REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO CHILD SEXUAL ASSAULT MATTERS

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At Sydney on Friday 19 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. John Hatzistergos
The Hon. John Ryan
The Hon. Janelle Saffin

JUDITH ANN CASHMORE, Honorary Research Associate, Social Policy Research Centre, University of New South Wales, Sydney, affirmed and examined:

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

Dr CASHMORE: As a private individual and researcher.

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

Dr CASHMORE: Yes.

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

Dr CASHMORE: Yes.

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

Dr CASHMORE: I have a PhD in developmental psychology and a history of research and experience in relation to children's experience of legal proceedings since about 1985; a number of publications. I was also the chair of the Child Protection Council and a member of the Task Force on Children's Evidence.

CHAIR: If 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, the Parliament can subsequently override the Committee's decision if it so chooses. I invite you to make a brief oral opening statement to the Committee if you wish.

Dr CASHMORE: In terms of general comments, I think it is well recognised now that there has been a marked increase in the number of cases of child sexual assault that are both investigated and come before the courts. For example, in 1982 the number of contested trials in higher courts was 34, in 1992 it was 143, and it reached a high of 177 in 1999. Over the last decade, the number has fluctuated somewhere between 140 and 200.

So there is a very marked increase in the number of cases that the court system is seeing. While there is no clear explanation for that, it seems that the major factors are an increase in recognition of child sexual abuse in the community; legal and procedural changes to the investigatory process, which means that their evidence is more likely to be heard; and an easing of restrictions about the admissibility of their evidence.

While there have been a number of substantial changes, in many ways these changes have been necessary but not sufficient. What they have done is to allow more children into the system, in particular changes to competence and corroboration requirements, the use of joint investigation teams, and procedural and technological changes like the use of closed-circuit television, video-recorded interviews, and court preparation and support.

My argument would be that we have only gone part way, that we have allowed more children into the system but we still have not necessarily allowed their voices to be heard when they are there. Under the United Nations Convention on the Rights of the Child articles 12 and 13, Australia has a duty not only to hear from child witnesses but also to free them from constraints, anxiety and distress which might inhibit their evidence. So while technological and procedural fixes have helped the process in terms of getting children in, I think we still have some way to go in making sure that there is a level playing field for children as witnesses in what is inherently an unequal contest at this stage.

I think one of the fundamental issues is the difference between what children and their families expect when they go through a court process and investigation process and what they experience when they get there. Although there has been some progress in the training of legal and

court professionals, the fundamental issue and what a number of people openly admit—and I notice that the Director of Public Prosecutions made a similar statement in his evidence before this Committee—is that a trial is not about seeking truth and justice. It is an adversarial contest in which the witness—and in cases of child sexual assault, often the only real evidence is that of the child witness who is the victim of that assault—is used as a tool between the two opposing parties.

I think that disjunction between the expectations of the lay participants, the non-lawyers, and the lawyers is what is at the heart of a lot of dissatisfaction with the process. I think we need to do a lot more in terms of focusing on how we can make it a more level playing field for children, looking at aspects of cross-examination, the use of expert witnesses, specialist staff and courts, and interviewers or interpreters for children in the process.

I noticed that some people say that they think the system is working, but I know from having talked to a number of child witnesses and their families in research that they do not think it is, that it does not work for them, and that they become very upset about (a) not being able to tell their story, or not feeling that they have been able to, and (b) feeling as though their own credibility has been substantially undermined in the process.

CHAIR: May I begin with a matter you have just alluded to, that is, children's evidence. It has come through very strongly, to me at least, that many people who have been through the process have formed the view that, using your language, it is an unequal contest. For example, our attention has been drawn to the use of very complex forms of questioning. Quite apart from the aspect of unfairness, it may well be that in a given case the child does not understand the question. On the general matter of questioning, the representatives of the Legal Aid Commission, for example, when they gave evidence before the Committee tended to argue to us that any perceived unfairness can be straightened out later on by the judge when he or she is summing up. What do you think can usefully be done regarding making questioning of children fairer? Can you tell us something about your understanding, on the basis of your professional experience, of the characteristics of a child's memory development and how it can best be presented to a court?

Dr CASHMORE: I think the first issue of the type of questioning and the unfairness of their questioning has been well demonstrated by substantial research, both here by *Brennan and Brennan*, and overseas. What it clearly shows is that the cross-examination process actually is almost a guide of how you do not interview to get the truth. It is not about seeking truth; it is about persuading a jury to that side of the argument.

There are two parts to that. One is that the defence relies on inappropriate and incomprehensible questioning. But I must say that it is not necessarily just the defence; sometimes it is other legal professionals who are so accustomed to legalese that they do not recognise when they are not speaking in a language that others can understand. The second is intimidating and hostile questioning. Both aspects underline the child's ability to provide reliable information and their capacity to resist leading questions.

There is an extremely useful analysis of the theory of cross-examination in a handbook on children's testimony that has just been edited by Westcott, Bull and Davies. That analysis, by Henderson, goes through the various aspects of what it is that cross-examination actually does. It relies on suggestive questioning, leading and misleading questions, repetitive questions, asking for minute and specific details, jumping around between topics, therefore not following any sequence, and in fact avoiding certain questions. The aim of cross-examination is not to ask questions which will lead the child to tell the truth but to tell a story which best supports the defence side of the story.

I think the major dissatisfaction that people have is that if children cannot understand the questions they are asked, it is not a fair process, and you are not getting either complete or accurate information from them. And, although they may not be very good at monitoring when they do not understand, they know at the end of the process that they have not been able to say what they wanted to say, and they feel that it is an unfair system that allows that to happen.

In terms of what can be done about it there are some processes already in place, but unfortunately many of them are not very well used at this stage. First, the judge, as the so-called neutral umpire, has the opportunity to intervene. But in the research that Kay Bussey and I did when

interviewing judges and magistrates in this State, we found that they are often reluctant and sometimes unaware of when children do not understand. A number of them also come from a defence background, so they do not see a problem with the process.

Prosecutors can also object, intervene and ask for questions to be rephrased, but, as the Director of Public Prosecutions pointed out, they often do not see it as their job to intervene in the process, and again they may be unaware of what is difficult for children and what is not. Professional training for lawyers and judges in the process is one approach that could be used. I think that may have some role for judges, but it may be more useful if there are specialist judges. I do not think you will necessarily expect every judge to be interested in this area and to pick up on all that is required to do it well.

The Hon. JOHN HATZISTERGOS: I am sorry to interrupt, but what about a specialist court?

Dr CASHMORE: Yes. I think that would be one way of doing it, that you would actually have people located within the process. I think there are other aspects that are used in the process. I would agree and I will come back to that. In terms of professional training for lawyers, I think it may in fact be counterproductive for defence lawyers. Their training is actually to take full advantage of the adversarial process. Schooling them as to children's vulnerabilities is not necessarily going to be in the best interests of getting full and complete evidence from children.

The other approach we have used is preparing children so that they feel more able to recognise when they do not understand and to say so. But that has not worked extremely well. There is some evidence that it helps them to say it, but even in terms of asking to go to the toilet, children often are very unwilling to interrupt the process. And they are unwilling to challenge the apparent authority of the court professionals by saying, "Sorry, I don't understand the question." They also may not be very good at monitoring when they do not understand and what happens then is that they may give nonsensical answers or answers that do not follow or answers that are inconsistent. It does not necessarily mean that they cannot tell a consistent story, just that they have not had the opportunity to do so.

We also have evidence that children will attempt to answer questions even when they do not understand the question. So, that may mislead judges and lawyers to think that children really do know what they are referring to when in fact they do not. That is particularly the case when you have double negatives, two or three questions in one, jumping around in sequence, reference by pronouns that do not necessarily follow, all of the things that the research has pointed out problems with. The other possibility is specialist interviewers and child interpreters. I can provide some material to the Committee about what is being used elsewhere—Israel, Norway, Sweden, Denmark and so on.

There are several different ways of doing that. One is at the investigative stage and then also in the court process, but concentrating on the court process. In some systems, in fact, in Israel, although I am not sure of the exact current use of this, they have an investigator who interviews the child and in fact appears for the child in court and answers questions on their behalf. I do not think that is a system that is likely to be accepted here. But some of the other jurisdictions actually do not allow defence lawyers to question children. Norway, Sweden and Germany actually have questions through the judge or in some other jurisdictions through a child interpreter.

CHAIR: Is the Israel precedent analogous to counsel assisting the court or something of that sort?

Dr CASHMORE: A little more than that because they are actually the investigator, the person who speaks to the child first up as the investigator. So, it takes that role a step further. I think, if you look at the legal literature and Spencer and Flin's authoritative work on this, there are some real questions and objections to that process. I think the others of having questions funnelled through a judge or through somebody who can ask the child or the other process, which is the pre-trial and deposition process where the whole of the child's testimony is done before the court process, and in some cases behind a glass window so that the lawyers feed in questions through an interviewer so that they do not directly interview or ask questions themselves.

The Hon. JOHN HATZISTERGOS: These countries are based on the civil code?

Dr CASHMORE: Not Sweden and Norway.

The Hon. JOHN HATZISTERGOS: They are not common law countries.

Dr CASHMORE: But according to Spencer and Flynn, they are working on adversarial approach rather than inquisitorial approach.

CHAIR: What the Hon. John Hatzistergos might be adverting to is that some time ago you said that the trial process is not really aimed at getting the truth. Under our adversarial system perhaps unfortunately that is so. Can we separate out proceedings involving children when the whole system really follows the adversarial approach rather than the continental inquisitorial approach?

Dr CASHMORE: Interestingly, it seems if you look at some of the research, that the inquisitorial systems are adopting some of the aspects of the adversarial system and in some places the adversarial systems are adopting some aspects of the inquisitorial process. I think that is actually what is happening in places like Sweden, Norway and Germany. In those cases, they still use an adversarial contest but in cases involving minors in Germany and Denmark I think the questions are directed through a judge or through some other body, not direct from a cross-examining defence lawyer.

The Hon. JOHN HATZISTERGOS: Are there jury trials?

Dr CASHMORE: As far as I know. I would need to check that.

CHAIR: Have you concluded your response to my question?

Dr CASHMORE: I think so, yes. The other possibility of remedying some of the situation or one approach that has been suggested is the use of expert witnesses. That is not a track we have gone very far down in Australia. It is much more common in the United States and to some extent in the United Kingdom, but not greatly used here except for medical evidence. There are various ways in which it could be used. One is to allow an expert witness to provide a framework or background to explain the behaviour of children. One of the complaints that is often made by prosecution or by families themselves is that they have been misrepresented or misinterpreted. So, typical reactions like delayed complaint, a gradual getting out of the story and so on are seen as evidence for inconsistency, making it upt, having ulterior motives, not telling the story because the child becomes angry with the person for something else. Those sorts of misinterpretations. So one of the suggestions is that expert evidence could be given to provide the general background.

Secondly, that it could be used to rehabilitate the child's credibility when it has been attacked in that way so that it would not be introduced unless the defence had actually used that type of tactic to undermine the child's credibility. The other is the direct opinion role of expert evidence. Again, that is something that is much more contentious. Although doctors can give opinion evidence as to whether not physical signs they see indicate or are consistent with child sexual abuse, it is very rare that behavioural reactions would be used for the same purpose, partly because the evidence is not as clear.

CHAIR: You have made some passing reference to intimidatory questioning. When the representatives of the Legal Aid Commission gave evidence to the Committee they tended to suggest that it would be counterproductive to the best interests of the defence to engage in intimidatory questioning. Is it your experience that, notwithstanding what they say, sometimes questioning does verge on being intimidatory?

Dr CASHMORE: Yes. Having watched a number of trials and talked to both prosecution and defence lawyers, some of them will say, "Softly, softly, catchee monkey" basically, that it is much better go in softly and to in fact invite the child to trust them and then follow their line of questioning. Others are much more blatant in approach. In Henderson's study and in some interviews I have conducted, defence lawyers will admit that if it is necessary to break a child down, they are willing to do that in the interests of their client. There is variability in the approach by defence lawyers as to

what they think is the most effective strategy at that time and also there is some variation amongst people according to their beliefs as to how appropriate that is.

CHAIR: Do you think there is anything that can realistically be done about intimidatory or unfair questioning given that even if we were to adopt Mr Cowdery's suggestion of setting up a pilot or trial court where the system is made as fair as possible in training court staff, judicial officers, et cetera, we would still be left with the residual problem that the defence would be able to engage whatever defence counsel it chose. Presumably there still would be the possibility of that unfortunate element being present in the process.

Dr CASHMORE: That is a problem, and it depends on the judge and what view the judge takes. The judge may be more willing to intervene in that process and prevent intimidatory, hostile, badgering tactics. But defence lawyers can do a lot which would not amount to that: jumping around all over the place; suggesting that the child is lying, which children find extraordinarily offensive and stressful; asking for a lot of minute detail about time and place, which they are unlikely to have a good concept or grasp of; and pointing out inconsistencies, many would say is an unfair process and not about getting to the truth.

The Hon. JOHN HATZISTERGOS: Do you not think juries would pick that up?

Dr CASHMORE: There is some interesting research that relates to the use of expert witnesses and whether those sorts of things are picked up by jurors and what sort of beliefs they take to that process. One study showed that jurors have some of the same sorts of beliefs that defence lawyers and some judges have: they believe that children are unreliable witnesses, that they may be making it up, that children fantasise, that they expect that there will be physical evidence so that if there is no physical signs of abuse that tends to discount the truth of the allegation in their eyes. They believe that children can be easily manipulated and that delayed complaint and retraction indicates inconsistency much more than do people who have knowledge of the area.

The Hon. JOHN HATZISTERGOS: I have no doubt that that is true but other jurors would take a different view about the ability of young people to be able to recollect that level of minutiae that you have referred to. That is why juries represent a cross-section of the community. They bring together all the skills that they have acquired in their lifetime to bring justice to a situation.

Dr CASHMORE: There are some questions about how representative jurors are.

The Hon. JOHN HATZISTERGOS: Let us not go into that. Jurors are chosen at random.

CHAIR: That may be a relevant consideration as to whether jurors are representative of the community.

The Hon. JOHN HATZISTERGOS: Jurors are chosen at random, the Jury Act is very strict about exemptions from jury service and deliberately so, so that juries do not become the exclusive reserve of one or other section of the community. Parties have rights to challenge jurors at committals and so on.

Dr CASHMORE: At this stage we do not have any really good understanding or evidence about how jurors work in a real-life situation. Research in that area is extraordinarily difficult and restricted. It would be very helpful if we could move beyond having mock jurors in mock videotaped simulations to understand how they actually operate through a deliberative process, what sort of bias they take to the process and how they deal with those implications and misinterpretations by defence lawyers. We do not know enough about that process, and I think we need to.

CHAIR: I refer now to the joint investigation teams [JIT]. You may recall that I launched them with the recently departed Commissioner of Police, Mr Ryan, at Ashfield on the basis that they were to be a joint enterprise between the Department of Community Services [DOCS] and the Police Service. What is your impression as to how well they work in practice? Before you respond, the Deputy Chief Magistrate, Ms Syme, recently gave evidence to this Committee bearing on this matter and tended to give a tick to the police element of the process and a cross to the DOCS element. I am

not sure whether that was fair or accurate, but at least she had a conscientious believe that that was so. How do you feel that initiative is working in practice?

Dr CASHMORE: There was an evaluation of the process and results are still forthcoming. My understanding is that with any new process, and one that is under evaluation, sometimes the first flush is the best blush. You get into a new program the best trained, the best selected and qualified people to be part of that process. The early results may not necessarily be indicative now. I know that there have been some reported problems about resourcing. Some suggestions have been made that the amount of time that officers would need to be available for court, for example, had not necessarily been factored into the resourcing of that process.

There are concerns about workload, particularly from the DOCS side, as to whether they can meet what is now an increased influx of cases into the system. Cases are referred from the Helpline to the JIT process, now referred to as Joint Investigation Response Team [JIRT]. Previously they used the acronym JIRS, because that referred to the rural response in which they were not necessarily co-located. In the JIT team they are co-located. Like any process, the resources are often stretched. The training that people have for interviewing needs to be reassessed because constantly new people come into the unit and I am not sure whether they can necessarily be well trained before they become operational in the unit.

Another aspect that has changed is the introduction of video recording of interviews. That allows a great opportunity for better supervision, if the time is available, for people to be able to go back to the interviews with a supervisor. I suggest that should be also with someone who has some expertise in the area, such as Kay Bussey from Macquarie University or Karen Salmon from the University of New South Wales, to help that supervisionary process. They would be able to say in a non-threatening way that a cue was missed, or the child was referring to something that was not picked up on, or that there was some other inconsistency and perhaps a question should be asked in a certain way, or things could be done differently, or opportunities could be provided for some learning on the case. That would be a very valuable way to go.

The Hon. JOHN RYAN: With regard to videotapes, your submission describes the impact of videotaping on a child. Ms Syme, the Deputy Chief Magistrate, said that precious few of the videotape interviews are used in court. She said that about 11 have been used since the process commenced. Do you have any experience, concern or knowledge of videotapes being prepared and not used in court?

Dr CASHMORE: I think there are a number of reasons for them not being used. One could be that they elicit a guilty plea. Another is that the family decides not to proceed. I prefer to leave answers to that question to Diana McConachy, who is doing some work for the police in evaluating video recording. If that is the case, our experience is not widely different from that in the United Kingdom in which only about 10 per cent of video interviews appeared in court.

The Hon. JOHN RYAN: Ten is not exactly 10 per cent. I understand that 3,500 videotapes have been made. The question Ms Syme was asking was why are more not used in court, at least at the committal stage when she sees them.

Dr CASHMORE: I do not know the answer to that question. I am not sure whether they are necessarily shown at committal. I think Diana McConaghy's evaluation may provide better answers to that. There are lots of things we still do not know about the use of videotaped interviews. I know that one problem is that they can be quite lengthy and the transcripts can amount to many pages. There is an issue about attacks that can be made on children who use the videotapes to refresh their memory. We do not know the best way for children to view them and when. For example, I do not necessarily think it would be a good idea for a child to see themselves on video for the first time in court, or at court.

I have several reasons are saying that. Firstly, if kids have not had the experience of seeing themselves on video—although many have—they would be more likely to be more taken with their appearance than with content of what they say. They can then be questioned as to the consistency between what they say on videotape and what they say during cross-examination. Secondly, if they had not seen the videotape before and some time has elapsed, and on the videotape they were upset, it

may be disturbing to them to see what they were like at that stage. Care needs to be taken. We really do not know how children react as yet.

CHAIR: You reviewed the merits of audio and videotaping in some detail in your article, which was prepared for publication in Britain. The article is entitled "Innovative Procedures for Child Witnesses". You indicated a number of arguments and conceded some criticisms, which you have just made, regarding videotaping. It seems to me, on balance, that there probably is an advantage in having videotaping—Ms Syme was certainly of that opinion—for example, trying to reduce the prospect of contamination of the child's evidence by repetitive interviews. That seems to be a matter of importance. Where would you come down on videotaping, given that there are some problems to which you have referred? One you referred to is that it may prevent children from having the opportunity of settling down when they appear in court.

Dr CASHMORE: On balance, I would say that it is good to use videotaped interviews. It preserves the child's presentation at that time because if there is some delay between them giving that statement and appearing in court they can look very different. A 12-year-old can look very different from a 13- or 14-year-old appearing in court.

Secondly, I think there is very clear evidence now that trying to interview children and take notes at the same time is a very fraught process. There is some research by Michael Lamb which shows that, in fact, it is a very inaccurate process. That was one of the main reasons that the Children's Evidence Task Force recommended going down this track. At that stage we were relying on evidence from police officers and Department of Community Services [DOCS] officers who had done that sort of interviewing—in fact there had been an informal trial in one office where they had done it both ways and noticed the difference.

Michael Lamb's research clearly confirms the difference in completeness and accuracy of reporting of a statement if it is done via video as opposed to being done on the results of notes taken at the time—or, in many cases, some time after the interview. Thirdly, it also allows the possibility that the child's evidence in chief can then be presented in court and save them that. But, as I said, I think we still need to do some work around understanding what the benefits and possible costs of that are.

CHAIR: Could I ask you about facilities currently available in many or most courts by way of closed circuit television [CCTV]?. Criticisms have been made, including some by the Director of Public Prosecutions, that sometimes court staff are not familiar with the best use of the equipment. Other criticisms about have been referred to that the child's face appearing on the screen may be unrealistically small to the jury in particular and problems have been encountered in regard to the correct placing of the screen. What has your experience been regarding the use of closed circuit television in courts? Does it enhance or defend the child's interests?

Dr CASHMORE: On behalf of the Australian Law Reform Commission I conducted the initial pilot on the use of closed circuit television in the Australian Capital Territory some time ago, which preceded New South Wales taking this up. I am aware of some of the problems of poor quality screens, small screens, small images, staff not familiar with the operation of the equipment, and also double booking of the equipment. The other issue I think that arises is the discretionary use when it comes to court. Children may be told that they can use it but get to court only to find out that they cannot, either because it has been double booked or has broken down; or because the judge decides that he thinks it would be prejudicial to the accused.

One of the main findings in the Australian Capital Territory was, in fact, that it is not necessarily just whether children use it that is important; it is whether they have some choice and control over that. Being able to use it when they want to it is a good thing. Being able to appear in court in person if they wish to do so is also useful. We actually had one child who decided to go into court but broke down and used the video in that environment. Yes, I think there are, does need to be, and I understand there has been, some updating of the equipment in some of the courts. It certainly needs to be to in order to make it an effective medium for the children's presentation in court.

Otherwise you have prosecution lawyers—and I think there is already a self-fulfilling prophecy here—who will not use it because they do not think they can secure a conviction as easily using it as not. Unfortunately, the self-fulfilling part of that is that they may only use closed circuit

television when they have really vulnerable witnesses and a weak case. If the outcome is an acquittal they may then say that closed circuit television does not work. Whereas, it may be the weakness of the case, not the use of the equipment.

CHAIR: What do you think of the argument that apparently is sometimes raised on behalf of the defence that the very use of CCTV raises a prejudice against the accused? Apparently an application is sometimes made to the presiding judge on that basis on some occasions.

Dr CASHMORE: There is research around to indicate that jurors do not react in that way, seeing it as prejudicial. The other concern about prejudice is that there is a suggestion that it is harder to tell whether children are lying, to judge their demeanour, via a closed-circuit television screen as opposed to the child being in court. In fact, the research shows that there is no difference in the capacity of jurors to detect deception—in fact, they are not very good either way. I think people mostly overestimate their capacity to tell when someone else is lying.

The Hon. JOHN RYAN: I notice that in your article you referred to something called a "live link". That means exactly the same thing as closed-circuit television, does it?

Dr CASHMORE: A live link, yes, it is.

The Hon. JOHN RYAN: The only other question with regard to your article was that you concluded with the sentence:

> There are also some promising developments in relation to computer-assisted interviews which allow children to have some control over the pace of the interview, using technology they are generally familiar and comfortable with. This form of interviewing also allows children to be less closely connected interpersonally with the interviewer.

Would you like to explain to the Committee what you meant by that?

Dr CASHMORE: Some work has been done in California, Marge Stewart did some work using video screens. Children now are pretty familiar with the use of computers, video screens and so on, in fact more so than their parents and adults usually. One suggestion is to use these figures to ask them questions—often in an interview situation but some suggestion that it might be able to be used in court as well—is that it allows them to direct their attention to that and focus on the content, rather than a direct interaction with a person, which they may find very stressful. This is usually with very young children. It is also a means of helping them to articulate things they may not have the verbal language for but can describe if they are given cues and so on to do so.

The Hon. JOHN RYAN: I imagine that part of the cues they would be given would be perhaps verbal options to describe events. Is there some criticism that that might in fact amount to coaching? For example, they may have four choices. I imagine that is part of what computer-assisted technology might involve, that they choose from menu of options.

Dr CASHMORE: I think what it might mean is that what they could do is place figures on a screen. There might be a screen and they could place figures according to how close they were, the position they were in, rotate the body, and use it in that way. Rather than verbal options it is actually using non-verbal options.

The Hon. JOHN RYAN: Similar, I suppose, to interviews I have seen done using a doll?

Dr CASHMORE: Yes. Again, that is an area that needs some caution in terms of the way in which those are used. I have seen it very inappropriately used in one police interview from another State. In the hands of unskilled, untrained people it can be suggestive and it needs to be done properly.

The Hon. JOHN RYAN: We have to some extent examined already the proposals that were put to the Committee by the Director Of Public Prosecutions. Are you familiar with the submission that he made to the Committee?

Dr CASHMORE: Yes.

The Hon. JOHN RYAN: Do you want to make any additional comment about that? We did not ask you those questions.

Dr CASHMORE: I said I would come back to that question, in relation to the specialist court. My view is that there is value in trying this out, taking on board the caution I referred to before, to the effect that you often get the best results out of a new model with the best selected people operating it. I think there is value in having specialist judges and prosecutors who understand the dynamics and nature of child sexual assault matters; children's strengths and vulnerabilities; and the legislation and the purpose of that legislation to allow children's evidence to be heard. One comment that we have heard from some judges is that this whole process has gone too far. I would assume that judges with those sorts of views may not elect to work in that particular area.

The Hon. JOHN HATZISTERGOS: I am sorry to interrupt but, when we are talking about specialist courts, one of the issues raised with the Committee by the Legal Aid Commission in particular is: To whom should that court relate? Does it only deal with child witnesses and offences in respect of which a child is giving the primary evidence, or should it also include adults, for example, who may have been the subject of child sexual assault but are now legally competent to give evidence? If it is the former, do you not get this problem where you will have specialist courts that are tailor-made to the nature of the witness who is giving the evidence, as opposed to the nature of the crime?

Dr CASHMORE: I am not sure how well qualified I am to answer that question. I would think that there would be considerations about the allocation of resources in terms of whether you would want to use it for both purposes, and whether, having just allocated it for child sexual assault, it might be cost-effective to extend it. There would also the same arguments that the same sorts of issues arise for adult witnesses who experience child sexual assault and are now complaining about it years later. Certainly, the issues about delayed complaint would be very clearly in focus. If the other aspect that you are referring to is having specialist people who become isolated away from the mainstream of the court system, I think that the Director of Public Prosecutions referred to a rotational process whereby you would rotate people in and out so that they did not become in near an isolated world, dealing only with those sorts of cases. We know of the problems of burnout experienced by people dealing with those sorts of cases. I am not sure that that necessarily answer's your question.

The Hon. JOHN HATZISTERGOS: No, I think that is helpful.

The Hon. JOHN RYAN: You said during the early part of your presentation to the Committee that recent developments, changes or reforms to how children may give their evidence had allowed more to enter the process but have not necessarily resulted in justice for more people. I do not know whether the RAS statistics to this level, but there has been comment that there appears to be a large number of failures of cases that enter the courts for prosecution in this area, by comparison with other areas. I believe it is of the order of 80 per cent.

One of the possible explanations why there is such a failure rate in prosecutions is that people say there is less likelihood of the Director of Public Prosecutions, given the pressure—I suppose it would be frank to call it political pressure—in this area means that more cases that would otherwise not have qualified even for prosecution make it to court and that that might be a better explanation of the failure rate than the suggestion that there is a lack of justice given to children giving their evidence in court. Would you care to comment on that counter-response?

Dr CASHMORE: Statistics are available from the Bureau of Crime Statistics and Research, and I actually published two papers, one in particular that provided a comparison over a decade. I think that was in 1995 and went to about 1992 statistics. I think there is an argument that there is a balance between bringing in cases that are so-called weaker and risking failure, or not securing a conviction if that is the term that is used, and going only for the strongest cases with more surety attached to a conviction. That is what we had pre-1985, basically. If you have a child who could not be sworn and could not be corroborated, there was no point in proceeding to a prosecution because their evidence would not get in. And they would not proceed; could not be heard. In those cases the conviction rates were high because you have much greater evidence supporting the allegation.

I know of some prosecutors in the United States of America who are very confident in theirr ability to deal with these cases, and who talk about 90 per cent success rates. I think the discussion that has ensued after those people have given papers and talked about that is, yes, you could secure a 90 per cent conviction rate if you only went with the strongest cases. That is not necessarily the approach that I think people in the field here would want to see.

The conviction rate, including guilty pleas, that I am aware of from the Higher courts, for example, is around the 50 per cent mark. It reached a high of 57 per cent in 1993 and was 51.6 per cent in 2000—the numbers fluctuated around that. I know that concern was expressed recently that some courts are not getting cases coming before them: there has been a drop in the number of child sexual assault matters being dealt with in the courts.

CHAIR: Could you tender the statistics to which you referred?

Dr CASHMORE: Yes.

CHAIR: Do those figures allow for subsequent appeals and the attrition rate as a result of people feeling that they have been through the mill once and do not want to put the child through it again?

Dr CASHMORE: I do not know that we have very good information about attrition rates, and I suggest that we need better research and better tracking of those cases. I think the Bureau of Crime Statistics and Research does a very good job by using sections of the Crimes Act to indicate whether the case involved a child victim. However, it admits that it underestimates. The research that I did for it at one stage involved a very time-consuming process because there is no coding that allows people to pull out immediately cases involving a child victim or late complaint cases—the complainant is now an adult but the crime is child sexual assault.

The Hon. JANELLE SAFFIN: I seem to remember that the Director of Public Prosecutions said that the conviction rate was 20 per cent, which is vastly different.

CHAIR: That was conviction at trial whereas Dr Cashmore is including guilty pleas.

Dr CASHMORE: I am referring to the overall conviction rate. The plea rate is about 35 per cent or 40 per cent, so if that is subtracted it might give the same sort of figure.

CHAIR: When Mr Cowdery gave evidence, although he was unable to be precise, he estimated that about 75 per cent of cases resulting in conviction at trial were appealed. He went on to say that the Court of Appeal trawled through the evidence—particularly the judge's summing up—and quite often found some mistake that was sufficient to order a new trial. At this point many people understandably drop out, perhaps in disgust, because they cannot stand the trauma any longer.

Dr CASHMORE: I think that is an extraordinarily high figure. I am not saying that I do not believe it, but it is a very high figure. I have been a member of the Sexual Assault Review Committee of the DPP since its inception and we have been concerned about that issue. We have reviewed appeal cases and considered the matter. It bears further analysis and research to see what is going on in these cases. It may be another argument for a specialist court.

The Hon. JANELLE SAFFIN: In his submission Nick Cowdery expresses a view about what is going on with that issue. I cannot remember the exact words, but he says something to the effect that those cases seem to be looked at far more closely: the judges examine the evidence very carefully. I think that is a good point.

The Hon. JOHN RYAN: I think he said that, because the consequences of a conviction in this area are so onerous on the person convicted, judges are inclined to go through the transcript and the judgments a great deal more closely than they would otherwise. That tends to result in a high level of appeals being successful.

Dr CASHMORE: These cases often rely very heavily, and sometimes almost solely, on the evidence of a child. I think the Legal Aid Commission referred in its submission to "almost always"

resulting in a custodial sentence. The figures that I have seen do not quite support that view. Bureau of Crime Statistics and Research sentencing figures indicate an upward trend from about 45 per cent in 1990 to about 65 per cent in 2000. But that is still two-thirds. These are higher court matters, so they are more serious. In the local court the figure is about 20 per cent.

The Hon. JOHN RYAN: I chaired another parliamentary committee that inquired into the increase in the prison population and evidence revealed a good reason why higher court sentences appear much harsher than the overall sentencing pattern. There is a tendency to put more serious matters before the higher court and to filter other matters down to the lower courts, which makes the higher court sentences appear harsher if taken alone.

CHAIR: A short time ago when you responded to my question about Mr Cowdery's estimate that 75 per cent of matters go to appeal you said that that percentage was rather high. Do you mean that you concede that it is at that level, which is high; or, alternatively, are you saying that Mr Cowdery is wrong and is overestimating the incidence of appeals?

Dr CASHMORE: No. I am not saying that I do not believe it; I am saying that it seems to be a very high figure. I think it needs to be compared with what happens in other cases. Some further analysis must be done as to what is happening in this area to lead to such a high rate of appeals and we must determine whether these appeals are successful. I gathered from Mr Cowdery's evidence that those appeals are often successful.

The Hon. JOHN RYAN: This may seem a dopey question to ask at this end of your evidence, but it is useful to the Committee to obtain this information in primary rather than secondary evidence. What characteristics of children's memory development impact on their ability to give evidence in child sexual assault matters?

Dr CASHMORE: I think that issue was included in the first question and I may have missed it. There is now a very substantial body of research about children's memory. I was very familiar with this subject until fairly recently, but if you want to talk to a person familiar with the most recent research I suggest you contact either Dr Kay Bussey or Karen Salmon from Macquarie University and the University of New South Wales respectively.

The issues about children's memory are wrapped up with things such as reliability and suggestibility and are very difficult to separate. There is a suggestion that children find it harder to recall things after a long period of time unless it is something really relevant to them. The information may be encoded in different ways. If it happens to them when they are much younger they may encode it differently from when they are older and tend to use more verbal cues. There is evidence that they are more affected than adults by delays in interviewing and coming to court, which is a reason for trying to fast-track some of these cases so that it is fresher in their memories.

Like all of us, children are susceptible to misleading questions. It is very hard to unpack the memory aspect as opposed to suggestibility and what comes out in questioning. We know that what children tell you in response to open-ended questions is generally very accurate. The problem is that it is not very complete, which means that people then feel the need to ask further questions. It becomes more of a problem when children are asked yes- or no-type questions, particularly those that have a leading emphasis that suggests an answer, or when they are asked questions that they may not understand to which they give a yes or no answer that seems inconsistent later because they were responding to one aspect of the question rather than another. I could provide a body of research and some summaries on that issue.

The Hon. JANELLE SAFFIN: I do not know whether there is any answer to this question, which is about the judge's role in court. There is a view that judges and prosecutors could do more but do not. I am not sure how to address that issue. Do you have any suggestions? I have noticed a similar trend in other cases, such as rape, when I have heard judges say after the event that what happened in court was appalling but they were there.

Dr CASHMORE: They were controlling the process.

The Hon. JANELLE SAFFIN: They could have done something but there seems to be even more of a reluctance to act in these cases. When I sit in on civil cases judges are not reluctant to intervene, say things and protect witnesses on either side. This is a problematic issue. A lot could be done without the Committee's recommending 5,000 changes, new legislation and other bits and pieces—which we will undoubtedly do. I think we should focus some attention on this issue somehow.

Dr CASHMORE: I agree. I think it depends where judges' reluctance comes from. It may be related to the appeals process or concern about appeals. Judges are concerned about intervening in a process that they see as legitimate. It is an interesting issue. I can quote a judge whom we interviewed. Referring to research and his view of the court process, he said:

> Results of research should be made known to magistrates and judges. Also we should be given more empirical training so that our natural biases are whittled down; we are not infallible. The adversary system is about winning and losing. It is not about truth and justice. One side bears a very heavy onus to prove something in a mystery game, dictated by a whole lot of technical rules **that has nothing to do with truth and justice as the layman would understand it.** There are powers to regulate questions but they are never used.

That is one attitude. We then have the contrary view from another judge, who says:

> Sure, I can think of a number of ways of helping the kids, but when you realise that the predominant philosophy behind a court trial is the protection of the accused, you have a problem. The purpose of the exercise is not to find the truth but to satisfy the jury of the guilt of the accused beyond reasonable doubt and the whole focus is upon the accused.

CHAIR: Is your experience in regard to such trials as you have attended that judicial officers in the main are reluctant to intervene?

Dr CASHMORE: Yes, both in terms of observation for the closed-circuit television pilot and the paper that Kay Bussey and I published about judicial views regarding child witnesses. There is another more extreme view:

> I think it's very important when cross-examination is proceeding … to permit the evidence to be properly tested and if that means, as it inevitably does, that the child has to be distressed, I'm afraid it's part of the system.

That comes back to the reluctance to intervene. We need to understand the issues better. There is some evidence that those who come from a defence background are more likely to hold those views. You will not shift those views very easily through any sort of educational process. Researchers often suggest more research, but I think it is necessary in this case. We need to understand more about the process and about how fact-finders work—particularly juries. I recommend, first, that you look at the very good recommendations of previous reports, such as the Australian Law Reform Commission "Seen and Heard" report and the Wood royal commission report. We have gone some way, but not very far, down the track of implementing those recommendations.

We must try out things like specialist courts and we must have a better idea of tracking cases through the system. What happens to them? Why do they drop out? How many of them drop out because the families will not come back for another bite when they have a hung jury, an appeal and so on. We really still do not know as much as we need to know about the process.

CHAIR: Is there anything further you might like to say that we might have overlooked arising out of your published article, or is there any other matter to which you might like to refer?

Dr CASHMORE: No, I do not think so, thank you.

CHAIR: Thank you very much for your assistance to the Committee. It is very much appreciated.

(The witness withdrew)

PATRICK NEWPORT PARKINSON, Professor of Law, University of Sydney, 173-175 Phillip Street, Sydney, affirmed and examined:

CHAIR: Professor Parkinson, in what capacity are you appearing before the Committee?

Professor PARKINSON: In my personal capacity. I do not represent the university in what I say.

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

Professor PARKINSON: I did.

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

Professor PARKINSON: I am generally conversant with them.

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

Professor PARKINSON: Yes. I am, as I said, a professor of law. A great deal of my work has been concerned with the protection of children and, in particular, the legal aspects of that. I have done some work in relation to the criminal prosecution of sex offenders against children.

CHAIR: You have made a written submission to the Committee, for which we are very grateful. Is it your wish that that submission be included as part of your affirmed evidence?

Professor PARKINSON: Yes, please.

CHAIR: If 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 would be willing to accede to your request. However, the House does have the right to override our decision.

Professor PARKINSON: Thank you. That will not be necessary.

CHAIR: I now invite you to briefly elaborate on your submission by way of some initial comment if you wish.

Professor PARKINSON: Thank you. May I first of all offer a disclaimer. Although I have worked for quite a while in child protection law and I have been concerned with the protection of children, the majority of my work has been in child welfare law and family law. I do not purport to be an expert on criminal law or on the laws of evidence. I know more than many but I would say that I know a great deal less than some. So if I defer to the evidence of other experts or refer you to others I hope you understand that I am trying to speak only about what I feel I can usefully comment on. Over the years I have been involved in issues of law reform to do with the child sexual assault prosecution process. That has been an ongoing process of reform. A great many changes have been made over the years.

What my submission does is provide some evidence from a recent study we have done of what we have called the process of attrition in child sexual assault cases. This was research done with Kim Oates from the Children's Hospital and other colleagues. We tracked 183 children who presented at children's hospitals in 1988 to 1990. We looked at what happened in the subsequent years. In 117 of those cases the name of the offender was known sufficiently so we could trace through criminal record checks and determine what had happened to those cases. In summary, 27 per cent of that 117 ended up with a conviction in the criminal courts. These were cases where the sexual abuse was accepted to the satisfaction of clinicians at the children's hospitals. That is not evidence of guilt but it is evidence of a

significant likelihood that these children were the victims of a crime and these children identified who they alleged to be the perpetrator of the crime.

So we have some sense of how many cases actually get through to the end of the criminal justice system and result in a conviction. Most of those cases which dropped out did not get towards trial. So what we see is that most cases are not proceeded with or drop out after charges are laid. Only about one in four make it right through to the stage where one can achieve a conviction following a trial or a guilty plea. So I refer you to that paper. I have given to the Committee a copy of that paper. I have talked about some of the reasons why those things occur—why cases drop out. The submission I have made really parallels the submission of the Director of Public Prosecutions. We say some very similar things and, of course, his expertise is much greater than my own in that area. But we say almost the same things. The other issues that I draw attention to, though, are ones which I am not sure you have had so much evidence about.

The first one is the issue of the complexity of language. It is a well-known problem that children who testify in court are often subjected to very complex questioning. You would be familiar with Mark Brennan's work in that area. The second issue that has been of concern to me is the application of the rules of evidence. I briefly address that issue in case it has not been addressed further. The law conceptualises any crime as an event. If somebody is charged with robbing bank there is an event which occurs on a day and there is an incident in which a bank is robbed. Each crime is a discrete and separate act. The experience of the child in an ongoing abusive relationship is not one of isolated and independent events; it is the experience of a relationship which is distorted; a relationship which is abusive; a relationship in which there are many different dynamics. But the law requires that specific incidents are proven to the satisfaction of the jury beyond reasonable doubt. That is often taking a small part of the child's total experience.

There were reforms to the criminal law. Section 66EA was introduced into the Crimes Act to allow for the prosecution of an offence of persistent abuse of a child where there are three or more events. But that does not change particularly what I am saying. It certainly helps but it does not change the fundamental idea that we charge something less than the totality of the experience of the child. What I want to draw your attention to is the difficulties for children in giving evidence when what the court will allow them to say is much less than the totality of their relevant experience. I mentioned this to one judge. I said, "We ask children to tell the truth, the whole truth and nothing but the truth." The judge added, "Yes, if we allow them to." And that, I think, is the point. But what is charged even under section 66EA, if that applies, is only part, usually, of the child's experience because one must prove each event beyond reasonable doubt.

So there is all the history of that relationship, all the context of grooming the child, of engaging the child in incidents, events, circumstances, which may not give rise to a criminal charge, which are part of the essential context of understanding the dangerousness of this offender and the dangerousness and the seriousness of the abuse. The law on admissibility of that evidence is very complex. Here I must reiterate that I am not an expert on the law of evidence—not at all—but others are, and they can help the Committee to understand, perhaps better than I can explain, the complexities of that. I would like to tender in evidence an article by Justice T. H. Smith, and O. P. Holdenson, QC. It is two or three years old, it was in the *Australian Law Journal*, and it discusses the admission of evidence of relationship in sexual offence prosecutions.

CHAIR: We will accept that as a tendered document

Professor PARKINSON: Thank you. Essentially, it has always been the case that one can give evidence in relation to a guilty passion. It is a very old-fashioned phrase now, but it gives some indication of how you can talk about the previous history of relationship with that person, indicating that they had a passion towards the victim. More broadly, we talk these days about relationship evidence as evidence of the relationship prior to the events which led to the charges being laid. The admissibility of that evidence is very complex. It may go to proving a tendency of this person to commit this offence or it may be simply background to contextualise the incidents about which charges were laid.

There is, nonetheless, a discretion—a discretion which is a very clear one in the Evidence Act—for the judge to exclude evidence of this kind. First of all, the evidence must be quite strongly

probative. I am paraphrasing, but that is the effect of the provision. Second, its probative value must outweigh its prejudicial effect, which is a standard term in the laws of evidence. It is the exercise of that discretion, the issues of admissibility of the background, which I think is something we ought to look at. I am not the best person to provide evidence of how serious the problems are and what the solutions are, but I think it is an aspect of this whole thing. What happens to children if their evidence is not able to be heard in totality? They experience a kind of unreality in which they are unable to tell the whole story of what has happened to them.

Issues of admissibility can arise in the course of examination in chief, objections can be made, the jury can be asked to leave the room and brought back in, and there could be cases of mistrials when children have said things which are not admissible. All of these problems occur and can be very confusing to the child. Depending on how the rules of admissibility of this evidence play out, the child may or may not be able to tell the truth, the whole truth and nothing but the truth. What I have suggested in my submission is that this is a problem—it is not a problem in all cases but it is a problem in some—and it is part of the distress that children can experience in testifying and it is part of the problem of hearing what they have to say. I raise other issues. At the end of my submission I suggest a reform agenda but perhaps, having taken more than the two or three minutes I think I might have promised, I can leave it there.

CHAIR: In your submission at page 2 you suggest that one of the key findings of the research to which you are there referring is that when a case was handled by a specialist child mistreatment unit it was much more likely that the case would proceed to a prosecution than if the case was handled by general officers. You might recall that when I was in a former role as Minister for Community Services I set up what were then known as the joint investigation teams [JIT], together with the Police Service. Mr Peter Ryan, the recently departed police commissioner, jointly launched that initiative with me at Ashfield. As you will be well aware, that had two elements: DOCS on one side and the Police Service on the other side. Ms Helen Syme, the Deputy Chief Magistrate, recently gave evidence to the Committee and suggested that the police element of that is working relatively well but she was far less complimentary regarding the DOCS side of the matter. Have you had any contact with that model that would indicate how it is travelling?

Professor PARKINSON: No. I am aware that an evaluation has been done. I would just make one or two comments by way of anecdote, if nothing else. I think, first of all, that the model is the correct one. Interviewing children is a very difficult and specialist area, and it makes a great deal of sense to have a specialist interviewing team. I would not want to see any change to the model. Catherine Humphreys' older research, which was prior to this, makes it very clear that that is the best way forward, as it is understood to be in other countries.

There has been a concern expressed to me by people in the field that one of the consequences of having the JIT teams, or JIRT teams as I think they are now called, is that if the police decide not to prosecute or not to investigate further because the child is too young or whatever, DOCS is not taking action either. One would have to ask questions of the people in the field as to whether this concern has any substance, but the concern is essentially that a criminal standard of proof and criminal criteria for assessing the quality of the evidence then dominates the response. Of course, the issues for the Department of Community Services in taking cases to the Children's Court are very different from the issues for the police in deciding whether it is worth pursuing the matter further through a criminal process.

CHAIR: I do not quite follow how it could be that DOCS would feel that it should not take action. Clearly, the standard of proof in the Children's Court regarding care proceedings is different from that applying to criminal prosecutions. Am I correctly understanding you to say that if the JIT team, or the JIRT team as it now is, decides not to proceed on a criminal basis DOCS feels discouraged or something of the sort and does not feel that it should take care proceedings either? Is that what you are saying?

Professor PARKINSON: The concern expressed to me is not so much where there has been a full investigation and the child has been interviewed but more in the discretion of whether or not to proceed with an interview. The JIRT does not take every case any more than DOCS does, and with DOCS apparently under so much strain at the moment with the numbers of reports of abuse, what I am hearing is that in a situation where there is a real concern, for example, about the sexual abuse of

the child but the child has not yet made a clear disclosure of that—there are just significant and justified concerns—because the police will not take it further, DOCS is not taking it further either.

The police might legitimately say, "Until the child says something, there is no point interviewing them". My understanding is that it becomes a resource allocation decision not to proceed further at all, although it may be that the department might be able to get further and have some legitimate role in promoting the safety of the child. This is anecdote and I would not want it to be understood as anything more than that, but it is a concern that has been expressed to me about the filtering of notifications or reports of abuse concerns.

CHAIR: Also at page 2 of your submission you say that in New South Wales, for example, prosecutions for child sexual assault increased fourfold between 1982 and 1992. You go on to say:

> Despite the increase in prosecutions, there was not a proportionate increase in the rate of convictions. Indeed, both the guilty plea rate and the rate of convictions after trial has declined dramatically over that period.

That is shown in the table to which you then refer. As you are well aware, Dr Cashmore gave evidence immediately before you this morning, and the conviction rate is one matter we were discussing with her. She perhaps tended to the view that a possible explanation might be that the quality of the prosecutions in terms of evidence might not necessarily be what it once was in the sense that under the law as it formerly stood the evidence had to be very good to stand up, whereas now even if the child's evidence is uncorroborated, as understandably it often is in these matters, it can nevertheless go before a court. What would be your view regarding the dramatic drop-off, as you refer to it? In your view, why has that happened?

Professor PARKINSON: I think my views are very much the same as Dr Cashmore's views on this. It seems to me that the Director of Public Prosecutions and the police should be commended for the efforts they have made to try to deal with this problem and to do so through the criminal justice system. Enormous efforts have been made to try to prosecute more cases and to secure more convictions but inevitably that has meant that the children who are now giving evidence are younger than they might have been, say, 15 years ago. Whereas 15 years ago one might only take a case if there was some clear corroboration, now there is a tendency to have a go with a prosecution if there is good enough, strong enough, evidence but without the quality of evidence that one had before.

I think there is almost inevitably a correlation between the rise in attempted prosecutions and the decline in conviction rates. I think the other thing is that there is a culture amongst defence lawyers of having a go—pushing cases to trial and recommending against a guilty plea—and maybe this awareness of the likelihood of conviction is known to some offenders as well. We are seeing a decline in guilty pleas, and I think this may be one of the explanations for the lack of referrals to the Pre-trial Diversion of Offenders program because the legal advice they might get is that they have a fifty-fifty chance of getting off if the case is pushed to a trial, and even if it is not pushed to a trial the case might drop out and therefore do not plead guilty.

CHAIR: In your preliminary oral remarks this morning you referred to the problem of language and understanding as it affects a child's evidence. We have heard quite a lot, even at this early stage of the inquiry, regarding matters such as children being repeatedly told that they are lying or that they have been paid money to give evidence. Reference has also been made to leading questions, questions containing double negatives, highly speculative questions, shifting from one scene to another very quickly. As Ms Syme, the Deputy Chief Magistrate said when she gave evidence to us, it seems to me that sometimes judicial officers should say to counsel, "The witness clearly doesn't understand the question." However, unless I am mistaken, that does not seem to happen very often. Judicial officers seem to be reluctant to intervene even to the extent to say that the child does not understand the question. Is that your belief or experience?

Professor PARKINSON: It is. I cannot talk from experience of looking at a number of criminal trials but it is certainly my impression that the whole culture of our adversarial system is one in which judicial officers are hands off, particularly in the criminal justice system because there is a very great reluctance to interfere too much in the defence's presentation of its case. It seems to me that here there is room for legislative reform, to overturn that reluctance to some extent and to indicate from Parliament's point of view that in this area one needs to be a bit more interventionist about helping children understand questions. In the submission I made I forwarded an article by Richards

from the United States of America. Some of the reforms in the United States along these lines have worked rather well. I do not think any of those reforms are earth shattering. I do not think they change the balance of power in criminal prosecutions but they do give a useful model of directing judicial officers to this issue as a problem.

CHAIR: Mr Cowdery even suggested when he gave evidence to us that in some cases the judicial officer might be looking down taking notes, or something of that nature, and does not even notice that the child does not understand. But even if that is not the case, I must say that I find it quite difficult to appreciate why the judicial officer would not be prepared to intervene to draw counsel's attention to the fact that the child does not appear to understand the questioning. From my perspective, that appears to be a lesser intervention than perhaps intervening to ask counsel to tone down the severity of the questioning if the questioning is regarded as badgering or intimidatory. Even though I would be very inclined to intervene, I find it easier to understand a reluctance to intervene then than if the child does not understand the questioning.

Professor PARKINSON: I think one of the issues is whether the judicial officer realises the difficulties the child is having. Judicial officers vary enormously in their background and experience, and they do a very fine job. But, inevitably, even if they have children themselves, they may be more or less attuned and sensitive to the child's difficulties in giving evidence. There may be some judges who are very attuned, and realise that the child has misunderstood the question; there may be others for whom it passes entirely without notice. There may even be crown prosecutors who, similarly, do not realise the difficulties the child is having. One can only do so much by directing attention to the issue; there will always be the problems of the level of awareness and sensitivity of those in the courtroom.

CHAIR: Given that this problem often exists—that is, the problem of a child's stage of development and difficulties with the language that is being used—would it be a useful initiative, at least on a trial basis, if, as Mr Cowdery suggests, there were a model or trial court or pilot set up to experiment with some of these matters—for example, appropriate training of court staff and judicial officers in stages of child development, so that account can be taken of some of the difficulties that children may be experiencing?

Professor PARKINSON: I read the Director of Public Prosecution's submission and I was very impressed by it; I think this is an excellent idea. May I suggest it is not just the issue of training that is helpful, but also selection. This is not an area which is easy to work in; nobody pretends that it is. And I am sure that dealing with child witnesses is not easy. There will be some judges in each court who are more temperamentally suited than others to be specialists in such a program. If one can, as part of this whole model, have some sensitivity to who might be most appropriate to act as judicial officers in the pilots and who might be most suitable to have other official roles, I think that would be most beneficial.

It raises a related issue about appeals from children's courts in care and protection matters. One of the issues I was concerned with in the review of the Children (Care and Protection) Act was the problem of what happens to children's court cases that go on appeal. There were some discussions with the Attorney General's Department about the possibility of setting up within the District Court a division of specialist judges to hear child protection appeals, because these are very different to the run-of-the-mill work that District Court judges do. If I can tie that proposal on to Mr Cowdery's one, it seems to me that the same judicial officers at least might be designated to deal with children's court appeals.

CHAIR: One of the arguments sometimes advanced against specialist courts or specialist jurisdictions is that the practitioners and judicial officers within them tend to become somewhat isolated from the general law. What view do you take regarding that? Do you think that that is a danger, and if so, is a possible answer to the problem rotating judicial officers into and out of such a court? If so, does that raise the further problem of suitable temperament and training of officers serving in that court?

Professor PARKINSON: It is an important issue, I think. I would suggest that the biggest problem could be burnout. I would not like to be sitting day after day hearing these cases. All criminal

matters are distressing, I am sure, where there are offences against the person, but these must be especially so, and, of course, in many cases they are especially complex.

So I think there is a need to combine this sort of work with other work. I do not think necessarily that judges need to sit full time and do only matters related to this specialist children's jurisdiction, but I think it is a good idea to have specialist judicial officers, rather than rotating. I think the parallel here is with the Children's Court, where generalist magistrates are assigned for periods of time to the Children's Court, and they are meant to be those who are suitable for work in that jurisdiction. I am not sure that that is always the case, but the model is a similar one: they do not rotate, they are selected.

The Hon. JOHN RYAN: If we were to have a specialist jurisdiction or court for children's complaint matters, how do you think we should address the issue of the cut-off point at which we decide that a matter deserves to be dealt with by the special jurisdiction, as opposed to being part of the normal adult court system?

Professor PARKINSON: In a sense, it may not matter very much. If one assumes that these cases are going to go to trial anyway, there is not a resource issue about whether they are heard in the specialist court or a general court. I would suggest that the policy which might lead one towards this reform is concern about children as victims of personal violence offences. That might be the obvious cut-off. One could instead take a view that if the child was the primary witness to an offence and the child was under 16, that would be a candidate for such a court.

I am thinking here of the child who witnesses an armed robbery or is not a victim. But I guess the same issues apply: one needs to deal sensitively with children as witnesses. I think one would want to deal with cases where the child is the primary witness or their evidence is crucial to the prosecution case.

The Hon. JOHN RYAN: Would you use a blanket age limit cut-off of 18, 16, 12, or something of that nature?

Professor PARKINSON: I always like simple rules if they will work, and I see no reason why the simple rule of under 16 should not work. Sixteen becomes the age at which we begin to think of young people as almost adults, but under 16 I think there is room saying that special protection should apply.

CHAIR: That is less clear than perhaps it once was. These days young people, even of 14 years of age, are somewhat more mature in some senses than they once were, perhaps because of the various societal influences that are cast on them. Nevertheless, I do not disagree with what you say about a simple rule.

Professor PARKINSON: And nothing turns on it. If we are looking at the age at which a young person should be able to consent to her own medical treatment—for example, contraception or . But I would think nothing terribly much turns on the decision as to whether something is in a specialist or generalist court.

CHAIR: A substantial issue that has been given attention in these hearings, particularly by Ms Syme, the Deputy Chief Magistrate, and also this morning by Dr Cashmore, is that of the video recording of children's statements. Ms Syme placed great stress on that matter. It seems that such video recordings are usually taken but very rarely introduced in evidence. Dr Cashmore referred to some possible negatives regarding their use. One argument, apparently, is that if a video recording is introduced at trial, it deprives the child of the chance to settle down prior to cross-examination. What is your view regarding the use of video recordings, particularly to prevent contamination by repeated interviewing?

Professor PARKINSON: I am not familiar with the current operation of the Evidence Act 1997 in which this was introduced. I would be most interested to read an evaluation of it. But let me draw some parallels with England and with the experience before 1997.

The fundamental question about the success of videotaping is the quality of the interview. In the early 1990s there was a pilot project in Newcastle, on the Central Coast, in which, without any legislative basis, there was an attempt to trial the videotaping of interviews with children, and that report was never released. I cannot remember which government never released it, but that is beside the point. The reason it was not released was, as I understand it, it was quite embarrassing. The quality of the interviews was seen to be so poor that they were regarded as having little probative value. At the time, that alerted us on the Child Protection Council to reassess the fundamental issue. It is not so much the passing of legislation allowing the technology to be used as the quality of the interviewing which is critical to its success.

One reason why there may be a reluctance to use those interviews might be that prosecutors look at them and say they are simply not of sufficient quality, they have inadmissible material, and so on. The second reason, I think, is a reluctance by prosecutors to use them. This was the evidence from England, where, long before New South Wales, they introduced video recording and Graham Davies and his team did an evaluation of that. There were all sorts of reasons why most of them were not using it, and one of them was a reluctance by prosecutors, who thought that a crying child on a witness stand was more impressive than a video recording. That was not the only reason they gave, but I think there is that conservatism amongst some prosecutors, for many reasons, about wanting to have a child giving live evidence.

The issue of warming up has also been a concern. But I think it was more of a concern in England, where the original legislation said that the video recording should replace evidence in chief. Pretty well the first live evidence the child gave was cross-examination. I think the view emerged that the best use of videotaped evidence was as part of examination in chief, but one would still want to have the child say something led by the prosecutor.

CHAIR: Dr Cashmore suggested this morning that one possible reason for a reluctance to use videotaped interviews in evidence relates to their length; they can often be very lengthy indeed, and that may be seen to be a problem.

Professor PARKINSON: Yes. I read that in the director's remarks as well. In England, the Memorandum of Good Practice in interviewing children was very specific that it should be under an hour. A few years ago I talked to the police and social workers in Cardiff, where there was a very good unit set up. They had a special cottage where the interviews of the children took place. There was a foyer where one could wait, and the room was set up with toys and a comfortable lounge. I was very impressed by the quality of the facilities they had.

I asked them this question about how they managed to keep interviews short, given that what we know about children is that they tend to disclose tentatively and one may have to give them considerable time to feel comfortable with the interviewer. They said that they always wait until the child is ready. They get a report about abuse, they then talk to the parents, and they talk to the child. If the child is not ready, or the parents are not ready, they say, "Why don't we leave it for two weeks; we will come back in two weeks time."

So, by the time they did that interview the child was as comfortable as could be about the idea of doing it, knew what it was all about, and they did not have a problem, it seems, about keeping the interviews fairly contained and short. Now, I do not know what the practice is here, but I think that is maybe one of the keys—to look at the timing of the interview and whether the child is ready at that stage to talk to strangers about these very distressing experiences.

The Hon. JANELLE SAFFIN: The Deputy Chief Magistrate in her evidence to us made some points about the interviewing practices with police and Department of Community Services [DOCS] officers. I do not know if you have read her submission.

Professor PARKINSON: No.

The Hon. JANELLE SAFFIN: It is very interesting what she says about the ability of people to interview, or inability.

CHAIR: In summary, what the Deputy Chief Magistrate said was that she gave a tick to the police element of the JIT team and a cross to the DOCS element. That was her impression; I am not necessarily associating myself with that view.

Professor PARKINSON: I know Helen Syme to be a woman of forceful opinions and no doubt she expressed them to the Committee. I would not like to comment. I do not know. All I would say is that the world seems through my eyes not always to be black and white, there are shades of grey, and no doubt if one were to do an objective evaluation one might have a more nuanced assessment of the quality of each. I have known Inspector John Heslop for many years and I do not think the Police Service in this State could have a finer leader of the child protection enforcement agency. I know a number of his senior staff and I am very impressed indeed by the quality of the senior leadership of that unit.

CHAIR: In effect, Ms Syme was saying that the police who participate in the JIT team are quite well-trained and, again to summarise her views, she tended to suggest that the DOCS component of the JIT team had a manual thrown at them and that was about it. Do you know whether that is the case?

Professor PARKINSON: I really do not and I would not want to comment. Can I just say in defence of everybody involved in this work, it is not easy to interview children. I would not want my professional performance to be judged if I were asked to undertake this important and difficult role.

The Hon. JANELLE SAFFIN: Except if one is doing it as one's job, one has a professional responsibility to become good as it?

Professor PARKINSON: Absolutely.

The Hon. JANELLE SAFFIN: I used to train people in how to interview, so I know a little bit about it.

Professor PARKINSON: I am sure you do, but there are some things that are easier than others. This is not easy.

The Hon. JOHN RYAN: I suppose it would be fair to say that getting good at it requires a fair level of patience and resourcing on the part of the agency that employs these people. For example, there is a need to give people time to look at previous evidence and interviews and assess whether they were any good, work out better question strategies and allow people to develop. The department does not have the time to make those people available for considerable periods of time of what people might consider is almost downtime. I suppose it is possible that they may not be able to develop the same level of expertise as perhaps the Police Service has invested in Inspector Heslop because he has had the opportunity to hold that job for a long time.

Professor PARKINSON: I think that is absolutely right and one of the issues the department has amongst many is the issue of turnover of staff and inexperience of staff. One constantly hears of very inexperienced staff dealing with very difficult issues and that combination is not a happy one.

CHAIR: What is your impression of the success of the use of closed-circuit television [CCTV] in child sexual assault court proceedings? Mr Cowdery seemed to be of the view that, while he was not at all dismissing its usefulness, its success is variable according to whether the equipment is working and whether it is available in a given court. For example, a busy court like that of Penrith might only have one set of equipment and two trials ready to proceed on the one day. Another matter he referred to was that sometimes the child's image on the screen might be, shall I say, unrealistically small for the purpose of the jury and the child's demeanour and so forth might not be as readily apparent as it ought to be to the jury and, for that matter, the judicial officer. Could you respond in general terms as to your view regarding CCTV equipment?

Professor PARKINSON: Certainly I have heard of those things and I am quite sure they are significant problems. The experience of child sexual assault prosecutions appears to be that they cluster in certain areas more than others and the facilities are not clustered in the same areas. That is a major problem. In evaluating CCTV one must trade off different things. Some interesting research

was done in the United States and perhaps Dr Cashmore referred to it, I do not know. The researchers took over a court room in Oregon over a weekend and got juries in mock trials to look at three different conditions: closed-circuit TV, a screen and a live testimony. The evidence from the research was that the live testimony had the greatest impact on the jury and that the closed-circuit TV had less of an impact.

That research was very well done and I think it reinforces the impressions one gets from evaluations in Britain and elsewhere. However, the trade-off is how much stress are we going to put the child under in order to get a criminal conviction? While I do not doubt that closed-circuit TV might in some cases have reduced the impact of the child's evidence for all the reasons you have given, on the other hand if it is protective of the child it might be a necessary compromise.

CHAIR: Perhaps for reasons of clarity I should say that a witness yet to appear apparently disputes Ms Syme's comment regarding the training of DOCS and police officers. This witness apparently will say that they have joint training. That is an issue yet to be thoroughly resolved.

Professor PARKINSON: Then I will reiterate my comments that I really am not in a position to give you any guidance on that. I simply am not close enough to the frontline of this work.

CHAIR: When representatives of the Legal Aid Commission gave evidence recently they tended to discount any suggestion that counsel would be unfair to a child witness, particularly that they would engage in intimidatory behaviour. The basis on which they put that to us was that it would be counterproductive and not in the best interests of the defence, given its effect on a jury. Have you sat in on trials of this nature and witnessed how children are cross-examined?

Professor PARKINSON: No I have not. As I say, my research predominantly lies elsewhere. I follow this in general terms, but let me make a couple of comments. First of all, I think there is a widespread understanding in the criminal defence bar that badgering a child, engaging in intimidatory conduct, is a risky strategy. It is risky because although it may be very effective in reducing a child to tears and incomprehensibility, there is the risk of prejudicing one's client in the minds of the jury. So, it would not surprise me if Legal Aid is right in saying that this is a defence tactic that not many defence lawyers will use regularly in court.

But having said that, it is perhaps a much more effective tactic to diminish a child's testimony to engage in subtle questioning. I know of accounts of very calm, very quiet, very patient and very caring sorts of cross-examination that are devastating in the use of tactics which undermine the credibility of the child in a way that does not reflect the truth of the situation or the quality of the child's testimony. One can do that by focusing on peripheral events. One can focus on minor inconsistencies of the child's testimony. One can, as you say, jump backwards and forwards to different events and different times so that the child is not clear on what you are talking about. All of that can be done in the most pleasant way without upsetting a jury.

I do not want to be understood to be saying that members of the criminal defence bar are deliberately engaged in these tactics; I am saying that one can engage in those tactics without getting a jury off side. The other thing I would suggest might be more of a problem is that one may not realise the extent to which one is asking questions that are inappropriate to the child's age. My impression is that very often if one has a young child in the witness box the judge and prosecutor and so on are attuned to the very young age of this child. If it is an older child, 15 years old, the issue does not arise very much, but it is the children in the middle who so often are the witnesses in child sexual assault prosecutions, those who are nine, 10 and 11 years old, where one sees the most insensitivity to the developmental stage of those children.

CHAIR: Do you think there is a fundamental difficulty in our criminal justice system that impacts most harshly regarding prosecutions involving children in that our system really is not predicated on the objective of ascertaining the truth; rather that it is an adversarial system played according to formal rules and to that extent perhaps the best interests of the child cannot be served in these proceedings? Or to put it another way, if we had an inquisitorial system, such as in some European countries, we might be able to cope better with the language problems of children and so on?

Professor PARKINSON: We might, but we might not. But I do not think we can really at this stage in our history move over to such a different model or to some better model than we have. I think the adversarial system is here to stay and the job of the defence is and always will be to create a reasonable doubt. I do not think there is much value in trying to pursue systems which change that fundamental requirement that the case must be proved beyond reasonable doubt; the defence must have a reasonable opportunity to prove the innocence of their client or to create a reasonable doubt.

What I think one can do is make more modest changes within an existing system. Is the system there for the best interests of the child? Obviously not. The proposition is almost laughable! And I know that you did not intend that as a comment on what we should be doing. It clearly is not. It is a system in which children testify with great difficulty and show great courage, but one which is not intended to promote their welfare. It is intended to be upholding the criminal law.

CHAIR: I was not actually advocating the inquisitorial system in my question. Rather, I was attempting to suggest that perhaps there are some unpalatable truths and inevitable verities in our existing system that mean that the prospect of reform, while perhaps not illusory, is very difficult.

Professor PARKINSON: I agree with that entirely. That is my view too. It is difficult. We have made a lot of changes and I do not want in any way to be understood to be changing the presumption of innocence. But may I outline a form of agenda of things that are modest, things that are possible. The first one is dealing with the issue of delays and adjournments. I am sure you have heard that this is one of the biggest problems in the system and one of the major reasons why I think parents are fearful of allowing the case to go forward towards prosecution or drop out when it does.

If we can deal with delays and adjournments we will at least make the system a lot more caring towards children. There could be nothing worse than being emotionally psyched up for the difficulties of cross-examination and then having the case not reached. When there are two cases in Penrith on one day and there is only one set of closed-circuit television facilities and both children need it, surely we could devise a better system? It is a resource issue. There is an issue about strategic adjournments that I have heard about over the years of defence lawyers seeking an adjournment for what might be ostensibly a good enough reason, but where the interests of the child in the matter not proceeding may not be given sufficient weight.

The second reform agenda that I have indicated concerns the rules of evidence. It seems to me that they are excessively technical and were devised for contexts which are very different from the circumstances of children giving evidence of abusive relationships. That may be the reason why so many cases go to appeal and so many retrials are ordered. The more complex the rules about admissibility the more likely it is that an appellate court would disagree with a trial judge's decision on admissibility If they do not disagree with that, they may criticise the summing up. Evidence might be admitted but how the jury is to place weight upon the background evidence, the evidence of offences which have not been charged, is critical.

The Hon. JOHN RYAN: You said that adjournments should be allowed only in exceptional circumstances. How could that be achieved? You commented on allowing the system, which facilitates separate trials for the same offender with multiple victims, to have one trial with all the victims able to give the evidence together. Would you like to elaborate on that?

Professor PARKINSON: I am not necessarily the best person to suggest how we reform the system, but there is a balancing between the rights of the defence and the rights of the child. We must always try to work towards a truth-promoting system. I suggest that the rules were devised to deal with different sorts of cases and different sorts of crimes. Children have given evidence in courts on a frequent basis only in the past 20 years, it is a new thing. A reference to the Law Reform Commission could be very useful on whether the rules regarding separate trials are appropriate for child sexual assault prosecutions in which the related matters are the best corroborative evidence of the child's account.

I do not think we have got the balance right. It would surprise me if we did, because we never devised the rules to deal with this context. I could make the same comment about adjournments. One tends to give every latitude to the defence, but if we can find a way of controlling strategic adjournments we must do so. Anecdotally, that is not an uncommon strategy. The more delay, the

more chopping and changing, the more likely it is that the case will drop out. I am afraid that I am elaborating more on the problem than the solution.

CHAIR: In your submission you say that during the period between March 1992 and December 1994, 20.6 per cent of all cases in which a trial date was set the matter was adjourned, not reached, or stood over by the court. You made the obvious point that children have been emotionally prepared for proceedings and when the matter is put off that causes great stress to them and, no doubt, to the parents. However, it will always be the case that judicial officers will have applications made to them on grounds that vary from the spurious to the legitimate. Adjournments will sometimes be granted.

Professor PARKINSON: Absolutely, but there are three categories here. There are cases in which the matter was adjourned, where it was not reached or where it was stood over. Court matters are overlisted because we try to use court time efficiently and I understand the reasons for that. But a great many problems arise. We must look at the consequences for vulnerable children and look at the dangers of offenders continuing to offend in society. In other words, we make a short-term gain by overlisting but we experienced a long-term cost. That long-term cost is borne particularly by some of the most vulnerable people in our society, that is children who are the victims of sexual assault.

I would want to hear what the Director of Public Prosecutions would say on the matter of adjournments. Obviously he and his staff are far more experienced than I in knowing to what extent adjournments are legitimate and whether we can adjust a rule in such a way that it takes account of the interests of the child. In deciding whether to grant an adjournment, courts should consider the welfare of the child, that might assist in some way.

The Hon. JANELLE SAFFIN: Adjournments are granted for reasons that have nothing to do with the interests of the child.

Professor PARKINSON: Yes, we should not take these things for granted. There is a real case of being specific in legislation, because if we are not specific the rule which wins out is the rule of latitude to the defence.

CHAIR: It seems to me that there is a crucial issue referred to in your submission. Page 10 states:

> The heart of the problem is that the law sees child sexual abuse as an event, and incident, and does not allow evidence of abusive relationships. The charges laid take specific events out from the overall narrative of the child's experience of abuse and isolate them as if they were discrete and separable events.

To what extent to you believe that might be overcome, at least partially, by the amendment in 1998 to section 66EA of the Crimes Act to create the offence of persistent sexual abuse of a child. I understand that relates to three or more separate incidents of abuse. Has that dealt with the problem to which you advert to any extent?

Professor PARKINSON: Absolutely not. It was a very helpful reform and a welcome one, but we need to be clear about the problem it was addressing. That was the problem which arose in *S v The Queen*, a High Court decision in 1989. The problem there was that a child allegedly had been abused over a number of years by a parent or parent figure. As sometimes happens she was rather vague about each incident of abuse. The events were charged within a certain period, from memory 14 to 16 years, and the dates were taken from her birthday. The one which was most readily proved was the first significant incident of intercourse, but that was before the date charged. In the event an acquittal resulted.

Section 66EA addresses that issue more than anything else and does so very helpfully. But one must still prove three events, with sufficient specificity, so that the jury is convinced. The jury must be convinced of all the same three events. If there is a history and the child says, "He came into my room virtually every Saturday night for 1½ years", the jury still has to be convinced of the same three events. Often victims give an account that psychologists call a script - what typically happened with those events - and that may not be sufficient information for the jury in regard to three specific events.

That reform is not the entire answer. I was addressing, in particular, those things which are not charged, for example background context. I give an example in a book that I have written about a little girl, who was the most compelling interviewee. She spoke of five incidents, only two of which could ever have related to criminal charges, and they were, but she was not allowed to testify about the essential context. That man is continuing that large today and that fills me with regret.

The Hon. JANELLE SAFFIN: To my understanding there is no reason why evidence of a pattern could not be admitted, that is within the discretion of the judge. The battered woman syndrome allows a similar pattern to be introduced to back up the defence. It is my view that the same pattern should be allowed in these cases, but it is not. The amendment to the Crimes Act dealt with nothing, it did not address that issue but some people thought that it would.

Professor PARKINSON: It addressed another important issue.

The Hon. JANELLE SAFFIN: That is correct, but some people tried to import it into this issue of a pattern.

CHAIR: The primary problem is allowing the child, through evidence, to place matters within their overall context rather than pinning them down to excessively specific detail.

Professor PARKINSON: Laws of evidence sometimes allow relationship evidence, what we used to call a guilty passion. I have talked about this to judges who are experienced in the criminal law and they have told me that often they can admit it. My point really is that those rules are excessively technical. In a situation where the evidence is not strongly probative of or would be very prejudicial, a discretion is exercised to exclude it. I give the example of the Pfennig test, which evolved from *Pfennig v The Crown*, in which the High Court said that the evidence must not be consistent with the innocence of the accused. That is a rather odd way of saying that it must be very strongly probative of a tendency to offend, there cannot be an innocent explanation very easily for this behaviour.

That puts it at quite a high level and I do not know what rules were applied in this particular case, it does not matter. One can see how asking a child whether she was wearing a bra wanting to stay in the room with her while she changed is not strongly probative of what happened in the middle of the night when he allegedly came into her bed. Sometimes context is allowed and sometimes relationship evidence can be brought in, but often it is not, When it is it can be a matter for appeal and controversy. We need to look at that.

CHAIR: Is there anything the Committee has overlooked arising out of your submission? Do you want to say anything more about the reform agenda set out on page 10 of your submission?

Professor PARKINSON: No, thank you. We have covered things very thoroughly. I reiterate my support for the Director of Public Prosecution's proposal, of which I was not aware, of course. It seems to me to be a very useful advance and well worth trying.

CHAIR: You referred to the proposed model court or pilot of a child-friendly jurisdiction.

Professor PARKINSON: I would want to emphasise that I think one can be more child friendly without reducing the legitimate rights of defendants. One is always open to the allegation, being involved in child protection work, that one only sees one side of the issue. As a professor of law, I try not to see just one side of the issue. I think my motivations, biases, are clear. It is important that we preserve the presumption of innocence. It is important that we preserve public confidence in that system and that innocent people will not be convicted. There is concern amongst professionals working with children about the possibility of erroneous allegations leading to the most serious consequences. Nothing we do should, in my view, erode the legitimate rights of the defence nor public perception of confidence in that system, but we can still be more child friendly. That is, I suppose, the burden of my submissions to the Committee and I am delighted that the Government has referred this matter to you.

CHAIR: There was one other substantial proposal that the Director of Public Prosecutions made in his submission to the Committee of an independent expert interviewer. You have had access to his submission, have you not.

Professor PARKINSON: Thank you.

CHAIR: What do you think about that proposal? It seemed to be worthwhile.

Professor PARKINSON: It seemed to me to be very sensible and I understood it to be about getting in the evidence in chief and was nothing to do with limiting the rights of defence counsel to cross-examine in any way they choose, within the limits of the law.

(The witness withdrew)

(The Committee adjourned at 12.52 p.m.)