REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO CHILD SEXUAL ASSAULT

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At Sydney on Wednesday 3 April 2002

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The Committee met at 10.00 a.m.

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PRESENT

The Hon. Ron Dyer (Chair)

The Hon. Peter Breen
The Hon. John Hatzistergos
The Hon. John Ryan

DOUGLAS JOHN HUMPHREYS, Director, Criminal Law Branch, Legal Aid Commission of New South Wales, and

JOHN ANTHONY FRASER, Senior Trial Advocate, Criminal Law Branch, Legal Aid Commission of New South Wales, 323 Castlereagh Street Sydney, sworn and examined:

CHAIR: Mr Humphreys, in what capacity are you appearing before the Committee?

Mr HUMPHREYS: As a representative of the Legal Aid Commission of New South Wales.

CHAIR: Did you receive a summons issued under my hand in accordance with the provisions of the Parliamentary Evidence Act?

Mr HUMPHREYS: I did.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr HUMPHREYS: I am.

CHAIR: Could you briefly outline your qualifications and experience as they are relevant to the terms of reference for this inquiry.

Mr HUMPHREYS: I am a solicitor of the Supreme Court of New South Wales and was admitted as such in 1981. I have been practising in the criminal law field for all of that period of time. I have been employed by the Legal Aid Commission since 1984 and have appeared in many, many matters involving child sexual assault. I am currently the Director of the Criminal Law Branch; that is, I am the senior criminal law practitioner within the Legal Aid Commission. I have held that position, or a similar position, since 1993.

CHAIR: The Legal Aid Commission has kindly made a detailed written submission to this inquiry. Is it your wish that that submission be included as part of your sworn evidence?

Mr HUMPHREYS: Yes, Mr Chairman.

CHAIR: Mr Fraser, in what capacity are you appearing before the Committee?

Mr FRASER: As a representative of the Legal Aid Commission of New South Wales.

CHAIR: Did you receive a summons issued under my hand in accordance with the Parliamentary Evidence Act?

Mr FRASER: I did.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Mr FRASER: I am.

CHAIR: Could you please briefly outline your qualifications and experience as they are relevant to the terms of reference for this inquiry.

Mr FRASER: I have been a legal practitioner since 1985. I was admitted as a barrister in 1985. I have 12 years experience as a prosecutor: six years with the Commonwealth Director of Public Prosecutions and six years with the Queensland Director of Public Prosecutions, where I was employed as a senior Crown prosecutor. From 1998 to the end of 2000 I was employed as in-house senior counsel for the Legal Aid Commission in Queensland, which is a position akin to a public defender in New South Wales. I have appeared in approximately 300 jury trials as counsel. I also have significant experience as an appellate lawyer, appearing primarily in the Queensland Court of Appeal. I have both prosecuted and defended a number of cases involving sexual offences and in particular sexual offences involving young children.

CHAIR: If either of you should consider at any stage during your evidence that, in the public interest, certain evidence or documents you may wish to present should be heard or seen only by the Committee, the Committee will be willing to accede to your request. However, I have to add to that a rider that the House itself has the right, and if it so decides, to override that decision of the Committee. Could I now invite you, Mr Humphreys, to make a brief opening oral statement to the Committee.

Mr HUMPHREYS: I suppose in many ways we—Mr Fraser, I and the Legal Aid Commission—find ourselves the spokespeople for the despised and the damned. Our function is to provide legal representation for those whom it is alleged have committed sexual assault offences, and particularly child sexual assault offences. Child sexual abuse is an abhorrent crime that arouses within the community feelings that on some occasions can lead otherwise reasonable people to lose sight of the objectives of the criminal justice system. Sexual assault matters, unfortunately, play a very large part in the current menu of trials before criminal courts. They involve both past and current offences.

In saying that, I am suggesting to the Committee that there is a large range of matters where the allegation will involve child sexual assault. In some cases it may involve an alleged victim who is still a minor. In many cases, however, it may involve an alleged victim who is no longer a minor but is in fact a person of some considerable years—in their thirties, twenties or whatever. Within the past 10 years we have seen a very large number of matters come before the court which involve allegations of child sexual assault that are generational; that is, they go back, in some cases, to the fifties, sixties, seventies, eighties and nineties. Also, the category of minors alleged to have been sexually assaulted can range from children of some tender years—and I include in that category a very young toddler to a child of say under 10 years – as well as children from their early teens through to their late teens who, by the time they come to court, may be deemed an adult in that they are past their eighteenth birthday.

It needs to be remembered that, in dealing with all of these matters, although the allegation may be child sexual assault, the person we are dealing with can be very, very different. What we may need to do to look after the interests of a young child under 10 years may be completely different from what we need to do to look after persons who are in their late teens, as compared to a person who has reached an age of some considerable maturity. However, in the recording of matters, they are all deemed to be child sexual assault, because the only way we record them is in accordance with the allegation, and we use the category of child sexual assault. So I think it is very important that we look at the range of matters that can be prosecuted. There is not one size that fits all, because they are completely different matters in terms of the way they need to be dealt with, perhaps in the way they can be dealt with by the courts, and in the protections and safeguards that are needed in relation to each one of those sorts of offences.

I think it is important, at the end of the day, that we do not lose sight of the fact that the sole purpose of the criminal justice system is to determine the guilt beyond reasonable doubt or otherwise of the accused in circumstances where there is a presumption of innocence. We also need to remember that an allegation of child sexual result carries very significant social and other penalties merely by the fact that the allegation has been made. Convictions for child sexual assault—and, can I say, sexual assault in general—result in significant gaol penalties being imposed. Perhaps unique among some of the criminal prosecutions is that those involving sexual assault can, at the end of the day, fall down to the word of one person against the other. We need to bear that in mind in relation to the way we approach these matters. Mr Chairman, that is all I would like to say in my opening remarks.

CHAIR: Mr Fraser, would you like to make an initial statement?

Mr FRASER: I would like to add to what Mr Humphreys said and emphasise that the aim of the process of a criminal trial is to ensure a fair trial. By that I mean a fair trial to the accused and a fair trial to the Crown. The object of the exercise is not to secure a conviction. One must bear in mind where the onus of proof lies and what is termed the presumption of innocence. One must recognise the standard of proof—that is, beyond reasonable doubt—is indeed a high standard. Then again, the stakes involved are very high. It would be my submission that the accused person has the right to know what case he has to meet and indeed the right to test that case. That should be foremost in any person's mind when considering the process of a criminal trial.

CHAIR: You may answer any questions from me or my colleagues in any way you choose. My first question relates to a central issue in this inquiry: the fairness or otherwise of cross-examination of children during prosecutions for alleged child sexual assault. The Legal Aid Commission's submission states:

> Evidence was given to the ALRC that counsel, magistrates and judges rarely intervene to protect child witnesses from harsh, intimidating and confusing questioning. However, such comments ignore the fact that the right of an accused to a fair trial must include the right to test the prosecution case by vigorous cross-examination of the complainant and other prosecution witnesses.

Last week the Director of Public Prosecutions gave evidence to the Committee and in his written submission stated:

> Suggestions that might be put to the complainant include: that they are not telling the truth, that they have been confused, or that they are making up stories. The child can have it suggested that they are making up stories for reasons such as: they do not like the accused, they want some money, they have been persuaded to make this up by someone else. It can also be put to children that they actively encouraged or participated in the sexual assault.

I have no problem with vigorous cross-examination, but I have a problem with unfair cross-examination. Can you address the concerns that Mr Cowdery outlined in that brief quotation?

Mr HUMPHREYS: I will make some opening remarks and then ask Mr Fraser to comment further. Appearing as a defence representative in a sexual assault matter carries very heavy burdens. These matters are very difficult to deal with and one must always remember the ultimate outcome that one is seeking. These matters generally come before a jury. In my experience, it is very rare that child sexual assault matters are dealt with by a judge alone because the defendant will not request it or, even if the defendant makes the request in some limited circumstances, the prosecution has the right to refuse that request under the current system.

There is no easier or quicker way to lose a jury then to misbehave in approaching a child witness. In fact, good counsel will take a child witness—someone who is young—very carefully and will be very gentle in cross-examining that witness. In my view the proper approach for dealing with suggestions that a child may be confused, may be fabricating evidence or may be unreliable is the address to the jury. That is the proper place to make those suggestions. You damage your case by going in too hard with a child witness. In fact, the quicker you can get the child witness in and out, the better it is. You need to concentrate on other issues in terms of what the child said in order to measure that evidence against other available information, such school record, other time line dates and information such as that. A defence representative who engages in the sorts of tactics to which you have referred does his client a disservice.

Mr FRASER: There is a procedure for preventing unfair questioning: there is nothing to stop the Crown Prosecutor from objecting or a trial judge from disallowing what might be termed unfair questioning. As to the techniques addressed in question one, when I was a Crown Prosecutor—I performed this role for some time and prosecuted a number of such cases—my experience was, first, it was rare for defence counsel to be overly aggressive; and, secondly, when defence counsel was overly aggressive it was almost certain that you would win the day when the jury came to consider your case. We must bear in mind the fact that an accused person has the right to test the case and to test the case vigorously. He does not have a right to test the case unfairly, and the courts have the power to step in. It may surprise you to learn that it has been revealed that in certain cases children were coached by various partners in the relationship to make up stories. That is my experience not just here but in Queensland.

CHAIR: Before the Committee last week Mr Cowdery said, "General techniques of cross-examination, for example the use of leading questions, are developmentally inappropriate for children." He then referred to three studies by Brennan and Brennan in 1998, Davis and Seymore in 1998 and Zajac and others in 2001. Mr Cowdery told us that, in spite of children's developmental difficulties, such questions—in this case leading questions—are used to question the credibility of the child and to discredit the child's evidence.

Mr Cowdery also said that the nature of disclosure of sexual assault by children presents difficulties for children when under cross-examination because children often disclose a little information at a time to see what response such disclosures receive and may then disclose more over

time. He pointed out that, unfortunately, the inconsistencies that might appear in those various stages are used by the defence to demonstrate that a child is not a credible witness and perhaps even to suggest that the child is making up things as he or she goes along. I put it to you that children by definition are immature in their development, mentally and otherwise, and thus there are special difficulties such as Mr Cowdery has outlined. Can you respond to that issue from a defence point of view?

Mr HUMPHREYS: Most of the problems outlined by Mr Cowdery can be dealt with by the trial judge adequately instructing the jury. Juries comprise representatives of the community, who bring with them a vast amount of experience and knowledge. Some of the jury—generally most of them—would have had experience with children and they can apply their commonsense to the circumstances in which they find themselves. The mere fact that a child may have disclosed information and gone on is a circumstance that will be well known to most members of the jury, who have had the benefit of raising children or teaching children or who have had general experience with children while undertaking a wide range of activities. In most cases that can be adequately explained by the judge in charging the jury. One would normally expect the jury to take account of that and for jury members to use their commonsense to determine whether the essence of the child's evidence is believable.

Mr FRASER: In my experience, juries are often told that children are not small adults. You make allowances for that fact and take into account their age and the fact that they are not professional witnesses. Judges often go out of their way to explain to a jury the fact that the jury is dealing with the testimony of the child.

CHAIR: The problem I am approaching in my questioning is probably the central reason that the Attorney General established this inquiry: complaints are being made by parents and by young people who have been through the mill that the process tends to be unfair and intimidating. I am sure you would well appreciate that a child who appears in any court proceeding where the atmosphere and procedure is formal would find it fairly overwhelming even without the overlay of a child sexual assault prosecution at which he or she is the chief witness. Mr Cowdery seemed to suggest to the Committee that children are often badgered and repeatedly called liars and that judicial officers are most reluctant to intervene to stop that. I accept your assertion that the judge can deal with a matter in his summing up and comment then. However, by that stage some days might have passed and in the meantime the child might have his or her credibility destroyed as a result of breaking down under this intense questioning. Do you think there is any answer to this problem that is consistent with preserving the rights of the defendant?

Mr HUMPHREYS: I have given evidence on many occasions, both as a professional witness representing the Legal Aid Commission and also as a lay witness due to my involvement, unfortunately, in some matters where I have been called to give evidence. Even as a lawyer who has been around criminal courts for the entire period of my professional practice, I find giving evidence intimidating, overwhelming and a difficult experience. One would imagine that perhaps I of most people would not feel that. So, I am aware from a personal point of view what those feelings are like and how difficult it is to put something that can be attacked as being untrue. The fact is we have a system where evidence has to be tested and you cannot have a person saying this did not occur, this is untrue, and on the other hand we can make it all warm and fuzzy for a person to come in and put allegations to the court. There is an essential tension between those two problems of having the evidence tested, which may involve putting those propositions that people might find uncomfortable.

We also need to look at the end. Although people may have found the process to be intimidating and difficult, if it resulted in a conviction they may well have found the outcome is sufficient. However, in a criminal trial there can be only one winner and the difficulty is that the winner is either the accused, who is found not guilty, or the State and the victim, when a recording of guilt is found. There will always be a loser in a criminal trial. The difficulty is in trying to get to the situation where people feel that the process has been fair but to get away from having a winner and a loser. The essential difficulty is between the two.

Clearly, the courts and legislature have recognised the difficulty of child witnesses and over a period of time a significant number of measures have been brought into place to ensure that child witnesses are dealt with in an appropriate and proper manner. It is a matter of trying to balance what

we are seeking to achieve, and the sole purpose of a criminal trial is to determine beyond reasonable doubt the guilt or otherwise of an accused. It is that tension that arises. My view is, if there is a problem that the Director of Public Prosecutions [DPP] feels about judges not intervening, that is a matter or training for the judges to reinforce what their proper role is in the conduct of matters where child witnesses are involved and to ensure that counsel do not behave inappropriately.

CHAIR: Last week Mr Cowdery, in his written submission and in his oral evidence, suggested to the Committee for consideration that there could perhaps be a designated Children's District and Local Court, which would entail the judiciary—in his view probably a judge alone and court staff—receiving training in the dynamics of child sexual assault, developmental ages, linguistics, the special needs of children and the legislative provisions pertinent to children giving evidence in court. He also suggested that court staff would be trained in the use of closed-circuit television and the video and audio playing equipment, and that mobile units could enable the Children's District and Local Court to sit in rural and remote areas at circuit listings. I understand you have seen a copy of Mr Cowdery's written submissions. That being the case, would you like to comment on that matter, the suggestion he has made of that specialised court to seek to overcome this problem and do justice to both sides?

Mr HUMPHREYS: I support the idea of special training, of ensuring that people are aware of the difficulties and problems that child witnesses can face, not just in sexual assault proceedings but in any criminal law proceedings where a child may be a witness. I would extend it to all child witnesses, because they have special needs that have to be looked after. We need to ensure that their involvement in the justice process—not just the criminal justice process—is the best that we can make it. I then go back and say that the right to trial by jury is one of the fundamentals we have in the justice system. To suggest that somehow we would remove child sexual assault allegations from the normal criminal justice system has great difficulties, in my view. The right to a trial by jury of one's peers at the moment can only be removed if is the accused who waives that right. Indeed, in the Federal system the accused has no right to select a trial by judge alone. So, for Commonwealth offences it must be a trial by jury.

At the moment we have the unique situation in my experience that whilst it is the right of the accused to elect to have a trial by judge alone, the prosecution can object. In my experience it is not unusual for the prosecution to object in a number of cases, and child sexual assault matters in general are matters where the prosecution will object to there being a judge-alone trial. So I find Mr Cowdery's suggestions somewhat surprising. My view in relation to a special court to deal with child sexual assault matters, we have problems with it—it removes them outside the general criminal law system.

CHAIR: This was suggested as a trial only, as a pilot.

Mr HUMPHREYS: Even as a pilot we would oppose it. I believe it is far better for these matters to be dealt with in the general criminal law system and for there to be appropriate training for those people who are dealing with these matters.

Mr FRASER: I do not know what the practice is down here, but in my experience as a prosecutor, what we used to do with children particularly was before the trial commenced we would get them in for a conference, not necessarily to talk about their evidence but just to talk to them about the process; what was involved; to explain to them that I was appearing as the prosecutor and that Mr Smith or Miss Jones was appearing as the defence counsel; and to explain to them the process of their evidence, that they would be cross-examined. What we would do in a number of cases is take them over to the District Court and show them a courtroom and point out to them, usually with the support person, where the judge will be, where the jury will be, and so on, just point out to them the geographical layout of a court.

CHAIR: Mr Humphreys in particular will probably be aware, relevant to the issue we are now discussing—if he has seen and read the DPP's submission to this Committee—that he is proposing what he termed an independent expert interviewer which, in some ways, resembles what Mr Fraser is saying. You are not saying that, but the role he would be taking—

Mr FRASER: I wanted to go on and say I noticed that one of these submissions, I think it was from the Deputy Chief Magistrate, spoke about the need to properly interview the complainants in these matters and of the need for training. That has been a call by the judiciary, particularly in Queensland, which has a process in place where the evidence-in-chief of a child complainant is generally the recorded interview had with the police officer. So, that is the evidence-in-chief. It is only admitted into evidence if the child is available for cross-examination. So far as that aspect of their evidence is concerned, at least they get their story before the court. That seems to me to be a fair process. It is also fair because one sees from the defence point of view how the story unfolds: is it the subject of leading questions, is it the subject of coaching, has the questioning been fair and proper? Of course, the other advantage is that it records the complaint quite often at a time very close to the events.

CHAIR: Mr Humphreys, I can appreciate your hesitancy regarding Mr Cowdery's suggestion about the trial of the designated Children's Local and District Court. However, I am somewhat bemused by your reluctance to embrace it even as a trial. Trials can be successful or unsuccessful. I know there are arguments not only in this area but in others in favour of dealing with them in a general court system rather than in a specialised structure, however it is true to say that in recent years various specialised structures have arisen—the Drug Court would be one example. Can I just ask you to think again about the issue of a pilot?

Mr HUMPHREYS: The suggestion in relation to the concept of judge alone and mandatory judge alone is what strikes me as being the most difficult aspect of the proposal. The Legal Aid Commission has always supported the concept of having a Children's Court which deals with matters involving children defendants, where a District Court judge presides over that court. One of the great difficulties we have at the moment in relation to child defendants—and we need to bear in mind also that in many cases we are not necessarily just talking about child victims, we are also talking about child defendants—is that they can find themselves in the adult courts with a judicial officer who may have no experience whatsoever of dealing with child defendants or child victims.

I would be prepared to countenance, perhaps, a trial where a specialised judge perhaps or a number of judges received specialised training. The part I have the greatest difficulty with is the suggestion of the judge alone. It strikes at the very heart of what we regard as being the rights of the accused in the criminal justice system. I am speaking here as a representative of accused people, which is the role I perform in the Legal Aid Commission.

The Hon. JOHN HATZISTERGOS: Not all criminal trials are dealt with in the District Court. Serious criminal offences are dealt with in the Industrial Commission and the Land and Environment Court. They are dealt with by a judge alone. No-one questions the quality of the justice that is dispensed in those jurisdictions and, if they do, there is an appeal process to look at it. What is so intrinsically unfair, bearing in mind the special nature of the proceedings involving children, with having such a procedure without juries? Mr Cowdery in his submission has made what I think is a pretty strong case for a specialist court or a specialist list within a court—whatever way you like to look at it—based on the need to develop expertise and to share resources and ensure there is a continuity of proceedings involving children, which, I think, can only be facilitated by having a specialist court or a specialist list. What is wrong with that?

Mr HUMPHREYS: I am suggesting to you I am not necessarily opposed to the idea of putting matters into a list, having judicial officers with specialised training and dealing with those matters with specialised officers familiar with closed-circuit TV and the other. I have always had concerns in relation to the spinning off—if I can use that term—of matters that are of a quasi-criminal nature which can involve significant criminal penalties, including gaol, from outside of a court of criminal jurisdiction to courts like the Land and Environment Court and other courts. I believe there are difficulties with that process and it is not a process that I support. It is a process that is fraught in many cases with difficulties and, indeed, we have seen some spectacularly unsuccessful prosecutions in the Land and Environment Court—one I can think of in relation to the prosecution of a person charged with the dumping of large amounts of tyres on a property on the Central Coast—that have failed.

In my view, whilst the court itself has been dealing with a matter of a criminal nature, one of the reasons it failed is that the court itself did not necessarily have the experience, nor did the persons

prosecuting it, of dealing with the matter in a manner that ensured the conviction would be dealt with in a manner that would be supported in the appellate process. So, we need to be careful in terms of the proliferation of bodies that are exercising criminal justice powers. As I said, we are not just talking about fining someone or giving them a good behaviour bond or fining a company; what we are talking about is, if a person is convicted of this type of offence, significant gaol penalties.

The Hon. JOHN RYAN: Nobody denies that. I understand the complication that occurs when the Land and Environment Court, which generally deals with civil matters, has the occasional criminal matter to deal with. The court proposed by the Director of Public Prosecutions [DPP] would be largely dealing only with criminal matters. So, that objection you have would not arise in this instance.

Mr HUMPHREYS: I am saying to you I am not necessarily opposed to it. The fundamental proposition that was put up was the judge alone. I have difficulties with that. The rest of it I am not necessarily opposed to.

The Hon. PETER BREEN: You do not appear to be drawing a distinction between a judge alone and a judge who has specialised experience or skill in dealing with children. What is the difference?

Mr HUMPHREYS: A judge alone is required to determine the ultimate factual issue. A judge who has specialised training and expertise in dealing with child witnesses is an entirely different matter. That is the difficulty. If we are talking about a situation whereby we have a specialist judge and we still have the right to jury trial, then that judge can turn out and deal with child witnesses, the summing up to the jury can be appropriate; that judge can then deal with the situation of the control or proper control of cross-examination, and I think that is appropriate. It is the issue of some mandating of judge-alone trials where it is an allegation involving child sexual assault.

CHAIR: To be fair, I do not believe Mr Cowdery was mandating that. If you read his submission, he was suggesting that perhaps it might be by judge alone.

Mr HUMPHREYS: I understand that, but we need to be very clear that at the moment the right to a jury trial is the right of the accused and to put it into the hands of the prosecution to somehow mandate it would be a very grave step. The other thing I might add is this: Are we going to leave situations whereby the victim is now an adult and the allegations may have occurred some years earlier in the general criminal justice system or is it going to deal with all allegations involving child sexual assault? As I said, it could range from a situation whereby the alleged victim could be 30 years of age or older and there are issues that you need to determine. What is the cut-off point? Would you still deal with matters in relation to where the alleged victim was now 18 and the offences occurred two years earlier? There are issues there that you need to think through as to how you are going to deal with it. As I said, my view in relation to situations where you are talking about a child of tender years is entirely different as to how one might deal with a person who is 16, 17 or even 18.

The Hon. JOHN RYAN: If you have a limited number of specialist judicial officers who deal regularly with child sexual assault matters as a matter of routine, are you anyway concerned that they may lose their level of objectivity because of the specialist nature of the court?

Mr HUMPHREYS: There is always that problem. However, in my view, as I said, the menu of most judges who are sitting in the criminal jurisdiction when it comes to trial matters is probably up to 50 per cent in some cases, or in some original areas even more, involving sexual assault of one form or another. Indeed, even with my staff I am wary and careful in relation to their work in that one can become too involved in those sorts of matters and you always need to get a break from them. For example, some of my staff long for the day when they can do a good old robbery, regrettably.

CHAIR: Under the existing practice regarding the giving of evidence by closed-circuit television [CCTV], a matter referred to in your submission, at the bottom of page 5 you make the comment that in your view there is a real concern that the use of closed-circuit television may cause undue prejudice to the accused. How do see that prejudice arising? Is it a matter that relates perhaps to the non-uniform use of that technology? I note that you say if the use were uniform the possibility of the prejudice is reduced.

Mr FRASER: I think the concern is this: somehow the jury may think that the reason she is not coming into court is for the child's own protection. There is a prejudicial spin-off.

CHAIR: Suppose in every single case—

Mr FRASER: It probably could be corrected. It probably could be alleviated by careful direction from a trial judge to say, "Look, the evidence here has been given by a young child. In our court system we have a system in place whereby young children give evidence by way of closed-circuit television. You're not to infer anything sinister." There are ways around that, I suspect. In fact, I have actually been in court cases where children have asked for screens to be put up or, in fact, the accused has been positioned in a courtroom so as to be not in the line of sight of the young child giving evidence. It has all been done very subtly.

CHAIR: On this same subject, in some written responses to questions the Committee submitted, the DPP said that currently there are problems in relation to the quality of the equipment, specifically the size of the television screen. He said that lawyers and members from other agencies have reported that there are often difficulties in actually being able to clearly see the child's image and for that image to appear realistic. He stated also to the Committee that other problems reported included the positioning of the camera within the courtroom; care is not always taken to ensure that the child can see only the person who is examining or cross-examining. Child witnesses have at times been able to see the accused person throughout the cross-examination due to the incorrect positioning of the camera. Would you indicate to the Committee whether you are aware of any similar problems?

Mr FRASER: I cannot comment on that. I do know this, that where I am from, and that is Queensland, closed-circuit television has been used for quite sometime. Having said that, it is quite often a very powerful tool that the prosecution has when they call a young person to give evidence and into court comes this very tiny child to give their evidence. In my view, it probably should be at least an option of the child as to whether or not they want to give their evidence in court before the jury or indeed on closed-circuit television.

The Hon. PETER BREEN: Have you ever been in a trial where you have had closed-circuit television and you have not actually seen the child in court?

Mr FRASER: No, I have not, but again I come from a jurisdiction where these sorts of measures are pretty well in place.

The Hon. PETER BREEN: So you have seen them operate but you have not been involved in them yourself?

Mr FRASER: Yes. I have seen them operate but I have never been in a situation where the child suddenly disappears from the image.

The Hon. JOHN RYAN: Where you have seen them operate, have they been built into the architecture of the courtroom or have they been installed afterwards?

Mr FRASER: From memory we actually had a room at the DPP in Brisbane that was quite close to the court. It was like a nursery and the child would be in there and then all of a sudden they would be called to give evidence and away they would go.

The Hon. PETER BREEN: When you say, "Away they would go", they would go into court?

Mr FRASER: No. They would be in this room and it would be quite a friendly environment, set up like a nursery. There would be toys there and different things and they would probably have their support person with them. Then when it was time for them to give evidence—

The Hon. PETER BREEN: Switch on the camera?

Mr FRASER: Yes.

CHAIR: When the DPP gave evidence last week he suggested to the Committee that there are some examples of court staff, and he named the courts in question, not being familiar with the operational aspects of the equipment. Have you encountered that, from the defence point of view?

Mr HUMPHREYS: I cannot say personally. However, I have no reason to doubt what the director has said. I think there is a huge training bill involved in ensuring that we are best at using the technology we have. We are only really starting to get experienced with the effective use of videoconferencing, if I can use that now, as a result of the project that is currently underway for videoconferencing in relation to bail applications, mentions and other things. People are only starting to get skilled up in relation to that. Before it was always the exception. Now, if you go to central or the District Court, this sort of thing is becoming a lot better. Also, the equipment is becoming a lot better. We are getting big plasma screens now rather than having multiple small television sets, but it requires skilled operators. As I said, I think what has happened is that in the past people have not been used to using it; they have not had special training.

As I said, I do not doubt for a minute that all of those problems have occurred. I think this system will get better because people are becoming far more familiar with using the technology that is available, and I should add that the technology itself is getting much better. The bandwidth in relation to CCTV is much better. If you are using the high bandwidth, 800-odd, what they use is about eight lines, your quality of the picture is far better. From a prosecution point of view, again I will make the comment that if you have a bad CCTV situation you will not use it simply because you will lose the benefit of having a small child, the facial expressions and all of those other things that you will not necessarily pick up that can be picked up and are appropriate, all the things you would want as a prosecutor from a witness, if the system is not good enough. As I said, with bigger bandwidth and with larger screens, those sorts of things, it makes it a lot better. In fact, you can get a more powerful presence if you have a small child on a big screen in front of the jury. In some ways it can be better than having a small child just about peering over a witness box. Those things can be dealt with better.

CHAIR: On page 6 of your submission you state, "In the commission's view, the current system of trying and punishing offenders is working and alternative procedures are not necessary or desirable." The reason for this inquiry is that people have approached the Government and the Committee virtually crying tears of blood, if I could put it that way, about how the current system works. They are aggrieved, to put it mildly, about the cross-examination process and the whole court process. Mr Cowdery indicated to us that even when a conviction is secured, which appears to be in a minority of cases, his guesstimate is that some 75 per cent would appeal. The appellate court then trawls through the transcript and finds that the judge made some technical misdirection and a new trial is ordered. At that point, although the Committee has not taken formal evidence from people who have been through the mill as yet, it appears anecdotally that when a new trial is ordered the parents decide, "We are not going to put our child through this a second time" so they give up. Could you comment on that general disquiet with regard to the way the system is working against your belief that the system is working?

The Hon. JOHN RYAN: It has been reported to the Committee that there is a generally low success rate for prosecutions in this field by comparison to others, and it is suggested to the Committee that that is evidence that there is something wrong with the way these matters have been prosecuted.

Mr FRASER: It might suggest that the system is working. The process is not to secure convictions. What is an acceptable rate of success in prosecuting? If it is too high, if it is in the range of 70 to 80 per cent, you could probably say that they are not doing the hard cases.

CHAIR: You have said more than once this morning that the objective is not to secure convictions. I would have thought that the duty of the State is to secure a conviction if the offence has occurred and the evidence is—

Mr FRASER: That is right, if the person is guilty. And there is a process whereby that has to be established. The process starts off with this basic assumption: that there is a presumption of innocence. The Crown does not secure a conviction unless it can prove its case beyond a reasonable doubt. That is a situation that does not attach just to a few accused; it attaches to all accused. It

attaches to everyone, irrespective of their background, their means, their political alliances, et cetera, et cetera, et cetera. That is a fairly important pillar of our criminal justice system.

CHAIR: I agree with that. However, it seems to me that there are particular difficulties regarding child sexual assault matters, in that the child's evidence might be the only evidence available in many cases. That is a fundamental difficulty. However, given that that is the case, should not the State be very aware and vigilant to ensure that the process is fair, so that the child is not destroyed, so far as their evidence is concerned, arising out of their immaturity, and the use of sophisticated questioning that a child could hardly be expected to cope with?

Mr FRASER: Let us examine the development over the last 20 years. About 20 years ago, where it was word against word, juries were told as a matter of practice—and in Queensland as a matter of law—that in the absence of corroboration it would be dangerous to convict. That has been abolished. Pursuant to section 107 of the Criminal Procedure Act, juries are told that a failure to complain does not necessarily mean that the complainant is lying or that these events did not take place. Indeed, in some States the warning goes further. Juries are often told, "You are entitled to consider here that there has been a failure to complain. But there might be a very good reason, in that this is a complaint made by a young child against her father, a brother or an uncle; it is in a family situation." In that situation, one can see how a complaint might not necessarily be made at the first reasonable opportunity.

We now have a situation where fresh complaint is evidence of the facts, by virtue of the combined effect of sections 66 and 60 of the Evidence Act, whereas under the common law fresh complaint was only a buttress to the credit of the complainant. We now have in place privilege attaching to sexual complaint communications. As I understand the law in this State, children can give their evidence via closed-circuit television. Their evidence, so far as their evidence in chief is concerned, can be the record of interview, as I understand it.

The Hon. JOHN HATZISTERGOS: That is subject to the court's discretion, is it not?

Mr FRASER: It may be. If, for example, the interview of the child was tainted in some way—for instance, there was a large degree of leading questions, or there was coaching or other improper suggestions were made—I suspect that in those circumstances the complaint might not be played to the court.

The Hon. JOHN HATZISTERGOS: But even the use of separate interview rooms and the use of audiotape or videotape methods to extract the child's evidence is subject to the discretion of the court.

Mr FRASER: That might be so. But all evidence is subject to the discretion of the court. It has to be relevant and it has to be admissible.

The Hon. JOHN HATZISTERGOS: It is not the content of the evidence; it is the method of delivering the evidence. What I am saying is that the question of whether the child is able to give that evidence in that separate and more friendly environment, which some people seem to think is preferable, is subject to the court's discretion, and there are no guidelines in the legislation which indicate how that discretion is to be exercised. You may have a situation where, for example, the defence objects to the child not being brought into the courtroom to give the evidence; the judge may be of the old school and take the view that the child should be brought into the courtroom. It appears to me from what I have been able to elicit from this inquiry that whatever benefits may be derived from that particular process are subject to the idiosyncrasies of the individuals who are conducting the trial, rather than the interests of the complainant.

Mr FRASER: I have to say that my experience—and again, it is interstate experience—works the other way. I am used to the system whereby there is nothing unusual for a taped interview of the child to be played; in fact, that is the normal course of events. In Queensland, children are defined as special witnesses if they are under the age of 12.

The Hon. JOHN HATZISTERGOS: Suggestions have been made to the Committee that the discretion has not been used in circumstances where perhaps the judge or even the court staff may

. It is far preferable for the alleged child victim—

The Hon. JOHN RYAN: But at the moment there is no right for that to happen, is there?

Mr FRASER: Then may never be a right as such. Going back to the mid 1990s, the provisions of section 93A of the Evidence Act were considered in a number of cases in Queensland, where Mr Justice Dowsett said, "Here we go again—another case where the need for special training for people who interview children is missing." He made recommendations. I have the cases.

Mr HUMPHREYS: We would much prefer to have a situation whereby that evidence is done properly the first time, by very highly trained people, and is then presented. If it is not happening, clearly it is not an issue for us in terms of—

The Hon. JOHN RYAN: I think the point my colleague was trying to make is that there is currently no legislative guarantee either for the defendant or the complainant in terms of the methods used in the presentation of the case, and that it may be helpful if there were things on which people could say, "Hang on. It is our right to have evidence given via high-quality closed-circuit television; that is the best way for this person to present their evidence." For example, at the moment you cannot not have a jury simply because it is difficult to empanel one; you have to have it. If these are valuable assets, is it not an advantage to have them in some way or another, by guidelines, regulations or statutory provisions?

The Hon. JOHN HATZISTERGOS: Or a specialised court?

Mr FRASER: Or specialised courtrooms, as opposed to a specialised court.

The Hon. JOHN HATZISTERGOS: A specialised court or list, which is presided over by someone who is familiar with these sorts of matters and can wheel in the equipment whenever it is required. We are told that one of the problems is that some of this equipment is not available in every courthouse.

Mr HUMPHREYS: Many of the courtrooms we are dealing with are archaic, in terms of their construction and their suitability for modern matters. But also, if you go to the country for example, there is a great unwillingness of country towns to lose their District Court sittings. So one of the issues you have to look at is that if you want to have a special list, are you going to provide all those facilities in Dubbo District Court or Leeton District Court and bear the cost of that, or are you

going to remove people and bring them down to Sydney, where they are not going to have a jury in front of their peers?

The Hon. JOHN HATZISTERGOS: It is suggested that there is mobile equipment that can be transported around, where necessary, to country towns. It is suggested that this should all come under the jurisdiction of a specialised court or a specialised list, with people who are familiar with the equipment and how to exercise appropriate discretions in relation to it in order to achieve much greater consistency and fewer problems and therefore fewer appeals.

Mr HUMPHREYS: It will be a very, very expensive exercise.

The Hon. PETER BREEN: We could call it the travelling inquisition. Mr Chairman, Mr Fraser was in the process of listing a number of important ways in which the presumption of innocence has been taken away by special advantages for people who are the subject of prosecutions of children. I, for one, would like to hear whether there are any further matters which Mr Fraser would like to draw attention to.

The Hon. JOHN RYAN: Given that we are constrained by time, we have a good list of them in Mr Humphreys's submission. If there are any others that you would like to add—

Mr FRASER: I would like to answer the Hon. Peter Breen's question first. In addition to the five matters I have listed, cross-examination of complainants in relation to their sexual history has been somewhat curtailed—and probably rightly so. The old common law was basically open slather. I have done a little bit of research into this. Section 105 of the Criminal Procedure Act would be the tightest legislation that I have seen dealing with the cross-examination of complaints as to their sexual history. In New South Wales, as I understand the legislation and as I understand the cases, there is a fairly strong argument that you cannot even cross-examine somebody about false complaints. A number of criminal lawyers would be horrified by that, because you might have thought that it is a fairly relevant matter that if somebody has made false complaints on other occasions that would be something which really affects their credibility. The legislation as it is drawn now and the cases say that you cannot cross-examine about it.

The Hon. PETER BREEN: Does that apply to all sexual assault matters, or just sexual assault matters involving children?

Mr FRASER: All sexual assault matters. It has been the case for some time that an accused does not have the right to make a dock statement, so he either gives evidence or he gives a version to the police. It seems to me that the Crown is probably in the strongest position it could possibly be in, in terms of trying to secure a conviction.

The Hon. JOHN RYAN: It is put to this Committee by submissions and witnesses that, in spite of all that, the success of prosecutions has in fact been declining. If that is the case, is there some explanation for why the level of success of prosecutions in this area is declining? It is put to us as evidence that the advantages on behalf of the victims are not strong enough.

Mr HUMPHREYS: I would like to go back to the original submission in relation to what we are categorising as child sexual assault matters and what are the statistics. If we are talking about allegations made of an assault on a person who at the time of the offence was a child, which I suspect we are, then I am not suggesting to you that those figures are false. We have seen a huge coming forward of complaints in relation to child sexual assault over the last 10 years. As I said, at the moment not only are we prosecuting matters that are current; in some cases we are prosecuting generational cases. One would imagine that where there is an allegation made of an offence committed 20 years ago where it is the word of the victim against the word of the defendant and there is little by way of other corroboration one can point to, one would not be surprised if there was a fairly high degree of scepticism on the part of juries.

The Hon. PETER BREEN: And a high failure rate.

Mr FRASER: Yes, of course.

Mr HUMPHREYS: So I think that is to be expected. The mere fact that the DPP is willing to prosecute these matters shows that there has been a huge change in thinking. In my experience those matters would never have been prosecuted 10, 15 or 20 years ago. They would not have got past first base. They would have said that there is simply not enough evidence to prosecute. We need to look at it in the context of what we are putting up. A comment I will make—I do not wish it to be in anyway pejorative—is that allegations of child sexual assault cause feelings in people that you would not necessarily expect in relation to other matters.

If a home is the subject of a break and enter and the police arrest somebody people accept that there is a very high burden of proof required, and people will not necessarily be devastated if the alleged person is acquitted after a jury trial. Many people expect that the fact that the matter is prosecuted will inevitably lead to a conviction. We need to try to deal with expectations and disappointment in the fact that the system is not designed to secure a 100 per cent conviction rate. If we did that there are very grave dangers. On normal matters there will be a not guilty finding in about 50 per cent of jury trials. As I said, we should look at the matters we are dealing with, at the age of the allegations and what other material is there. It is perhaps not surprising that there is a lower conviction rate.

The Hon. PETER BREEN: A number of claims have been made for sexual assault—and I am not sure about child sexual assault—in the Victims Compensation Tribunal. It is not necessary for there to be a conviction. Is it possible that the large number of claims in this area before the Victims Compensation Tribunal has also contributed to the large number of prosecutions?

Mr HUMPHREYS: It is beyond my expertise to comment on those sorts of situations. Money, however, can be a very powerful motivation for people to fabricate allegations, particularly in circumstances where people think they have little chance of being caught out.

The Hon. PETER BREEN: Let me give you example. Someone claims that they have been sexually assaulted. They make a complaint to the police. The police launch a prosecution. They make a claim on the Victims Compensation Tribunal. They are successful one way or another. They get $20,000. They then think that because this worked once they will try again. As you have already said, previous claims cannot be introduced in evidence. So is likely that a person can be successful once, twice or three times before the Victims Compensation Tribunal with no system in place to make sure that this person is not a serial claimant and is not abusing the system.

Mr HUMPHREYS: Those matters are best remedied by dealing with the manner in which we deal with claims for victims compensation. I am aware that there are proposals before the Parliament in relation to the increased use of counselling, and others. In this regard the Legal Aid Commission provides legal assistance to people who make claims for victims compensation. It is a matter of balancing whether or not the best remedy to provide to a genuine victim is a cash settlement or whether it can be best structured by way of increased access to counselling. They could be provided with counselling or other assistance up to a net level and that is the end of it. It might be by access to university places or tuition to materially assist a victim to overcoming the difficulty and the trauma and to compensate them for what has happened in circumstances in which the system is not open to abuse. You have to look at them somewhat separately and apart.

The Hon. JOHN RYAN: Mr Humphreys, on a related matter, one of the submissions that the Committee has received makes the suggestion that the defence should be prohibited from questioning a complainant during the trial about applications for victims compensation. Would you care to comment?

Mr HUMPHREYS: My response to that is that, regrettably, money can be a very powerful motivator for people to lie. If it is clumsily handled by a defence counsel the only thing it does is ensure a conviction. You have to be very careful about how you use it. Have a look at the situation—

The Hon. JOHN HATZISTERGOS: It would not be a motivator amongst children.

Mr FRASER: It might be a motivator with the single mum It would not be the first time, regrettably, that a claim of sexual abuse is made out of malice or a desire for revenge or profit. Getting back to what Mr Breen said before, I was involved in a case about 2½ to 3 years ago in Maryborough.

It was a case involving a small degree of violence. My solicitor provided me on the brief with the civil pleadings that were instituted by the defendant. The defendant went to the District Court with a plaint for $200,000. I had photographs of injuries—very minor bruising to this woman's backside. Yet she went to court to claim $200,000. I think the jury are entitled to know that in the circumstances of that case. Why should the jury not be entitled to know that a complainant has brought a claim for monetary compensation arising out of the case? I am not saying that they should not be allowed to bring a claim; quite clearly, there is a need to compensate victims.

The Hon. JOHN RYAN: It might be difficult for a child or young teenager to explain that their parents have sought compensation. Let us imagine that a legitimate injury has been incurred. There really is no big deal that they have gone to get victims compensation. It might be difficult for a child to explain that it is a standard operating procedure for people in that position and it does not suggest avarice—

The Hon. JOHN HATZISTERGOS: Even if the child was successful it would go to the public trustee, would it not?

Mr HUMPHREYS: Not necessarily. It may go to the parents as trustees for the child.

The Hon. JOHN HATZISTERGOS: It would come under the Minors (Property and Contracts) Act that says—

The Hon. JOHN RYAN: It is absolutely true, of course, that somebody could be exploiting the capacity for monetary compensation. Nobody doubts that. But many people access it for no other reason than that they are rightly entitled to compensation for injuries.

Mr FRASER: But is that not a matter for addresses? That is a matter for the jury to consider. That is a matter that the prosecutor can deal with in his closing address, I would have thought.

Mr HUMPHREYS: Again, we need to draw a distinction between a young child of seven, eight or whatever, under 12, and if we are talking about a damaged individual—I use that term regrettably—who may be at the time 16, or 17, who may have had a regrettable family history, who may have a significant involvement with drugs, who may have a psychiatric history. Claims for compensation from such people—you talked about serial claims for compensation—are an entirely different circumstance. But at the moment the way the legislation is framed what we proscribe for young children applies exactly the same for young people in that category there.

The Hon. PETER BREEN: That is right. They are still children and they are still victims of sexual assault. In the case of males under the age of 18 there is a whole list of them that you can fairly argue are serial claimants.

Mr HUMPHREYS: As I said, I want to draw a real distinction. How you deal with someone who is young is entirely different from how you deal with someone who is 16, 17 or 18. There is a two-year difference in New South Wales in the age of consent for males and females. One can have a different debate in relation to that. As I said, whenever we talk about child sexual assault we have to look at what we are talking about. Is it a 30 year-old victim now with an offence more than 10 years ago? Is it a teenager where the alleged perpetrator is also a teenager? Then there is true paedophilia, which is an abhorrent crime and deserving of the very strongest punishment that we can mete out.

The Hon. JOHN RYAN: In what circumstances do thing it is appropriate for joint trials to be held for defendants accused of sexual assault of more than one child?

Mr HUMPHREYS: I will let Mr Fraser answer that question.

Mr FRASER: As it currently stands, if section 97 and 98 and the test laid down in section 107 (2) of the Evidence Act are met and there is no realistic possibility of concoction then the courts allow for a joinder of charges in those circumstances. Let us assume this scenario. If two complainants who do not know each other give stories which very much overlap one can see the strong probative force. It is almost an affront not to run those trials together. But one has to bear in mind—and the High Court has recognised this in a number of cases, including De Jesus's case—that in the ordinary

course of events these are cases which generate strong emotions and without that strong probative force, generally speaking, trials involving separate complainants should be dealt with separately, and I think the law should remain as it is now. Otherwise there is a danger that someone may not get a fair trial. The prejudice would be just overwhelming.

Mr HUMPHREYS: In addition, we need to emphasise that if you have a separation of the counts and in the first count involving victim A there is a conviction that will then, of necessity, prevent the defendant in relation to victim B raising good character, which can be a significant matter of issue and a significant disadvantage for the defendant. There is a choice to get into the witness box or remain silent. If you even inadvertently raise character and say, "I am not the sort of person who would do that sort of thing" in response to a question the Crown is entitled to bring up the conviction in respect of victim A in the trial of victim B. There are checks and balances in relation to each way one proceeds. Where there are a number of accused the Crown generally runs the strongest case first. Sensible advice is normally given to a defendant that if they are convicted in respect of victim A they might care to consider their position very carefully in respect of victims C, D and E.

CHAIR: In fairness to you, you do say that the Commission is of the view that the use of the electronically recorded statements of the child's evidence in chief would go a significant way to reducing the stress experienced by children giving evidence in child sexual assault matters. Can I assume that you place particular emphasis on that aspect?

Mr FRASER: It is an option that should be open.

CHAIR: It seems to me to be a sensible and practical suggestion to reduce the stress and trauma that is occasioned when a child goes through the trial process.

Mr FRASER: Can I suggest, though, that there has to be a cut-off point. In my view it probably should relate to children under 12. Under 12 they are at a different developmental stage to those aged 12 and over. There are other safeguards one can bring into play with children who are 12 and over.

CHAIR: Is it not the case that adult offenders, for all sorts of offences now, go through a record of interview process at a police station that is electronically recorded, including videorecording?

Mr FRASER: Yes.

CHAIR: That being the case, why do you draw a distinction between a child under 12 and child over 12?

Mr FRASER: Because I think a child under 12 is at a different developmental stage. My view is that those children who are over 12 can give their evidence in the normal way.

The Hon. JOHN RYAN: Are you sure that a 15-year-old girl is in the same position as an adult giving evidence about a break-and-enter offence, particularly if the defendant is her father or uncle?

Mr FRASER: There may be an argument there that rather than the ERISP that they could give their evidence by way of closed-circuit television. It seems to me that there has to be a cut-off point. In my view, if one regards children under 12 as special witnesses, that probably significantly addresses all of the checks and balances.

(The witnesses withdrew)

HELEN LORRAINE SYME, Deputy Chief Magistrate of New South Wales, 143 Liverpool Street, Sydney, affirmed and examined:

CHAIR: In what capacity at you appearing before the Committee?

Ms SYME: I am appearing privately. Although my position is that of Deputy Chief Magistrate of New South Wales, the opinions I will express are not necessarily the opinions of the office, but are my own personal opinions.

CHAIR: Are you conversant with the terms of reference for this inquiry?

Ms SYME: Yes, I am.

CHAIR: Would you please briefly outline your qualifications and experience as they are relevant to the terms of reference for this inquiry.

Ms SYME: Certainly. I qualified as a legal practitioner in 1978. In 1987 I was appointed a Specialist Children's Magistrate in Western Australia. I sat in the Specialist Children's Court in Western Australia for approximately five years. I then sat as a magistrate in the Family Court of Western Australia for approximately five years. From 1996 I have been a magistrate in the New South Wales Local Court, Deputy Chief Magistrate only from November last year.

CHAIR: You have very kindly made a written submission to this inquiry. Is it your wish that that submission be included as part of your affirmed evidence?

Ms SYME: Yes, it is. Thank you.

CHAIR: I invite you to make a brief oral statement to the Committee if you wish, before we ask you any questions.

Ms SYME: The only oral statement I want to make probably addresses a lot of the questions that have been raised and, by doing so, I may perhaps encompass the answers to a lot of the questions. The Committee may be aware that the police have commenced an evaluation of the electronic recording of children's evidence, through their own research department. Diana McConachie is the person who is conducting that research. As far as I am aware, that research has only started; it is not yet complete. Our office has been contacted in relation to that. I expect that when the research is completed, she will be able to present you with the answers to some of the questions that you raise.

CHAIR: Your submission, though, focuses very heavily on—in fact, its central theme could be said to be—the importance of taking the initial interview with the child in proper form.

Ms SYME: Yes.

CHAIR: I think it is also true to say that you very strongly are of the view that that should be videorecorded.

Ms SYME: Yes.

CHAIR: Could I invite you to tell the Committee why you consider that to be so important?

Ms SYME: Yes. The initial interview with the child is accepted—I think in all cases and by most people who are involved in the prosecution of sexual assaults on children, or anything to do with that in any other jurisdiction—as the most important because that is the interview that comes before the evidence can be contaminated by discussions with friends, family, counsellors or anything else and the question of the suggestion of evidence could come into play. Videorecording that evidence means that it will cut out a lot of questions as to how that first interview was taken, how the child conducted himself or herself in that interview, whether there were any leading questions, and tones of voice and inflections of voice. Because those matters are always very important, especially when discussing issues with children. If, for example, a statement is put to the child but with an upraised inflection,

making its a question, a transcript of that evidence will not show the infection and, therefore, will not necessarily put the child's response in context.

CHAIR: You might have heard me question the witnesses from the Legal Aid Commission, who have just been excused, about a submission they made to the Committee that it is the Commission's view that the use of electronically-recorded statements as a child's evidence in chief would go a significant way to reducing the stress experienced by children giving evidence in child sexual assault matters—leaving aside the question of the other merits, such as avoiding contamination of the child's evidence. Would you agree that that would be useful from the point of view of reducing stress on the child?

Ms SYME: Absolutely.

CHAIR: You might also have heard at least one of the previous witnesses argue for a distinction between children under 12 and those over 12. Do you think that is a distinction that is usefully made? Or is it not a valid consideration?

Ms SYME: I think any distinction that relates to a particular age as being important, as being somewhat arbitrary and therefore somewhat difficult. For example, the criminal age of responsibility for children is 10, but until they are 13 years of age proof has to be put before the court that they understood the nature that what they did was wrong and seriously wrong before a criminal conviction can be secured against them. Therefore, even the criminal law recognises that children between 10 and 13 have different stages of development and different understanding of issues. Even dealing with children—I think I heard a Committee members suggest—perhaps as old as 16, in my experience 16-year-olds can be either very old 16-year-olds or very young 16-year-olds, and I would be reluctant to draw a particular age as being a cut-off point. We do that badly enough when we call them 18.

CHAIR: The difficulty could also arise, I would imagine, with an arbitrary age in regard to a child who is developmentally delayed, for example.

Ms SYME: That is so.

CHAIR: Who would have a lower level of understanding and dexterity, shall we say, in responding to questions than would perhaps a younger child in that case.

Ms SYME: That is so. And it is developmentally delayed children who have the most difficulty in dealing with questions and answers sessions, especially in a court setting. And it is also developmentally delayed children, or children who have the appearance of being developmentally or psychologically delayed who are perhaps more likely to be giving evidence in assault cases, keeping in mind that children who are assaulted sexually or otherwise frequently come from homes where alcohol abuse and domestic violence are also features of their domestic setting, and those inputs into a young child's life will, I think it is accepted, reduce their capacity to develop quickly.

CHAIR: You mentioned in your submission that video evidence appears to be rarely used. Why would you say that is the case? Is it a resource question?

Ms SYME: I do not know. But that is where I think the evaluation being done by the Police Service will prove useful to the Committee. Much to my surprise, since I gave you my statement I have done some further investigations and have found out that since 1 August 1999 there have been some 3,500 electronic video or audio recorded evidence statements taken. I do not know what has happened to those video/audio statements. My further inquiries reveal that only 10 magistrates in the Local Court had ever had such evidence before them.

CHAIR: Are you aware at all of the breakup between video and audio recordings?

Ms SYME: Only from what Ms McConachie has told me. Apparently, it is about half and half. The issue there, as I understand it from information that she has given me, is the rollout of resources available to police stations and police officers.

The Hon. JOHN RYAN: Over what period of time did you say that had happened?

Ms SYME: From 1 August 1999, when the Evidence (Children) Act came into force, and interviews in that form started being conducted from 1 August 1999.

CHAIR: The number you gave is not small.

Ms SYME: No.

CHAIR: I would think that would indicate that such recordings are taken quite frequently.

Ms SYME: It would appear so. But, as I said, only 10 of them have got as far as the Local Court.

The Hon. JOHN RYAN: Do you mean 10 magistrates or 10 cases? I thought you meant that only 10 magistrates had ever seen it.

Ms SYME: Only ten magistrates had ever seen it, and most of those have only ever seen one. There is one magistrate who has seen two.

CHAIR: I know you are not here to speculate, but I wonder what the reason for that could be. If there is such a propensity to take these statements, one would think it would assist the court and assist the prosecution to have such clear evidence introduced.

Ms SYME: I agree. I have discussed that, again with Ms McConachie. She is tracking several of the cases through. I think her response would answer your questions. If I am asked to speculate, the only thing I could think of is that, for some reason, after the video evidence is taken, some charges are not proceeded with. Of course, they do not have to be if the video evidence is not sufficient. That may account for some of them. Or some cases are not going through the Local Court by way of giving evidence under section 48(e) proceedings. Or perhaps matters are taking a long time to get to court. Those are the three options that I can think of.

The Hon. JOHN RYAN: I understand that quite often the video-recorded evidence of children giving evidence against perpetrators is often very compelling in getting persons to admit, and that when given the opportunity to confront that evidence perpetrators frequently plead guilty rather than have a trial.

Ms SYME: That is my understanding.

The Hon. JOHN RYAN: It that a possible explanation?

Ms SYME: Yes. It is also my experience in Western Australia, where these sorts of recordings were used quite frequently prior to their being piloted in New South Wales.

The Hon. JOHN RYAN: Is that a reasonable explanation as to why many magistrates have not seen video-recorded evidence?

Ms SYME: It is possible. I do not know the numbers, because I do not know the numbers where pleas of guilty have been entered in such circumstances. My discussions with counsel would certainly indicate that if the video interview is compelling—and they certainly can be—then not many defence counsel would wish to cross-examine on such evidence, and may give the appropriate advice, provided the video or interview is conducted professionally in the first case. And that is what needs to occur. In fact, I think if the interviews are conducted very well, it may well reduce the need on many occasions for children to ever have to be called for cross-examination. That would be my hope.

CHAIR: I want to ask you about the joint investigation teams—or JITs, as they are commonly known. Perhaps I need to make a disclosure that as Minister for Community Services I jointly launched those with the Commissioner for Police.

Ms SYME: I understand that, Mr Dyer.

CHAIR: I give you an assurance that I will not be offended if you make any criticisms. In fact, I note you do so in your submission.

Ms SYME: Yes.

CHAIR: You say that proper training appears to be the exception rather than the rule. You appear to be more critical of the Department of Community Services component of the JITs team than of the police. Am I correct in thinking you believe that police officers generally speaking appear to be fairly well-trained, however you say the DOCS officers have only ever had a manual given to them and that their training is less than ideal?

Ms SYME: That is my experience, and that experience has come from working in the care jurisdiction in New South Wales, which I did for some three years up until 1999. That was, quite probably, at the very beginning of the JITs process. The police officers were very well trained in asking non-leading questions. The DOCS officers would therefore leave the questioning to the police officers and became rather redundant in the process. As I understand—again, only from speaking to Ms McConachie—the process now is that the DOCS officer generally sits outside the interview room and the interview that is being videorecorded is conducted by a properly trained JITs police officer only.

CHAIR: If that is the case, what would be the role of the DOCS officer? Would it be one of perhaps looking after possible care proceedings or issues relating to a child such as that?

Ms SYME: I think it should be twofold: yes, to look at possible care proceedings, or to ask the police officer to ask questions that might be related to care proceedings and not specifically related to the sexual assault that is being complained of, keeping in mind again that issues of substance abuse and domestic violence often are tied up with issues of sexual abuse, and those issues themselves will be able to found care proceedings. The other issue for the DOCS officer might be to look at other family-related issues relating to the children and whether consideration should be given to removing a person from a family or removing a child from a family.

CHAIR: If, as you have just said, the police officer may be the only person who conducts the interview and the DOCS officer remains outside, would it not be the case that the training of the police officer in interview techniques and other related issues would be of most importance and that the training of the DOCS officer in this respect, namely taking of interviews, would be of less importance?

Ms SYME: Yes, that may be the case. But, as I said, it is only information that I have received recently from Ms McConachie that indicates that is how interviews are now being conducted. I assume that is a process that has evolved, possibly because of other problems that have arisen. I am not sure why that process may have evolved.

CHAIR: I must say that quite some years ago now, when I was in Opposition, I was scandalised, really, during proceedings that were commonly called the Children of God case, where it came to notice that there were no proper interview records at all, let alone audio or video ones. There were just accounts written up subsequently of what the interviewing officer believed the child had said. I would hope that we have moved beyond that now. Are you saying to the Committee that, ideally, there should be a uniform practice of taking a video recording in each case that is capable of being introduced in evidence?

Ms SYME: In both care and criminal proceedings, yes, I think that would be very helpful.

CHAIR: What I be correct in assuming that you have from time to time heard committal proceedings yourself regarding child sexual assault matters?

Ms SYME: Yes, I have, and also matters that are dealt with summarily in the Local Court.

CHAIR: You probably are aware, anecdotally at least, that some people take the view that the form of questioning of children at these proceedings, including committal proceedings, can tend to

be unfair in the sense that questions that are asked are incapable of being dealt with by the child because of the child's stage of mental development.

Ms SYME: Yes.

CHAIR: The Legal Aid Commission earlier this morning argued in favour of vigorous questioning, with which I have no problem. However, I have a problem—in fact the Director of Public Prosecutions, when he gave evidence to us last week made the point—that sophisticated questioning, the use of leading questions and double negatives and matters such as that can be unfair to a child witness. What do you think can be done, if anything, to overcome that problem, given that we are led to believe that judicial officers are usually reluctant to intervene, and particularly to intervene prematurely?

Ms SYME: In relation to the issue of unfairness, when questions asked in cross-examination may be leading questions—which a cross-examiner, of course, is entitled to do—my main difficulty as the judicial officer would be that the child might find the form of questioning not so much unfair but completely incomprehensible. I have no difficulty in pointing out to a defence counsel, if their mode of questioning appears to be completely incomprehensible, that that is the case. I cannot comment on what other judicial officers might have difficulty with.

CHAIR: I understand that you have been provided with at least part of the submission made to the Committee by Mr Cowdery.

Ms SYME: Yes.

CHAIR: I acknowledge that you are giving evidence in a private capacity, albeit on the basis of your experience as Deputy Chief Magistrate. You will be aware that Mr Cowdery suggested to the Committee that some consideration might be given to a pilot of a specialist children's local and district court at which judicial officers and staff would receive special training and at which appropriate equipment would be available. What do you think of that idea?

Ms SYME: It is difficult to comment on it as a judicial officer because whether one wishes to evolve an entirely different court system to deal with a particular group of charges is a matter for Parliament; it is not a matter for somebody with my experience.

CHAIR: I understand that. I do not want to be unfair to you, but if it were to be conducted on a pilot basis do you think there might be some merit in having a specialist model such as this given that there are other specialist models such as the drug court?

Ms SYME: I think it depends very much on defining what problems exactly you will try to solve by such a venture. If the problems are of a resource or equipment nature, a decision would have to be made as to whether the best way of solving that equipment problem would be going to a totally new court.

The Hon. JOHN HATZISTERGOS: A number of criticisms have been made of the current system. One of which—you alluded to this—is that the general court system has resources available to it but perhaps not readily available whereas a specialist jurisdiction would have those resources all the time and would know how to exercise discretion properly in using those resources. We have heard other criticisms that judicial officers are not aware of the particular sensitivities associated with matters relating to child sexual assault and, because of their experience and training, tend to fall back on the normal modus operandi of dealing with criminal matters rather than being attuned to the special nature of child sexual assault complaints, particularly since they are of only relatively recent origin.

This has meant that there have tended to be more appeals against those determinations, which have had to be corrected. In some cases that has caused victims to revisit events and give evidence on several occasions because matters have not gone as they should in the first instance. We have also heard criticism of the speed with which the ordinary court system deals with matters of this nature, bearing in mind other workloads. For those three principal reasons it is argued that having a specialist jurisdiction—or, as I put to previous witnesses, a specialist list within the jurisdiction—would allow the development of expertise and training and allow resources to be available on call. You could act in

a much speedier manner in dealing with and finalising these matters. First, do you acknowledge those criticisms; and, secondly, do you see any attractions?

Ms SYME: You have outlined a lot of criticisms and problems, some of which I agree with, some of which I cannot agree with and some of which I cannot comment on. If I remember them accurately, I cannot comment as to whether the provision of a specialist court will provide better-focused resources. As to the issue of whether more appeals would result if everyone were better trained, I wonder whether it is necessarily an issue of training staff. I read in Mr Cowdery's submission about training staff, prosecutors and defence counsel. That is an interesting concept, but the issue surely is that someone who is accused of a sexual assault on a child has the right to choose whatever counsel he or she wishes. If that particular counsel is not specially trained in child sexual assault matters I would be surprised if any court would not give that counsel leave to appear for the defendant. That would be quite a departure from the way that we currently do things.

With respect to the appointment of specially trained prosecutors, I would have thought it is currently within the power of the DPP, if he so wishes, to stream prosecutors in a particular direction. I do not know whether that currently occurs in the DPP's office—I suspect it does. With respect to the issue of properly trained court staff, I think it is the focus of this Committee to try to ensure that children spend less time in court, not more. Perhaps we should focus on the question of how to make sure that evidence is put before the court in such a way that bringing children to court is less necessary. I have neatly returned to the beginning of my submission.

CHAIR: Mr Cowdery made another suggestion—which is in the copy that you have—regarding an independent expert interviewer. What view have you formed about that suggestion? Do you think that would be a useful initiative?

Ms SYME: Yes. I have had experience dealing with such interviewers and seeing evidence taken by such interviewers in two different areas. The first area was in relation to properly trained interviewers interviewing children and forming a view as to their ability to give evidence. In that regard I believe they are very useful. Even if the initial interview is done not with a trained person but with a joint investigation team [JIT] member, a specially trained developmental psychologist can give separate evidence as to the ability of the child to do certain things. That expert can then be made available for cross-examination as to the child's ability to understand particular questions in a particular way. I think they are very useful and I have seen them used in New South Wales by the DPP, especially when children who are developmentally delayed have been victims in sexual assault matters.

CHAIR: In his written submission to the Committee Mr Cowdery criticised the technical standards of closed-circuit television equipment. He suggested that in some cases court staff were not familiar with the operation of the equipment—he named a couple of courts in that regard—and that sometimes the television screen is too small to indicate the child's features and how the child might be reacting to the questioning. In other cases, the dividing screen might be placed in such a way that the child is not screened appropriately from the alleged offender. In your experience of hearing these matters does closed-circuit television equipment assist the child and the court to elicit evidence?

Ms SYME: When a child is giving evidence in a remote witness room, depending on which court we are sitting in, the court television can sometimes be very small and the quality is occasionally poor. I have certainly experienced that. It makes it very difficult for all concerned to view that sort of evidence. In the evidence that I have heard, because I have not been involved in a matter where the first interview was recorded, the evidence from the child has had to be elicited in total in the courtroom setting, with the child in the remote witness room and the prosecutor, the defendant and defence counsel in court. The child appears only by way of a very small television screen situated either on the bench or on the wall. When evidence is heard in that way I would agree that from time to time it is unsatisfactory, from time to time the quality is poor, and from time to time the placement of cameras is not ideal. Of course this occurs in courtrooms that were not necessarily designed for such features, which also causes some difficulties.

CHAIR: It has been suggested to the Committee that sometimes the defence will make an application that the use of closed-circuit television will prejudice the accused. Has that occurred in your experience? If so, what is usually the basis of that application?

Ms SYME: It has never occurred successfully before me. Applications have been made from time to time but none have had any merit in my view.

CHAIR: If there were ever any merit in such an application do you think it would be overcome if such equipment were used uniformly in all such proceedings?

Ms SYME: Yes, I think that would probably assist. There are certain cases and situations where defence counsel might believe that if a child is brought into court he or she might be intimidated sufficiently to alter his or her evidence or give evidence in a less satisfying manner.

CHAIR: Returning to the central theme of your submission, you suggest that a video recording should take place first, that the opportunity for contamination should be minimised and that the police should receive expert training, particularly in interrogation techniques.

Ms SYME: Yes. I think that may be happening to some extent but you will have to refer to Di McConaghy's investigations. I know that they are incomplete, but I think her conclusions will be useful to the Committee—especially in relation to my submission.

The Hon. JOHN RYAN: Do you know when that review is due for completion?

Ms SYME: I gave her the names of the 10 magistrates fairly recently.

The Hon. JOHN RYAN: It will probably be a little while.

Ms SYME: Yes.

CHAIR: Is this an evaluation of the joint investigation team?

Ms SYME: It is an evaluation of the electronic recording of children's evidence. As I understand it, she has evaluated it with a number of JIT officers, Department of Community Services officers, prosecutors, defence counsel and now magistrates.

CHAIR: I ask that question because Mr Cowdery, in his written submission to us, noted that we may wish to refer to the results of the evaluation of the joint investigation response teams, which he said was conducted by the New South Wales Police Service and the Department of Community Services and which has not yet been released publicly. Is he referring to the same appraisal as you?

Ms SYME: He may well be, but the note I have received from Ms McConaghy states that the final report is due to be completed by May 2002.

CHAIR: That would seem to imply, given that Mr Cowdrey is using the past tense, that the results of the evaluation that was conducted, that you may be referring to another review?

Ms SYME: Yes. I am not aware of the review that he has referred to. I am only aware of this one.

The Hon. JOHN RYAN: Do you consider that care proceedings and AVO proceedings with their lower standard of proof could be an alternative to criminal prosecution in instances of child sexual assault?

Ms SYME: Well, that would depend on whether Parliament was happy to deal with child sexual assault matters as a criminal proceeding on a balance of probability standard of proof. They are quite different proceedings, looking at different issues from an entirely different point of view. Care proceedings look at a whole range of care issues from the child's perspective and deal with things in a two-stage process: firstly, whether a need for care is established and, secondly, if that need for care is established there ought to be some provision made about placement. AVO proceedings and care proceedings can be dealt with in tandem. But care proceedings concentrate on the child, criminal proceedings concentrate on an event concerning a defendant.

The Hon. JOHN RYAN: Under section 48E (2) of the Justices Act there is an assumption that victims of violence offences, including child sexual assault offences, will not be required to attend committal proceedings to give oral evidence. Some submissions to this committee have suggested that in spite of section 48E, many victims of child sexual assault are required to give oral evidence at committal hearings. Are you able to comment as to why that may be happening, because I understand there is a capacity for special reasons to be given and they are typically given in order to require attendance at committal hearings of victims of child sexual assault. Are you aware of any inappropriate use of special reasons being used as a means of circumventing the intent of that legislation?

Ms SYME: Not in my personal experience. The meaning of "special reasons" has been laid out in subsequent appeal decisions and special reasons as far as I am concerned are simply that—special reasons. Applications have been made before me, none of them successful, although some successful applications have been made for the cross-examination of expert psychological witnesses who are able to give advice and evidence as to the capacity of particular disabled children to understand the implications of their evidence.

CHAIR: Regarding the matter of applications being made on the basis that the use of closed-circuit television [CCT] raises a prejudice against the defence, what is the usual basis of that? Why would a prejudice be caused to the accused?

Ms SYME: The only prejudice I think that can ever been made out in any form is that the ability of one to judge the reaction of a child in person is more than perhaps the ability to judge the reaction of a child if the child is on a fairly poor quality television screen. That makes the assumption that we are able to define the difference between a child reacting to a particular question in a way that will show that that child is telling the truth or not. In my experience, if the child is fidgeting during the answer to a question, that might mean anything from the child's lying to wishing to go to the toilet. I do not think we can necessarily draw a conclusion on a child's reaction in court. It is probably true of adults as well.

The Hon. JOHN RYAN: May I ask a question in relation to your statement that 10 magistrates had not seen much electronically recorded evidence from police. Is there some possibility that this evidence is not normally presented at the Local Court but is used more extensively in the higher courts?

Ms SYME: It is possible. The requirement that briefs be served would include the requirement that the video evidence be served as well.

The Hon. JOHN RYAN: I am not quite sure I understand your answer.

Ms SYME: If a brief be served by the DPP in such matters, that matters may go, either on a plea of guilty straight to the District Court for sentencing or on an unargued committal, if you like, to the District Court for sentence.

The Hon. JOHN RYAN: I am not a lawyer but I understand a magistrate will in most instances see all of that evidence at the committal stage of the hearing?

Ms SYME: Yes, but not necessarily view the videotape if a transcript is available.

The Hon. JOHN RYAN: But they would have at least known of its existence and had it presented to them?

Ms SYME: They would have known of its existence but not necessarily have it played if there was a plea of guilty and the matter was going up to the District Court under 51A.

The Hon. JOHN RYAN: Do magistrates get to see all contested matters at the committal stage?

Ms SYME: All contested matters?

The Hon. JOHN RYAN: Yes, if the person is not pleading guilty.

Ms SYME: Yes, to a greater or lesser extent.

The Hon. JOHN RYAN: So, it would be reasonably unusual that only 10 magistrates had seen evidence of 3,500 tapes?

Ms SYME: It is a figure that I cannot explain.

CHAIR: Coming back to the issue of applications being made on the basis of perceived prejudice to the accused arising out of the use of CCT equipment, would it be a possible solution to negative any such suggestion if there were to be some statutory or other warning that judicial officers could give or should give that no adverse inference is to be drawn from the use of such equipment, that is no adverse inference against the accused?

Ms SYME: To be drawn because they are on CC television?

CHAIR: Yes.

Ms SYME: Yes, that may be appropriate in matters where a jury is sitting.

The Hon. JOHN HATZISTERGOS: If I may go back to this matter of the committal proceedings, in light of the restrictions under section 48E as you have described them and as I understand them, and also in the light of the success rates of prosecutions in the District Court, I am struggling to understand the utility of having committal proceedings in child sexual assault matters. Bear in mind that in a number of these cases it is one person's word against the other. We know that a large number of cases go to the District Court and about 50 per cent of them fail. As I understand it, the Local Court is not acting as much of a syphon of which cases get up. Perhaps that is a problem because of the legislation, which makes your task very difficult in exercising the discretion you have under the Justices Act. Is there a case in these sorts of instances for just allowing the matter to go to the District Court for trial?

Ms SYME: Sometimes there are issues in child sexual assault cases other than one person's word against another.

The Hon. JOHN HATZISTERGOS: Perhaps you can elucidate on that?

Ms SYME: They may be issues of timing in relation to particular assaults. They may be issues in relation to continuing sexual assaults that do not rely only on the evidence of the child and a particular interview at a particular time. There may be other issues of first disclosure, and the person to whom the person makes first disclosure may well be called to give evidence. While it is often said that there are issues only of the child's evidence versus the defendant's evidence, one on one, and in formal corroboration that may be the case, there may be other issues of supporting evidence that might be useful to investigate—often not in committal proceedings.

The Hon. JOHN HATZISTERGOS: What proportion of cases involving child sexual assault get discharged?

Ms SYME: I have no idea, I am sorry.

The Hon. JOHN HATZISTERGOS: What about in your experience?

Ms SYME: I could not speculate.

The Hon. JOHN HATZISTERGOS: It would not be very high, would it?

Ms SYME: That get dismissed?

The Hon. JOHN HATZISTERGOS: Yes. It is not a criticism, it is simply a product of the legislation.

Ms SYME: I do not know. I could not even say if it was 50 per cent. I have never taken even an informal tally of what percentage of cases in child sexual assault matters get dismissed or otherwise. I have not even taken an informal tally in my mind as to how many committals I send up and how many are refused. I am sorry, I do not keep that kind of information in my head.

CHAIR: Part of the rationale for this inquiry, apart from the perceived unfairness of cross-examination, appears to be the rather high failure rate, if I can use that expression, of these prosecutions. When this was put to the Legal Aid Commission representatives, they seemed to be expressing the view that as a result of media attention to this issue, namely, child sexual assault, the atmosphere of, perhaps, hysteria has been built up over the years or, to put it another way, an expression that is commonly used now, moral panic, and as a result of that far more matters are coming into the court system than was once the case. They went on to say, in essence, that as a result of that that cases with comparatively little merit, in evidence available to approve the matter, were coming into the system. What you think about that? Do you think the courts are being flooded with unmeritorious prosecutions?

Ms SYME: Not in my personal experience, although I did hear a Legal Aid Commission representative refer to a number of cases where a sexual assault was alleged to have occurred many years ago and the complaint is made when the then child is now an adult. I have personally had a number of those. They are particularly difficult matters for a prosecution to succeed on. Because the event that occurred may have been 10 or 15 years ago, when the person who is now the complainant or the victim is no longer a child. In those cases, of course, there is no video-recorded evidence of what that person said when they were a child, there is only what they recall having happened to them some 15 years ago. There are a number of cases of that nature, and in those cases it is perhaps not infrequent for 48E orders to be made for cross-examination of those people, because their evidence is vital, often the only evidence in the proceedings, and a committal hearing in the circumstances may be useful to stop something unnecessarily going to another court.

CHAIR: At this stage we have not heard from ordinary witnesses, if I can use that expression—that is, people who have been through these proceedings. However, anecdotally it appears to be the case, as I suggested in the previous question, that apart from the perception of unfair cross-examination there is a feeling that the dice are loaded against them in the sense that the child has to go through the committal proceedings, through the trial proceedings and then, according to Mr Cowdrey, perhaps 75 per cent of matters where a conviction is recorded are appealed. The appellate court then trawls through the transcript and finds out, in the view of such people, some technicality and orders a retrial, at which point the people give up on the basis that they will not put the child through the trauma a third time. Do you have any view regarding that, whether the dice are loaded against a person?

Ms SYME: I do not think that is a matter I could sensibly comment on.

CHAIR: Dealing with your own jurisdiction, what is your impression regarding the fairness or otherwise of cross-examination of children, given the developmental difficulties that can often be present arising out of their immaturity?

Ms SYME: I think frequently it has the potential to be very unfair and that is why, for example, in care proceedings there is rarely, if ever, cross-examination of children. Certainly children rarely if ever are called to give evidence. There are special reasons required if the matter is going to proceed to committal. With older children, older being children over 12 who have been in court to give evidence, I have had experience of such children being cross-examined and often as I have stated cross-examination tends to be incomprehensible for them. They may well feel that it is unfair because they do not understand it.

CHAIR: If cross-examination can sometimes be incomprehensible, and that appears to be the suggestion to us through submissions, what can be done about that?

Ms SYME: I have noted some suggestions that there should be better training of everybody involved. That is an obvious solution, but there are some situations I think where people should be chosen for the job. You cannot necessarily train people to talk to children.

CHAIR: What you suggest is certainly appropriate and achievable, if I may say so, regarding judicial officers, court staff and interviewers. However, I doubt that it is achievable regarding the private bar. How are we going to tell a defendant that they are going to retain only counsel who is sanitised?

Ms SYME: With great difficulty I would think. I am quite sure that it is a very important issue that a defendant is entitled to choose whomever they desire in order to represent them.

CHAIR: That particular part of the equation appears to be close to insurmountable?

Ms SYME: I cannot make a sensible suggestion that is going to assist your Committee in that regard that would be, I cannot imagine, in any way acceptable politically or in legal circles. I cannot imagine it. There has been some suggestion that there should be specialist accreditation for advocates dealing with defence matters. That is certainly the case and it has been a matter of persuasion in, say, advocates who are practising in the Family Court jurisdiction. They are able to—advertise is not the correct word—notify that they have particular qualifications, say, as specialist family law advocates and, therefore, are more likely to be recommended as people who are appropriate to deal with Family Court matters. The Bar Association runs advocacy courses and allows people to advertise themselves in the same way as being specialist advocates. The Law Society, as far as I am aware, at least up until a year ago, had no specialist accreditation for advocates who were involved in children's matters. They were rather lumped into the family law specialist jurisdiction and, of course, the jurisdictions are quite different.

The Hon. PETER BREEN: From what you are saying, perhaps the only way an advocate could be restricted would be by legislation, by amending the Evidence Act so they cannot ask particular questions of a child witness or cannot ask leading questions, for example? That would be the only way that it could be done, otherwise you cannot restrict a person's right to consult Ian Barker, QC, for example—

Ms SYME: No, you cannot.

The Hon. PETER BREEN: —just because it happens to be a matter involving child sexual assault.

Ms SYME: I think that is correct.

The Hon. PETER BREEN: But you could restrict the kind of questioning Mr Barker could ask, for example?

Ms SYME: You could do that and perhaps you could make the discretion available to judicial officers a little wider. As I said, it is not a matter that I have had particular difficulty with, but that is quite possibly because of quite some extensive personal experience in Children's Court matters, which is a different issue. But in so far as criminal procedures are concerned, I think judicial officers do have the ability to be able to say, without interrupting cross-examination and without being unfair, that a particular form of question is something "that the witness does not appear to understand what you are asking" and, for example, might say "And I wonder how I am going to be assisted by the reply to a question that the witness clearly does not understand."

CHAIR: In an appropriate case you would make the comment to that effect?

Ms SYME: I would.

CHAIR: The suggestion to this Committee is that judicial officers are somewhat reluctant to intervene during cross-examination and you have said that there is a reluctance to interrupt cross-examination, however, you feel it to be appropriate to notify counsel to indicate how the court is being assisted by an answer that the witness does not understand?

Ms SYME: I think that is not inappropriate and it is not only of course confined to cases concerning child sexual assault. If it is a case concerning larceny and cross-examination is starting to

run into something that happened after the event, even if the prosecutor does not object on the grounds of relevance I think at some point the judicial officer has a duty to say, in the nicest possible way, "Well, is this going anywhere that is going to assist?"

The Hon. JOHN HATZISTERGOS: One thing Mr Cowdery said in his evidence is that we sometimes lose sight of the fact that criminal prosecutions involving child sexual assault, or any other matter, involve prosecution of an offender and that the role of the DPP in that context is to present the evidence and not necessarily to be an advocate for the victim?

Ms SYME: Yes.

The Hon. JOHN HATZISTERGOS: He referred also to a scheme called the Witness Assistance Scheme which runs out of his office, which is a service that I understand provides some assistance to witnesses, particularly young victims, in relation to the processes and explaining procedures and matters of that kind. Are we placing too much emphasis on adjusting the court system to deal with the particular contingencies of the victims as opposed to determining guilt or innocence of the accused? Is it not better to address the issues concerning the victims by means of an advocated witness assistance scheme?

Ms SYME: I have had experience with the Witness Assistance Scheme on a number of occasions, both the Witness Assistance Scheme provided by the DPP, which I must say is excellent, and also various witness assistance schemes provided either formally or informally by various courthouses that deal with various assault cases, not necessarily concerning children and not necessarily concerning sexual assault. In all cases, especially the Witness Assistance Scheme, the witnesses who have given evidence after they have had some introduction by that scheme have always been far more at ease in the giving of evidence and far more comfortable whether they are in the remote witness room or whether they are in court. So, it is a scheme I think that has a great deal of merit and so far as I have seen it works very well.

I do not think the issue of giving comfort to victims is necessarily mutually exclusive to prosecuting a defendant because the victim is, albeit a very important witness, a witness who is part of the proceedings who gives evidence and then if they wish are free to go. There is no requirement for them to sit in through the rest of the case, although sometimes they want to. So, I do not think it necessarily has to be a conflictual situation and if we have an adversary system, as we do, then any assistance we can give to any witness is going to help the court process. It is going to make it easy for everybody, it is going to make it a lot smoother. It is going to make it easier on me as a judicial officer. If the witness is comfortable giving evidence it means, for example, I do not have to stop court every 10 minutes and provide tissues and drinks of water on that very practical level.

The Hon. JOHN HATZISTERGOS: Should we be focusing on that kind of assistance as opposed to, for example, changing rules of evidence and other technical requirements relating to the manner of giving evidence to assist victims?

Ms SYME: I think you can probably do both. I think the technical requirements are probably important. The issue of equipment we spoke about earlier is probably important. I think the issue of witness assistance is also important because both of those issues go to making the giving of evidence easier.

The Hon. JOHN HATZISTERGOS: Do you believe that the Witness Assistance Scheme is best place within the Office of the Director Of Public Prosecutions?

Ms SYME: Yes.

The Hon. JOHN HATZISTERGOS: Or should it perhaps be outside the DPP and perhaps in the court system?

Ms SYME: Probably a matter for the DPP. I have seen the witness assistance schemes work as provided by the court system. They work well too. I do not really have a view of who should provide it or where they should be placed. It does not matter a lot to me provided the witness gets assistance.

The Hon. PETER BREEN: Would you have a view about placing the Witness Assistance Scheme within the Victims Compensation Tribunal?

Ms SYME: The Victims Compensation Tribunal is one of the very few courts that I have had almost nothing to do with in my experience as a judicial officer.

(The witness withdrew)

(The Committee adjourned at 12.42 p.m.)