ in court and to assume that the court process will be, within the constraints of the legal justice system, as child focused as possible. This paper will show that while steps have been undertaken within the criminal justice system in Queensland, Australia, to ameliorate the trauma caused to young children when they are required by law to appear as a witness in court, the reality is that many of these children still face the old, and sadly devastating, fact that the process remains unchanged and decidedly ‘unchild’ focused. What this reality means for young children who are exposed to the adult-centric world of the criminal justice system is that they are often re-abused by the very system that has been developed to assist them; a system that ultimately leaves the child, and their families, believing that if the court brings down a not-guilty verdict then what the court is in fact saying is that they, the child, must be guilty of lying. While recent legislation in Queensland, Australia, has passed legislation for the giving of testimony by closed circuit television, the reality is that very few courts in Queensland have this technology available for use and of those that do it is sometimes the case that the technology is out of working order.

I INTRODUCTION

Plato stated that ‘justice is but the rule of the stronger’.² The truth underlying this claim is that there is in reality an intrinsic connection between power and justice. Power cannot be real power unless it uses the instruments of justice to promote the common good (Thompson, 1993). Justice without power is empty and useless and detached from the structures and dynamics of actual being. ‘Power without justice is ultimately self-defeating, for, even the tyrant’s power depends upon evidence that his rule benefits others beside himself’.³

Traditional doctrines of natural law and natural rights are grounded in an ontology of power, in the structures and dynamics of being, and seek to spell out the necessary and sufficient conditions for human beings to fulfil their potential humanity, both individually and collectively. The notion of ‘power’ is also explained by Organski’s

¹ Judith Oliver is a Lecturer and coordinator of the Professional Practice program in the School of Humanities and Human Services, Queensland University of Technology, Brisbane, having worked for many years in the area of child protection.

² W H D Rouse (Ed), *Great Dialogues of Plato* (New American Library of World Literature Inc, 1956).

³ Ibid.

research, part of which addresses ‘middle powers’ that have difficulty challenging the dominant state or the system structure.⁴ Formally the concept of moral and political authority rests on the premise that the exercise of power by the state and individuals gains its legitimacy only through the promotion of the good of the individual and the common good, by empowering individuals to achieve their maximum potential.

This paper will address the notion of justice as it affects children in Australia with specific examination of the Queensland *Evidence Act 1977*. To place the issue of justice under criminal law in context we will take the journey of children under 12 years who have arrived at the court system following disclosures of child sexual abuse.

II LAWS RELATING TO CHILDREN’S EVIDENCE IN AN HISTORICAL CONTEXT

In Britain towards the end of the 19th century, the Society for the Prevention of Cruelty to children had succeeded in altering the Law of Evidence as it affected young children who were injured by ‘immoral men’⁵ whose testimony was generally the principal evidence in the case. Prior to this change, no evidence could be heard by the court unless it was given under oath and as the majority of cases involved children considered at the time too young to understand the nature of the oath, these cases were excluded from the court system. The effect of this situation was that alleged offenders were ‘beyond the reach of punishment, and they generally know it’.⁶

After much legal debate, it was allowed that a child of ‘tender years’, who did not appear to understand the nature of an oath, would be permitted to give evidence as long as the child ‘is possessed of sufficient intelligence’ to understand the duty of speaking the truth.⁷ The test for intelligence remains in use today in all Australian jurisdictions.

Prior to the Bill of 1888 early canon law excluded children from giving evidence because they were deemed incompetent. Children could be judged incompetent for a wide variety of reasons, one of which was, simply being a child.⁸

I suppose there never was a more slapdash, disjointed and inconsequent body of rules than that which we call the Law of Evidence. Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builders’ debris.⁹

III THE ADVERSARIAL COURT SYSTEM

The adversarial legal system used in Australia, derived from English law, is based on the notion of the accused being held to be innocent until proven guilty. Under this

⁴ A F K Organski, *Power Transition Theory* (1958) Wikipedia <http://en.wikipedia.org/wiki/Power_Transition_Theory>

⁵ Cardinal H E Waugh, ‘The Child of the English Savage’ (1888) 53 June *The Contemporary Review*, 687-700.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ J R Spencer and R Flin, *The Evidence of Children: The Law and the Psychology* (Blackstone Press Ltd, 1990) 31 (CP Harvey, (QC)).

system, the prosecution must prove the defendant's guilt beyond reasonable doubt and it is a jury of peers who make the final judgement regarding guilt or innocence. In western countries this system applies equally to children as it does to adults with few exceptions made regarding the youth of the witness.

Until recently in Australia, under the adversarial system, although the court is closed for cases involving children, the defendant had the right to face his/her accuser. Under these conditions the young child appeared in the same courtroom as the adult who abused them, although some judges allowed a screen to be used to obscure the child's view of the alleged offender. Although the common law assumes that the best form of evidence is that given by a witness on oath in open court,¹⁰ where the witness is a child, however, that assumption is not justified.

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...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.¹¹

In Europe the court is closed and the defendant is not permitted in the court whilst the child victim is present. In 1990 two Australian states, Queensland and Western Australia, enacted legislation which gave the court the power to order that the accused be removed from the court and placed in a room to which the child's testimony is transmitted by closer-circuit television or 'live-link'.¹² Whilst this power has been adopted procedurally in Western Australia, the Queensland situation remains difficult because, although the legislation has been adopted, there are only two courtrooms with the available technology. A child remains vulnerable when it comes to the courtroom in which she/he is to give testimony.

Under the Israeli legal system there is no jury system and only professional judges preside. The procedure is both accusatory and adversarial. The Israeli 'Law of Evidence Revision (Protection of Children) Law' allows for a 'youth interrogator' who is empowered to protect the psychological welfare of the child victim throughout the investigative and court procedures.¹³ The 'youth interrogator' obtains the necessary evidence from the child and presents this to the court. While it could be argued that this evidence is second-hand, or hearsay according to our adversarial system, it is provided to the court only when there is corroborating evidence, both of the crime itself and the identity of the offender. This evidence, however, may be accepted by the court without corroboration on two grounds;

- (1) the child's mental state, this is, that the child is suffering trauma, for example in the form of night terrors, and
- (2) the lies of the offender, if the offender is determined by the court to have lied on a particular piece of evidence (Hamon, 1990).

¹⁰ A Palmer, (1997) 'Child Sexual Abuse Prosecutions and the Presentation of the Child's Story' (1997) 1 (23) *Monash University Law Review* 171-99.

¹¹ Ibid 180.

¹² Ibid 171-99.

¹³ *Law of Evidence Revision (Protection of Children) Law 1955* (Israel) s 9.

In Queensland until very recently there was no legislation to provide support to the child witness whilst the child is giving testimony – even if the child is as young as 5-6 years and his/her feet do not reach the floor whilst sitting in the witness box. In 2002, a Consultation Draft¹⁴ addressed some of the more pressing and disenfranchising matters relating to the giving of evidence by children under 12 years. One of the points raised in the Bill was the necessity to provide a support person for the child witness.

The Queensland *Evidence Act 1977*, as amended in 1988, requires a court to receive the evidence of a child ‘unless the court is satisfied that the child does not have sufficient intelligence to give reliable evidence’.¹⁵ This makes the test for competency turn on the child’s reliability as inferred from the child’s mental development, rather than the ability to understand the duty of speaking the truth. For example, while a particular child may be considered to be mentally dull, it is possible that the same child could still be able to comprehend the difference between telling the truth and telling a lie.

- (a) In determining the question of competency, the law of Queensland expressly allows the court to receive evidence about the child’s level of intelligence, powers of perception, memory, expression and ‘any other matter relevant to his ability to give reliable evidence’.¹⁶ This evidence can be presented to the court by an ‘expert witness’. That the knowledge of an ‘expert witness’ be admitted to the court in cases of child sexual abuse was one of the recommendations incorporated in the Sturgess Report.¹⁷ This recommendation now forms part of the legislation of the amended *Evidence Act 1977* of Queensland.

One of the main concerns of the Queensland court, under the rules of evidence is the concept of intelligence.¹⁸

IV CHILDREN’S INTELLIGENCE AS DEFINED BY QUEENSLAND LAW

In Queensland, one of the concerns regarding children’s competence in law is that some of the revised forms of the competency requirements still refer to the child’s intelligence. This is a difficult term which different judges are likely to interpret in different ways. For this reason, the Law Reform Commission of Australia proposed abolishing the existing competency rules and replacing them with a simpler two part test, under which the child is permitted to give evidence provided:

- the child is capable of understanding that in giving evidence there is an obligation to tell the truth, and
- the child has the capacity to give a rational reply to the questions that may be put to the child.¹⁹

¹⁴ Consultation Draft, Explanatory Notes, Evidence (Protection of Children Amendment Bill 2002) (Qld).

¹⁵ *Evidence Act 1977* (Qld) s 9A insert Act 17 of 1989 s 62.

¹⁶ *Evidence Act Amendment Act 1989* (Qld).

¹⁷ D G Sturgess, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld Government Printer, 1985) 103 (recommendation 7.110).

¹⁸ *Evidence Act 1977* (Qld) s 9 sub-s(1) subst Act 17 of 1989 s 61.

¹⁹ Law Reform Commission of Australia, *Evidence*, Report No 38 (1987).

This approach has since been endorsed in reports by the law reform bodies of New South Wales and Victoria.²⁰ The traditional common law test requires a belief in divine punishment for lying on oath, and courts in Queensland, South Australia and Western Australia have held that this test be still applied despite the obvious objections which can be made to it in a secular age.²¹

V SPECIAL WITNESSES

The relatively new section of the Queensland *Evidence Act 1977* s 21A provides for the evidence of 'special witnesses' such as children under 12 year of age, and lists several ways in which the court may assist in reducing the trauma of the court procedures for the young witness. Section 21A (2) states that:

the person charged be excluded from the room, person charged obscured, court to be cleared, that special witnesses give evidence in a room other than that in which the court is sitting and that room be cleared also, that an approved person be present while the special witness is giving evidence.

While there are several important issues relevant to the support of the young child witness in s 21A of the *Evidence Act 1977*, the discretionary powers of judges make these concessions a tenuous gift. For example, at the time of research, this writer was aware that one Brisbane judge would not allow a screen to be placed between the child witness and the accused under any circumstances.

Recently in Queensland hearsay exception for documentary evidence of the statements of young children was proclaimed. It provides that in any proceedings where direct oral evidence of a fact would be admissible, a statement made before proceedings that is contained in a document is admissible if the maker of the statement is a child under the age of 12 years, had personal knowledge of the matters dealt with in the statement and is available to give evidence in the proceedings.²² Similarly, the New Zealand Geddis Committee has recommended that a special hearsay exception be adopted that would allow the admission in cases of child sexual abuse of certain out-of-court statements that do not fall within the existing hearsay exception.

The Australian Law Reform Commission has suggested sweeping changes to the hearsay rule which although not specifically concerned with children's evidence, would considerably relax the exclusionary operation of the rule in cases of out-of-court statements made by child complainants in sexual abuse cases. The general rule excluding hearsay is affirmed but a revised and simpler category of exceptions is proposed. While acknowledging that restrictions on admitting evidence of the out-of-court statements of child complainants should be revised, the Victorian Law Reform Commission has recommended awaiting the outcome of the review of the Australian Law Reform Commission Report on Evidence by the Standing Committee of Attorneys General.

²⁰ K Warner, 'Child Witnesses in Sexual Assault Cases' (1988) 12 *Criminal Law Journal* 286-302.

²¹ Palmer, above n 10.

²² *Evidence Act 1977* (Qld) s 93A(1).

In 1998 the Queensland Law Reform Commission developed a discussion paper which examined exclusively the evidence of children by Queensland courts.²³ The Commission considered all aspects of the giving of evidence in a court of law by children. While recognising the necessity to ensure the consistency of a fair trial, the Commission provided information which would allow that ‘every possible opportunity to communicate as effectively as it (the court) can with the child witness, so that the case is decided on the best available evidence’.²⁴

While the Commission acknowledges that there could possibly be a role for the support person when young children are required to give evidence, or ‘child communicators’,²⁵ it was the Commission’s view that lawyers, magistrates and judges should bear the responsibility of supporting the child witness, thus leaving the young child at the mercy of the court.

Magistrates and judges are meant to be ‘referees’ for a fair trial. It is reasonable then to assume that judges therefore have particular responsibility to ensure that child witnesses understand the questions asked and are not harassed or intimidated by tone of voice, aggressive questioning, incomprehensible language and unfair or abusive treatment. The Commission reached the conclusion that ‘counsel, magistrates and judges tolerate, or even perpetuate, child abuse by the legal system’.²⁶

VI THE NOTION OF RATIONALITY

Rationality is a concept that has been mentioned in the Rules of Evidence of several Australian states and is a requirement in Queensland. Hall and Clarke believe that the only criterion necessary for presentation of testimony is that it should be rational and that rational testimony should be unfettered by an age barrier.²⁷

Perry and Wrightsman state that the vast majority of children, even as young as four years, meet the criteria for competence, that is, they are able to relate information in a ‘rational manner’.²⁸ According to Flin and Bull if children’s level of competence is compared with a baseline of adult competence, which can be very poor, then perhaps children’s abilities ought to be viewed less harshly.²⁹

VII SUPPORT FOR THE CHILD WITNESS

A two year study by Morgan and Plotnikoff concluded that for young children to give competent testimony, they require much support.³⁰ Such support could be provided by

²³ Queensland Law Reform Commission Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, WP No 53 (1998).

²⁴ Ibid 278.

²⁵ Ibid 75.

²⁶ Ibid.

²⁷ A Hall and A Clarke, ‘The Evidence of Children in Criminal Trials’ (1991) April *Legal Action* 11-13.

²⁸ N W Perry and L S Wrightsman, *The Child Witness – Legal Issues and Dilemmas* (Sage Publications Inc, 1991).

²⁹ R Flin and R Bull, ‘Child Witnesses in Scottish Criminal Proceedings’ in J R Spencer, G Nicholson, R Flin and R Bull (eds) *Children’s Evidence in Legal Proceedings – An International Perspective* (1990).

³⁰ J Morgan and J Plotnikoff, ‘Children as Victims of Crime: Procedure at Court’ (Paper on unpublished research, The Centre for Criminological Research, University of Oxford, 1987).

allowing either the child's mother or other person close to the child to be present with the child on the witness stand, if indeed, the child must take the stand at all. In the United States the National Children's Advocacy Centre (hereafter known as NCAC) originated in 1985 in order to review and manage cases involving child sexual abuse and severe physical abuse. The underlying philosophy of these centres was to provide support for young children following disclosure of abuse.

VIII CHILD ADVOCACY CENTRES

Teams at these centres are multidisciplinary and aim to collect evidence through medical examination by medical practitioners and to conduct investigative interviews by professionals from child protection agencies and the police service who are considered experts in their field. The outcome of the investigative process is to provide sufficient information for decision-making regarding prosecutions and child protective issues.

During a pilot study NCAC found that there were a group of children (26%) who found it difficult to disclose and therefore the initial interview yielded unclear results.³¹ Researchers argued that although these children had not made clear disclosures of abuse, it was very likely that they had been abused. What was proposed was that some children require a series of interview processes in order to achieve results. Many researchers have identified that many young children require more than one interview before the child feels comfortable enough to disclose.³²

The NCAC provides the child with an on-going worker so that there is no need for the child to repeat themselves to a number of different workers. When the case goes to trial the child is able to give their evidence and be cross-examined if required, by closed-circuit television. The child has their worker with them at the time as well as a 'carer' who could be the non-offending parent, foster parent or other relative with whom the child feels comfortable.

NCAC have devised their own model for forensic evaluation which provides for a series of coordinated contacts that spread a 'good' forensic interview over multiple sessions. The components of the model are 'a structure, but not a cookbook, for evaluating children'.³³ In this model the evaluators use their clinical judgement and discretion to tailor the sessions to the emerging facts, the circumstances of the case, and the unique characteristics of the child. Components of the model comprise rapport building, developmental assessment, social and behavioural assessment, touching and body-parts terminology, and finally the abusive act.

³¹ C N Carnes and D Nelson-Gardell, 'Extended Forensic Evaluation when Sexual Abuse is Suspected: a Model and Preliminary data' (1999) 3(4) August *Child Maltreatment* (1999) 242-54.

³² See eg DM Elliott and J N Briere, 'Forensic Sexual Abuse Evaluations of Older Children: Disclosures and Symptomatology' (1994) 12 *Behavioural Sciences and the Law* 261-77; L Lawson and M Chafin, 'False Negatives in Sexual Abuse Disclosure Interviews' (1992) 7 *Journal of Interpersonal Violence* 532-42; K Saywitz, G Goodman, E Nicholas and S Moan, 'Children's Memories of a Physical Examination Involving Genital Touch: Implications for Reports of Child Sexual Abuse' (1991) 59 *Journal of Counselling and Clinical Psychology* 682-91.

³³ Carnes and Nelson-Gardell, above n 31.

In relation to the concept of memory, NCAC have found that ‘preschoolers need different cues for retrieval than do school-age children’.³⁴ This finding serves to reinforce the fact that workers must be mindful of children’s stages of development at the time of interview. Full examination of the procedures and processes undertaken at the NCAC show that from the time children enter these centres they are provided with on-going assistance and support in order to produce the best possible outcomes thus adding further weight to the importance of a supportive approach to young child witness.

IX QUEENSLAND – SUPPORT, COMPETENCY AND CORROBORATION

Under Queensland legislation there exists the provision for a child to be accompanied in court by someone who can provide emotional support whilst the child is giving evidence.³⁵ Also available to the child is the admission of an expert witness to present social/psychological data to support the fact that a young child has the capabilities of delivering competent testimony. These concessions, however, are granted on request of the legal counsel and at the discretion of the presiding magistrate or judge.

One of the arguments made by defence counsel in relation to the giving of testimony by young children is that children under 12 years are likely to be manipulated into providing false evidence; that they are suggestible and often don’t understand the difference between fact and fantasy. A review of the literature concerning suggestibility was carried out by Baxter who, like previous reviewers, found little evidence to support the view that young children were more suggestible than adults.³⁶ Rather, Baxter states that ‘it may be that the situations in which child witnesses are interviewed are often particularly suggestive, rather than that child witnesses are particularly suggestible’.³⁷ Therefore, if Baxter’s analysis is correct, then the responsibility for suggestibility passes from the child witness to the adult interviewer.

It is important to keep in mind that very young children have successfully proved to be ‘competent witnesses’ in a court of law. There are cited cases in which children aged two, three and four years were deemed by the court to be competent witnesses. There is also a well known American case, documented by David P Jones,³⁸ involving a three year old child who was kidnapped, sexually abused, thrown down a well and left to die by her abuser. Although this child was quite naturally traumatised by her ordeal, over a period of two years she was questioned many times, her recall remained constant, and she proved to be a competent witness in court. Perhaps given this very young child’s traumatic experience and subsequent recall over time, it is possible to deduce that some young abused children do in fact possess the ability to present as competent witnesses.

Having established that children must be seen to be competent and not suggestive in the giving of evidence, it is often the case that a child’s statement alone in matters of sexual abuse is considered insufficient evidence. In fact, Dawson states that ‘a fundamental

³⁴ R Fivush, ‘Developmental Perspectives on Autobiographical Recall’ in G S Goodman and B L Bottoms (eds), *Child Victims, Child Witnesses: Understanding and Improving Testimony* (1993).

³⁵ *Evidence Act 1977* (Qld) s 21A(2)(d).

³⁶ J Baxter, ‘The Suggestibility of Child Witnesses: A review’ (1990) 4 *Applied Cognitive Psychology* 393-408.

³⁷ *Ibid* 406.

³⁸ D P H Jones, ‘The Evidence of a Three-Year-Old Child’ (1987) *The Criminal Law Review* 677-81.

aspect of the criminal trial is entrenched scepticism towards *all* evidence'.³⁹ This leads to the matter corroboration. The rule of corroboration, which states that a person cannot be convicted on the uncorroborated evidence of another person, is comparatively new. The first edition of Archbold's manual of criminal law practice (1922) made no mention of corroboration in the index but does contain direction in cases of sexual assault.

Prior to the *Criminal Justice Act 1989* (Qld) corroboration was required in relation to the evidence of children in Australia. The corroboration of evidence in cases involving the sexual abuse of young children caused particular difficulties as in most instances these young victims were the only witnesses to their abuse. In his report, English Judge Pigot states that there is no evidence that false allegations in sexual abuse cases occur on such a scale that a special measure is necessary to enhance the normal standard of proof.⁴⁰ The report cites developments in Canada, where the Criminal Code and Canada Evidence Act have been amended to abolish the requirement for a corroboration warning in such cases.⁴¹

While corroboration requirements were meant to protect the right of accused persons to a fair trial, they have been severely criticised in recent years, and in several jurisdictions they have been modified or abolished. It is no longer seen as indisputable that the groups covered (which include children) represent special risks to the outcome of a just trial.⁴²

It has been suggested that either the requirement for corroborative evidence be abolished, or that no prosecution be commenced unless there is clear and unequivocal corroboration of the child's allegations.⁴³ This is to counteract the cases where the accused is acquitted because of paucity of corroborative evidence and as a result of this acquittal, the child is left with the belief that all the people involved in the court case consider that she or he is a liar.

Summit states that the acquittal of an alleged offender often leaves the child with 'a monstrous apparition of guilt, self-blame and rage. Acceptance and validation are crucial to the psychological survival of the victim'.⁴⁴

The rules regarding corroboration changed in Queensland in the 1990s and there is now not a specific requirement that a judge warn a jury of the danger of convicting on the uncorroborated evidence of a child (which was a previous requirement), however, in Queensland the common law rule still applies,⁴⁵ where judges are required to warn the jury on matters of corroboration in all cases of child or adult sexual abuse. So it is unlikely that the uncorroborated evidence of a young child following a case of alleged sexual abuse would be accepted without the judge using their discretionary powers to

³⁹ J Dawson, 'Expert Evidence of Behaviour of Child Complainants of Sexual Abuse: Legal Principles' (1998) 2(2) *Childrenz Issues* 13, 15.

⁴⁰ Judge T Pigot, 'Report of the Home Office Advisory Group on Video Evidence' (Pigot Committee Report, London: Home Office, 1989).

⁴¹ Hall and Clarke, above n 27.

⁴² B Naylor, 'The Child in the Witness Box' (1992) 2(22) *Australian and New Zealand Journal of Criminology* 82-94.

⁴³ A McMillan, 'Children as Witnesses' (1990) Summer *Child Safety* 35-58.

⁴⁴ R Summit, 'The Child Sexual Abuse Accommodation Syndrome' (1983) 7 *Child Abuse and Neglect* 177, 192.

⁴⁵ *R v CBR* [1992] 1 Qld 637.

warn the jury of the possible danger of accepting such evidence. What this means, of course, is that the jury is left with a sense of enormous responsibility having been warned by the judge, to weigh the matter up with utmost caution.

Although one of the main justifications for abolishing the warning requirement is that it might result in an increase in the rate of convictions, there is no evidence that it has had any such effect.⁴⁶

X THE NEW LEGISLATION

In September, 2003, *The Evidence (Protection of Children) Amendment Act 2003* was passed in the Queensland parliament. Whilst this Act undertook to assist in the giving of testimony by young children, it is the belief of this author that there remains much left to be done. The new Act states that all children under the age of 16 years have the right to give their evidence in a place other than the court room via closed circuit television. Section 21AQ(2) states that 'If' there is an audio visual link within the court precincts, the judicial officer presiding at the proceeding for the giving of evidence by the affected child must direct that;

- (a) the child give evidence outside the courtroom and the evidence be transmitted to the courtroom by means of the audio visual links: or
- (b) while the child is giving evidence, the defendant be held in a room apart from the courtroom and the evidence be transmitted to that room by means of the audio visual link.

While this section of the Act is quite clear, the harsh reality is that unless there is a courtroom available for this means of communication then the child will still be required to give evidence in the same place as the accused. In Brisbane there are only two courtrooms with an available audio visual link. If it is the case that more than two trials involving young children are heard at the same time, or if the technology breaks down, then the outcome for the child again highlights the contradiction between the legislation and the reality. Closed circuit television facilities are unavailable in many Queensland rural courtrooms.

Section 9E of the 2003 Act appears to be a valuable leap forward for young children caught up in the criminal court system – Principles for dealing with a child witness. Section 1 states that because a child tends to be vulnerable in dealings with a person in authority, it is the Parliament's intention that a child who is a witness in a proceeding should be given the benefit of special measures when giving evidence. The following general principles apply;

- (a) the child is to be treated with dignity, respect and compassion;
- (b) measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence;
- (c) the child should not be intimidated in cross-examination; and
- (d) the proceeding should be resolved as quickly as possible.

⁴⁶ See eg J Cashmore, 'The Prosecution of Child Sexual Assault: a Survey of NSW DPP Solicitors' (1995) 28 *Australian and New Zealand Journal of Criminology* 32-49; M Dixon, 'Child Witnesses in Court – the Legal Framework' (1996) Summer *The ISA Journal* 17-29.

While these principles are worthy, it is important to remember that even though the state government has gone some way to addressing the disenfranchisement of young children in the criminal justice arena, individual judges still maintain discretionary powers in many aspects of the law. It remains of concern that some judges hold the view that even if young children are interviewed well, by experienced interviewers, their videotaped evidence still should not be presented to the court. Presumably the reasoning for this is that by presenting evidence at trial that was obtained in 'cloistered surroundings' (Brisbane District Court judge) this would somehow prejudice the court against the accused. This researcher would argue that young sexually abused children, by virtue of all that has been learnt about the nature of sexual abuse, have a right to expect that society will grant them special consideration.

Previous research by this writer has found that there remains a divergence of opinion by Brisbane judges regarding the giving of evidence by young children. Whilst some judges indicated that young children should be accepted as witnesses and granted special consideration, there were others who were of the opinion that any consideration made by the court could be seen as prejudicial to the accused. When this latter view is compounded by the fact that many cases of child sexual abuse, by the very nature of the abuse, are devoid of corroborative evidence, it is not surprising that very few accused who plead not guilty receive guilty verdicts.

XI CONCLUSION

It is not the intention of the writer to deny the accused the right to justice. Under the adversarial system of jurisprudence it is clear and right that all those accused of committing a crime should always be considered innocent until proven guilty in a court of law. It is, however, my intention to suggest that we advocate for the rights of all young children involved in the criminal justice system. If children are required to present as witnesses in a court of law then we should advocate that such court should not be intimidating or frightening, nor should it inflict undue pressure upon vulnerable young children, but rather, provide services to aid young child witnesses on their path to justice. We should also be ever vigilant of political systems and power structures that oppress the weakest members of society.