

THE LAW REFORM COMMISSION
AN COIMISIUN UM ATHCHOIRIU AN DLI

CONSULTATION PAPER
ON
CHILD SEXUAL ABUSE

August 1989

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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First Published August 1989

THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4 January 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty Reports containing proposals for reform of the law. It has also published eleven Working Papers, one Consultation Paper and Annual Reports. Details will be found on p 230.

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INTRODUCTION

1. On the 6 March 1987, the then Attorney General, in pursuance of section 4(1)(c) of the *Law Reform Commission Act 1975*, requested the Commission to formulate proposals for the reform of the law in a number of areas. Among the topics was:

"Sexual offences generally, including in particular the law relating to rape and the sexual abuse of children".

In response to this request, the Commission submitted a Report on *Rape and Allied Offences* to the Attorney General on the 3 May 1988. This Consultation Paper embodies the results of the Commission's examination of the second aspect of the topic, i.e. the sexual abuse of children, and contains provisional recommendations for reforms in the law.

2. In the course of their lengthy examination of the topic, it became obvious to the Commission that the issues raised were by no means confined to the criminal law, but extended over a wide area of law, both civil and criminal. This Paper is, accordingly, divided into three sections, the first relating to the civil law generally, the second to the criminal law generally and the third to the other aspects of the law not dealt with in detail in the preceding parts. The section dealing with criminal law in turn is divided into two broad sections, the first dealing with substantive offences and the second with relevant aspects of the law of evidence. Although the Paper attempts to address most of the more important issues of law reform it cannot pretend to be comprehensive. For example, it has not been possible to address in detail the difficulties that arise where allegations of child sexual abuse are made in the course of custody disputes between parents. The Commission would, nevertheless, welcome views on this and on other areas of possible reform which may have been omitted.

Attempts to reform the law in other jurisdictions, particularly in relation to criminal offences and the law of evidence, are examined in detail. The Commission has sought to bring forward the widest possible range of options for discussion in the more complex and sensitive areas.

The Paper does not embody the Commission's final proposals to the Attorney General for reform in the existing law. The object of the Paper is, rather, to stimulate reaction among interested sections of the public to the Commission's initial and tentative conclusions. When these reactions have been carefully assessed by the Commission, they will be in a position to present their final report and proposals to the Attorney General. In order that the Commission's final report may be available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission not later than 22 October 1989.

Extent of the Problem

3. In the past decade, sexual abuse of children has emerged as a major social problem. In the U.S., Canada, the U.K, Ireland and other countries, there has been an unprecedented rise in official reports of child sexual abuse. Official reports, however, are generally regarded as a significant underestimate of the actual problem.

Of the cases that are detected or reported, only a minority result in the laying of charges by the police. And of those cases, a smaller fraction still end in the conviction of the offender. The majority of current cases that are detected and reported are dealt with by the child health services and other community agencies. In recent years in Ireland there has been a steady and often dramatic increase in the number of cases reported to health boards. The number of confirmed cases rose from 33 in 1984 to 456 in 1987. Legal action is taken only in a minority of cases and most frequently involves civil proceedings.

There is a firm and broad consensus that the number of officially reported cases of child sexual abuse does not accurately reflect its true level of occurrence. There is little agreement, however, on estimates as to what that level is, i.e. what the ratio is between unreported and reported child sexual abuse. A more detailed discussion of the extent of the problem internationally is contained in Appendix I. Such inadequate data as exist on the incidence of child sexual abuse and reporting in Ireland are reviewed in chapter 3 of *Report of the Child Sexual Abuse Working Party*, published by the Irish Council for Civil Liberties earlier this year. Until more reliable and comprehensive information is available, the true extent of child sexual abuse in Ireland will remain a matter of speculation. Some indication of the scale of the problem was provided by a pilot survey on "*Child Sexual Abuse in Dublin*" conducted by the Market Research Bureau of Ireland in March 1987 for Radio Telefis Eireann and the Sanctuary Trust. Six per cent of a sample of 500 Dublin adults between the ages and 18 and 44 admitted to having been sexually abused as children.

The Approach of the Law Reform Commission

4. The Commission has proceeded on the basis that no single source should be exclusively relied upon from which to derive general findings about the nature of child sexual abuse and the precise requirements of law reform. The issue of child sexual abuse transcends institutional and professional boundaries. It is essential that it be approached from a balanced interdisciplinary perspective. Failure to adopt such an approach is likely to result in distortion, and may lead to proposals to reform the law that are superficial.

The Commission recognises that a solid foundation of fact is a prerequisite to the reform of the law in relation to child sexual abuse. We have tried, within the financial and practical means at our disposal, to obtain as much basic and applied data on child sexual abuse as possible. As well as collecting relevant research information, the Commission has sought opinions and endeavoured to gain some practical experience on such matters as the credibility of children as witnesses, and children's reactions to court involvement.

We have attempted to identify the practical problems experienced by victims and their families, as well as by health and social workers, the Gardai, the DPP and the courts. To this end, we have allied our research into substantive and comparative law reform with consultations with practitioners in the areas of health, child care and law enforcement, as well as with the families of some victims of child sexual abuse. We have also requested and received a number of letters from individuals directly affected by child sexual abuse, and briefs from professional associations and other interested groups.

*The Role of the Law - Children as a Special Class**

5. The law has traditionally treated children as a special class which competed with other social interests for legal protection, e.g. the autonomy of the family and the integrity of the trial process. The way in which these different interests have been balanced has meant that children are not always optimally protected against child sexual abuse.

The special legal status of children is based primarily on three considerations: the special needs of children who because of their age and immaturity are dependent on adults to grow and develop; the vulnerability of children to older and more powerful adults; the actual or presumed inability of children to perform certain legal acts.

These considerations have found legal expression in both the removal from the child of legal powers otherwise enjoyed by adults or conversely the imposition of special duties or responsibilities towards the child on members

* The ideas expressed in this section are more fully explored in *Sexual Offences Against Children: Report of the Committee on Sexual Offences against Children and Youths*, Canadian Publishing Centre, 1986, which will be referred to as the *Badgley Report*.

of society generally. This special legal status of children is intended to promote the welfare and protection of children in two complementary ways. The legal incapacities and disabilities which the child possesses are imposed primarily for his or her own protection, while the various legal duties and responsibilities imposed on others towards the child put the protection of the child on a legal basis and thereby strengthen them. Examples can be found regarding the special legal status of children in relation to education, employment and mental care. With regard to child sexual abuse, the special legal status of children raises a number of very complex and difficult issues. Two in particular stand out:

- (1) The appropriate balance that the criminal law should strike between protecting children from sexual abuse on the one hand and on the other hand allowing young people to express their sexuality on an equal and genuinely consensual basis.
- (2) The legal principles that apply to children's evidence, i.e. the balance that needs to be struck between upholding the integrity of the trial process and making it easier or even possible for children to give evidence.

The Role of the Criminal Law

6. The criminal law has a number of important functions to perform in the context of child sexual abuse. The various criminal offences which prohibit child sexual abuse express society's judgment about what is and what is not tolerable behaviour towards children. The attachment of often serious penalties to different forms of abuse is intended to deter such conduct, to strengthen the taboos surrounding them and to reflect the gravity with which such conduct is viewed by society. If the criminal law does not operate effectively in this area, then not only is its deterrent and educational role diminished, but the genuineness of society's commitment to combat child abuse is thrown into question, affording a source of comfort to those who abuse children and causing a sense of betrayal in the victims of abuse.

There is another particular reason why it is important that abusers should know that society will hold them responsible for their actions. One of the most damaging effects of child sexual abuse is the sense of guilt which may be felt as a result by the abused child, and one of the most important and yet elusive objectives of intervention is to persuade the abuser to accept responsibility and thus help restore the victim's sense of worth. The invocation of the criminal process and criminal sanctions may often play a vital role in achieving this objective.

Prosecution Rates

7. For these reasons it is particularly worrying that, in our discussions and researches, we have encountered a widespread view that the criminal law is

not working effectively, that too few cases are being brought forward for prosecution and, that in the case of intrafamily abuse against very young children, criminal prosecution is usually pointless. The statistics tend to confirm these beliefs. While the number of cases of child sexual abuse coming to the attention of health boards has increased dramatically over recent years, the number of cases being referred to the Director of Public Prosecutions and the number going forward for trial have remained relatively low.

Part of the Commission's task has been to identify factors which have contributed to the apparently low rate of prosecution. Where the causes are legal, we have tried to suggest appropriate reforms. But attitudes also play an important part. It is fair to say that we have encountered a good deal of scepticism, not only about the efficacy of the criminal justice process, but also about its appropriateness in responding to child sexual abuse.

Health and child care professionals often perceive a conflict between the requirements of therapy and the demands of the criminal justice process. Where young, vulnerable children are involved, it is natural that the caring professions should wish to place the interests of the individual child before the public interest in securing the conviction of child abusers. This conflict is sometimes based on a belief, which may not always be well-founded, that a young child may suffer further damage or re-victimisation within the criminal justice process. There is also a widespread belief that the criminal justice system is so slow and leans so heavily in favour of the accused that the chances of conviction are slight. In addition, those charged with the responsibility of caring for children fear the loss of control which comes with the institution of criminal proceedings, which appear to take on a life of their own. We have found that these attitudes are sometimes shared by the parents of abused children. They may decide, despite a strong wish that the abuser should be brought to justice, that it is more important to protect their children from the stress and anxiety which they associate with the criminal justice process.

The perception of the criminal justice process on which these attitudes are based is unfortunate, but cannot be ignored if we wish to make the system more effective. Many of the reforms which we will be proposing are designed to reduce the stress to the child within the criminal justice process and to increase confidence that the criminal justice process can work with reasonable speed and sensitivity.

The prosecution rate is also affected by the attitudes of officials within the criminal justice process itself. There appears to be some scepticism among the Gardai and within the office of the Director of Public Prosecutions about the prospect of a successful prosecution where the principal evidence is the uncorroborated story of a young child. Again, if the criminal justice process is to work effectively, this scepticism must be addressed. Where it is founded on myth, those myths need to be dispelled; and where it is founded on a

realistic assessment of the limitations of the present law, those limitations need to be examined. We have tried to do the latter by re-assessing the rules relating in particular to the competence of young children to give evidence, and to the various ways in which the young child's story may be presented to a court and the rules relating to corroboration.

The Rights of the Accused

8. While it is right to try to reform the criminal justice system in a manner which will reduce distress for the child complainant and facilitate the presentation of the child's story, the right of the accused to a fair trial must be respected, and in particular his or her basic right to confront and challenge the evidence against him or her. It must also be remembered that the benefit of any doubt will be given to the accused. This is a principle which we were at pains to point out in our Consultation Paper on Rape, and it is worth quoting a passage from the introduction to that Paper which is equally applicable to child sexual abuse:

"We have a system of criminal justice which operates on the basis that, where some doubt remains as to a particular allegation, the doubt should be resolved in favour of the accused. This is expressed in the principle that the accused is presumed innocent until proved guilty and in the heavy onus that is placed on the prosecution to prove its case beyond reasonable doubt. The operation of this principle means that, in cases of doubt, guilty persons may sometimes be acquitted. From the point of view of the victim and society this is a serious loss. On the other hand, if doubts were always resolved in favour of the complainant, innocent persons would inevitably sometimes be convicted. This would represent a loss of a different kind. Society has to make a choice about the balance it wants to draw, in doubtful cases, between ensuring the conviction of rapists and avoiding the conviction of the innocent. At present the criminal justice system operates on principles which assume that the need to avoid convicting an innocent person is, in a free society, important enough to justify the risk of allowing the occasional rapist to go free. This is a heavy price to pay for freedom, but it is generally felt that the price is worth paying."

One consequence of this emphasis within the criminal justice system is that the criminal law can never offer total protection or complete satisfaction to the victims of child sexual abuse. The criminal process cannot guarantee that all child abusers will be brought to justice. We have stated why we think it important to improve the efficiency and sensitivity of the criminal process, but we must also recognise that some of its limitations are unavoidable so long as society wishes to preserve the existing balance within criminal process. It is therefore to the civil law that we must turn to provide the primary means of protecting children at risk.

The Role of the Civil Law

9. The civil law defines the circumstances in which the State may step in, if necessary against the wishes of the parents, to protect children at risk. The forms which State intervention may take vary considerably from country to country. They range from emergency care orders, abruptly separating a child from his or her parents, to a supervision order enabling a social worker to review the progress of a child in his or her own home. It is generally accepted that society has a duty to protect children who are at risk from sexual abuse. The State's duty is secondary to that of the child's parents, who under the Constitution are the primary educators of the child. The State, through its child care services, may intervene only where parents have failed in their duty to a child or where there is a compelling reason to do so based on the child's welfare. Unfortunately a great deal of child sexual abuse originates within the family, and the source of risk to the child is often the very person in whom the primary Constitutional rights are vested.

In approaching the reform of the civil law, we have tried to steer a path between two extremes. If the law is excessively cautious in its approach to child protection, many children may be left to suffer avoidable abuse. On the other hand, if the law allows State intervention too readily, the impact on family life can be shattering. There is no easy answer as to how this balance should be maintained. The Cleveland episode provided startling examples of the way in which the lives of families may be thrown into turmoil by an over-zealous approach to child protection. At the same time many cases may be cited where long-term damage to children might have been avoided if society had been more alert to the problems of child sexual abuse.

General Principles Underlying the Civil Law

10. The following general principles have informed our approach to the reform of the civil law.

- (1) Law and procedures surrounding the reporting of child sexual abuse should be framed in a way which facilitates and encourages the reporting of genuine cases while minimising the risk of over-reporting. The principal requirements are for clarity in the definition of what must be reported, simplicity and speed in the reporting process and legal immunity for *bona fide* reporting.
- (2) Laws and procedures regulating health boards in the investigation and management of child sexual abuse should, while maintaining flexibility, ensure a measure of accountability.
- (3) The grounds for compulsory intervention need to be clearly stated, so that parents and others have fair warning of the types of conduct in relation to children which the State regards as unacceptable.

- (4) The definition of child sexual abuse should not be over-broad. There is general agreement about a core of sexual acts in relation to children which should be prohibited, but on the borderline there exist honest differences of opinion about what is appropriate conduct. The law should only concern itself with those forms of abuse which are generally recognised as unacceptable.
- (5) Where intervention occurs, it should be the minimum necessary to secure the safety and welfare of the child. To achieve this, a court in child care proceedings should have a range of orders available to it, not all of which will involve the separation of a child from his or her parents.
- (6) Where the separation of a child from a parent is necessary for the child's protection, the option of removing the parent rather than the child from the household should be available.
- (7) Summary action to remove a child from a parent, or *vice versa*, should only be taken in situations of genuine emergency, and the parents should be afforded the right to challenge the action at the earliest possible opportunity.
- (8) Health boards and courts should, before making arrangements for the protection of a child, take account of the child's wishes.
- (9) All persons, medical, legal or social workers, charged with the responsibility of making decisions in respect of sexually abused children, or of representing such children, should have received appropriate training.

Procedural and Administration Problems

11. As a result of consultations with various bodies, it became clear to the Commission that a weakness in the existing administrative framework is that in practice there is a lack of clarity about appropriate procedures for determining whether compulsory intervention is necessary, and if so whether it should involve the civil or criminal law, or both. Often the helping services that are available are working in relative isolation. The manner in which the Department of Health Guidelines are implemented varies greatly in different catchment areas. There can be tension and rivalry between different services regarding the provision of services to sexually abused children. There are insufficient resources and facilities available to these services and, while there is often commitment in principle to inter-disciplinary working methods, in practice there is often uncertainty about roles and work practices.

There are also many discretionary decisions regarding the management of child sexual abuse. These critical decisions include whether the incident is reported to the police or not; whether some acts are considered minor or

serious; whether a full, partial or any assessment is made of the child's complaint, needs, situation etc.; whether care and assessment are provided exclusively by one agency or whether other services are contacted and consulted. As has already been observed, there are also doubts within the child care and health services about whether the criminal law should be invoked at all in the management of child sexual abuse.

The making of discretionary decisions is an inherent and essential feature of all professional work. However, in the absence of clearly articulated standards which are monitored, there is a risk that decisions can be made without full understanding of the child's vulnerabilities and needs.

The Place of Law Reform

12. The criminal and civil law relating to child sexual abuse can provide part of the framework within which the problem can be tackled. However, it is right to point out that more than law reform measures as such are required. We also need:

- (a) A general recognition of the rights of children to be protected from abuse, sexual or otherwise;
- (b) An educational system that informs parents and children as to the risks and the means by which they may protect themselves;
- (c) The provision of services of high quality for victims;
- (d) The provision of adequate and appropriate treatment for offenders and other family members;
- (e) The provision of proper training for all persons professionally involved in cases of child sexual abuse, i.e. in the health and child care professions, in the Gardai, in the legal professions and in the judiciary.

There is also a need for a more general understanding at a societal and individual level of what constitutes child sexual abuse and the circumstances which surround such abuse. Thus, the Commission in the course of its investigation of the problem has attempted to review and assemble information on such basic questions as:

- (a) Who are the victims of child sexual abuse?
- (b) What kind of people are offenders?
- (c) What roles do mothers of victims play?
- (d) To whom do victims turn for help?

- (e) What are the psychological consequences of child sexual abuse on victims?
- (f) What are the different therapeutic interventions used in the management of child sexual abuse?

This material does not always relate directly to the concrete issues of reform of the law which it is the Commission's task to address. However, it forms important background material against which the relevance and possible efficacy of reform options can be assessed by the various disciplines in the field. It is accordingly reproduced in detail in Appendix I.

Part I: The Civil Law

CHAPTER 1: THE PRESENT POSITION***Reporting and Investigation of Suspected Abuse***

1.01 No statute lays down in express terms a duty on any person, private or official, to report child sexual abuse or suspected child sexual abuse. This applies to health care and child care workers, as it does to teachers, friends and neighbours. The criminal law does still contain a little known and seldom used offence called Misprision of Felony, which punishes failure to report the actual commission of certain serious offences (or felonies) such as rape and buggery.¹ However, misprision does not extend to many of the offences relevant in the context of child sexual abuse (i.e. incest, indecent assault, unlawful carnal knowledge of a girl between fifteen and seventeen years of age). It possibly does not extend to felonies disclosed professionally to a lawyer, doctor or clergyman. In *Sykes v DPP*² Lord Denning conceded that certain relationships, including those of doctor and patient and clergyman and parishioner, might give rise to a claim in good faith that it would not be in the public interest to disclose the felony.³ This concession has been criticised.⁴ The crime of misprision does not extend to a mere suspicion that a felony has been committed.

1.02 The Department of Health has issued Guidelines,⁵ which were updated in 1987, outlining the procedures which should be observed in reporting and investigating abuse or suspected abuse. These guidelines are not legally binding. They make it clear that the person with overall responsibility for monitoring and co-ordinating the management of child abuse cases is the Director of Community Care and Medical Officer of Health or a person delegated by him.⁶ He or she therefore is the person to whom reports of suspected abuse should be made. It is worth quoting the relevant sections from the Guidelines which relate to suspected sexual abuse.

"6.2.1.

At any stage in the investigation where there are reasonable grounds for suspecting child sexual abuse the DCC/MOH should report the matter to the Gardai. Where a suspected offence first comes to the notice of hospital/clinic personnel or a General Practitioner they should contact the DCC/MOH and, if the circumstances so warrant, they may initiate contact with the Gardai.

6.2.2.

When the suspicion of a person other than health board personnel, G.P. or hospital/clinic personnel is aroused e.g. teachers, day-care staff, residential care staff, he should notify the DCC/MOH immediately after consultation with his superiors. The DCC/MOH should then arrange with the appropriate member of his community care team to investigate further.

6.2.3.

Cases of child sexual abuse which come directly to the attention of the Gardai should be reported to the DCC/MOH in that area."

Some other aspects of the Guidelines are worth noting. Emphasis is placed on the need for multi-disciplinary teams in the validation of alleged sexual abuse.⁷ The welfare of the child is seen as the primary concern of all professional staff involved in investigating a case of alleged sexual abuse, though the criminal nature of child sexual abuse is recognised and, together with it, the need to ensure that steps are taken to deter the abuser.⁸ The guidelines also lay down the procedures to be adopted by the various professionals who may become involved in abuse cases, such as community care social workers, public health nurses, general practitioners, hospitals and child psychiatrists. Standardised procedures for the holding of case conferences, which are seen as an essential feature of inter-agency co-operation, are suggested. The person responsible for deciding whether a case conference should be held is the DCC/MOH.

1.03 Although there is no express statutory obligation on any person to report or investigate child sexual abuse, there remains the question of possible civil liability. General principles of liability in tort for negligence and for breach of statutory duty involve the imposition of liability in damages on certain persons in some cases for failure to make such report or investigation. In the absence of decided cases it is difficult to state the exact parameters of this liability, but there is no doubt that in some situations it will be imposed.

The negligent failure by a medical practitioner to diagnose child sexual abuse would give rise to liability for the reasonably foreseeable consequences of such failure.⁹ The question as to when such failure is negligent is largely a matter to be determined by reference to conventional practice within the medical profession, subject to the entitlement of the court to characterise as negligence a universal or customary practice obviously lacking in due care.¹⁰

However, a heavy onus would lie on a plaintiff who was in effect alleging not merely that the defendant was negligent, but that many others who had followed the same practice were also negligent.¹¹

The failure by a doctor to *report*, as opposed to *diagnose*, child sexual abuse remains as yet uncharted waters, insofar as civil liability is concerned. The position historically in relation to the law of negligence has been that there is no general duty to take active steps to protect others from harm that might befall them,¹² but that specific relationships give rise to such an affirmative duty.¹³ It seems reasonable to assume that the list of these relationships, like the categories of negligence in general, is not closed. It may well be that an Irish court would hold that the discovery by a doctor that his or her young patient had been sexually abused would impose on the doctor an affirmative duty to take some appropriate steps to protect the patient from further abuse. Case law in other jurisdictions, especially the United States,¹⁴ would suggest that the discharge of such duty would not necessarily consist of reporting the offence; other solutions might be appropriate depending on the individual circumstances.

1.04 The position as regards the Gardai, the health boards and the Department of Health is also unclear. The general trend of the law of negligence would appear to be towards imposing a duty of care arising from the discharge of statutory functions,¹⁵ though the policy considerations which ought to guide the courts in fixing the limits of the duty of care have not been fully explored. Most recently, in *Ward v McMaster et al*,¹⁶ the Supreme Court held that there was a proximity between the defendant County Council and the first plaintiff which "had its origin in"¹⁷ the *Housing Act 1966*, whereby in administering a scheme for house loans the Council owed the first plaintiff, as intending purchaser, a duty of care. McCarthy J noted that the Act:

"imposed a statutory duty upon the County Council and it was in the carrying out of that statutory duty that the alleged negligence took place. It is a simple application of the principle in *Donoghue*, confirmed in *Anns*, and implicit in *Siney*, that the relationship between the first plaintiff and the County Council created a duty to take reasonable care arising from the public duty of the County Council under the Statute. The Statute did not create a private duty but such arose from the relationship between the parties."¹⁸

It is possible that the Irish courts would hold that the provision of community care as a statutory function must give rise to an implicit duty of care towards sexually abused children, at all events those coming to the attention of the authorities. It should also be noted that s.3 of the Child Care Bill 1988 makes it an express function of every health board "to promote the welfare of children in its area who are not receiving adequate care and protection," and in doing so "to take such steps as it considers requisite to identify children who are not receiving adequate care and protection". The matter, however, is not a simple one. The duty of a health board is not simply

towards children who are believed to have been sexually abused; it extends to others, including parents of children who have not in fact been abused but who manifest symptoms of abuse. Throughout common law jurisdictions, courts have recognised the multiplicity and potentially conflicting range of duties as being a reason for being slow to impose a single duty of care towards one of the parties.¹⁹ It would, however, be unfortunate if the courts were always to step back from imposing any duty of care on this basis; there is no reason why they should not impose a circumscribed duty that is sensitive to the competing interests involved.

1.05 As well as an action for negligence arising out of a statutory function, the action for breach of statutory duty simpliciter could also be invoked in this context.²⁰ Before imposing liability for such a breach on the professed basis of gleaning the intention of the Oireachtas to confer a civil remedy,²¹ the court must be satisfied that

- (i) the legislation was designed to protect a specific group of persons rather than the public at large,
- (ii) the plaintiff is a member of that group, and
- (iii) the injury of which he or she complains was of a type that the legislation was designed to prevent.

Other possible avenues for the imposition of liability include damages for interference with the constitutional entitlements of an abused child²² as well perhaps as his or her family members.

Protection in an Emergency

1.06 The *Children Act 1908*²³ still contains the major provisions for protecting a child who is at risk, whether on an emergency or a long-term basis. These provisions of the 1908 Act are currently undergoing substantial reform in the Child Care Bill 1988. At present, it is ss 20 and 24 of the 1908 Act which set out emergency procedures for providing immediate protection for children (up to fifteen) or young persons (over fifteen and under seventeen) at risk. Section 24 is most often used. It provides for the issuing of a warrant by a District Justice which may authorise a member of the Gardai to search for the relevant child or young person, to enter specified premises (by force if necessary) for that purpose, and to remove the child or young person to a place of safety. The child or young person must then be brought before the District Court, and the Justice may then make a further order committing the child to the care of a fit person. Although any person may commence place of safety proceedings, in practice the applicant is usually a health board, and it is the health board which is generally named as the fit person. The order can only be made if it appears to the District Justice, on the basis of an information sworn usually by a social worker, that there is reasonable cause to suspect that the child or young person "has been or is being assaulted, ill-treated or neglected in a manner likely to cause [him] unnecessary suffering, or to be injurious to his health", or that one of a list of offences²⁴ has been

committed in respect of him or her. A place of safety is any Garda station, hospital, doctor's surgery or other place willing to receive the child or young person.

The s 24 procedure may be operated swiftly and on an *ex parte* basis. In other words it is not necessary to give the parents or guardian notice of the application. For this reason, although it may be used in cases of suspected child sexual abuse, it tends to be used only in exceptional circumstances of risk to the child or young person.

Section 20 of the 1908 Act offers an even swifter protective device for cases where there is reason to believe that a specified offence has been committed. It authorises a member of the Gardai in such case, without first obtaining a warrant from a District Justice, on his own initiative to remove a child to a place of safety pending criminal proceedings against the alleged offender. Section 20 is seldom used. Section 24 is preferred in most cases of emergency intervention where there may be insufficient evidence of the commission of an offence.

1.07 The 1988 Child Care Bill²⁵ proposes to reform emergency care procedures in a number of respects. The circumstances in which a member of the Gardai may, on his own initiative, remove a child (under eighteen) to a place of safety are extended to cases where he or she has reasonable grounds for believing that "(a) a child has been or is being assaulted, ill-treated, neglected or sexually abused, and (b) there is an immediate and serious risk to the health or wellbeing of the child"²⁶ A criminal prosecution need not therefore be in contemplation. However, the child or young person may only be kept in the place of safety pending an application to the District Court for an emergency care order which must be sought within, at most, twenty-four hours of the removal of the child.²⁷

An emergency care order may be applied for by a health board, or, by information on oath, any person. It may be granted where the District Justice is satisfied that there is reasonable cause to believe "that there is an immediate and serious risk to the health or wellbeing of a child which necessitates his detention in a place of safety"²⁸ The order will authorise a health board to cause the child to be kept in a place of safety for a maximum period of eight days.²⁹ In issuing the order the Justice may also issue a warrant authorising a member of the Garda Síochána to enter premises by force if necessary.³⁰ The application for the emergency care order may be made *ex parte*.³¹ It is not essential to name the child in the proceedings.³² Where a child is subject to an emergency care order, the health board is obliged as soon as possible to inform a parent or a person in *loco parentis*, but the District Justice may direct that the location of the place of safety not be made known to the parent or guardian if he is satisfied that the safety and wellbeing of the child requires it.³³

1.08 Another order which can at present be applied for *ex parte* in an emergency situation is a protection order under the *Family Law (Protection of Spouses and Children) Act 1981*. A protection order may be applied for only by one spouse in respect of another, and it requires the respondent spouse not to use or threaten to use violence against, molest or put in fear the applicant spouse or any dependant child of the family. The protection order is an interim order pending the determination of an application for a barring order and it is available on the same basis as a barring order, i.e. where there are reasonable grounds for believing that the safety or welfare of the applicant spouse or of any dependent child of the family so requires.³⁴ It may therefore be sought in a case of alleged sexual abuse by a parent against his or her child. Its advantage is that it is available quickly but it does not separate the child from the alleged abuser, nor is it available at the instance of a third party, such as a social worker.

1.09 The jurisdiction of the High Court and the Circuit Court to grant injunctions may also be invoked in cases of alleged sexual abuse. The injunction may require the alleged abuser not to molest the child or it may effect the removal of the alleged abuser, where for example further assaults are threatened. It may be applied for *ex parte* or on an interlocutory basis. The expense of applying for an injunction, and the problems associated with its enforcement, lessen the usefulness of the remedy, but it may provide a swift solution in certain extreme cases. Its use is not confined to spouses. It may therefore be appropriate where the removal is being sought of a person other than the parent of the abused child, for example an uncle or a sibling.

Care Proceedings

1.10 Care proceedings are at present governed by section 58 of the *Children Act 1908*. Under that section any person may apply to the District Court for an order committing a child (under fifteen) who is in need of care and protection to an industrial school or to the care of a fit person. The grounds upon which an order may be made are set out in detail in section 58. The ground most frequently used by health boards is that the child "is found having a parent or guardian who does not exercise proper guardianship".³⁵ In relation to sexual abuse cases, it is relevant to note that a daughter may be the subject of an order under the Act where her father has been convicted of an offence under section 4 or 5 of the *Criminal Law Amendment Acts 1885 to 1935* in respect of any of his daughters.³⁶ So too may a child who is under the care of a parent or guardian who has been convicted of an offence under Part II of the 1908 Act or an offence mentioned in the First Schedule to the Act in relation to any of his children.³⁷ Section 58(1) requires that the child be brought before the court.

Most proceedings under section 58 are initiated by health boards, and it is the health board that will usually be named as the fit person. The order may commit the child into care after the age of sixteen. The effect of a fit person

order is to vest in the fit person "like control [over the child] as if he were his parent".³⁸

Care Proceedings Under the Child Care Bill 1988

1.11 Part IV of the Bill deals with care proceedings. Sections 15 and 16 are the core provisions. Section 15(1) provides that the court may make a care order where, on the application of a health board with respect to a child who resides or is found in its area, the court is satisfied that:

- (a) the child has been or is being assaulted, ill-treated, seriously neglected or sexually abused, or
- (b) the child's health, development or wellbeing has been or is being avoidably impaired or seriously neglected, or
- (c) there are reasonable grounds for believing that the child's health, development or wellbeing is likely to be avoidably impaired or seriously neglected,

and that the child requires care or protection which he or she is unlikely to receive unless the court makes an order under the section.³⁹

In the exercise of its jurisdiction under section 15, the court is to have regard to "the rights and duties of parents, whether under the Constitution or otherwise, and the natural and imprescriptible rights of the child".⁴⁰

A care order commits the child to the care of the health board for so long as he or she remains a child, i.e. under eighteen or for such shorter period as the court may determine.⁴¹ For the duration of the order, the health board has "the like control over the child as if it were his parent".⁴²

Nevertheless the health board, for a fixed period or until it otherwise determines, may allow a child committed to its care under a care order to be under the charge and control of a parent or other suitable person.⁴³

1.12 Section 16 deals with supervision orders. Where on the application of a health board, with respect to a child residing in its area, the court is satisfied that one of three conditions identical to those specified in section 15(1) exist - including that the child has been or is being sexually assaulted - and that it is desirable that the child be visited periodically by or on behalf of the health board, the court may make a supervision order.⁴⁴ A supervision order directs the health board to have the child visited on such periodical occasions, weekly or otherwise, as the court may determine, in order to satisfy the board as to the welfare of the child and to give to his or her parents or to a person acting *in loco parentis* any necessary advice as to the care of the child.⁴⁵

As a general principle, a supervision order is to remain in force for not more than twelve months; it may, however, be extended or discharged before then.⁴⁶

Where a care order is in force, the court may at any time, on the application of the health board, give such directions as it sees fit as to the care of the child, which may require the parents or a person acting in *loco parentis* to cause him or her to attend for treatment or attention at a hospital clinic or other place specified by the court.⁴⁷ Failure to comply with the terms of a supervision order or any directions given by the court as to the care of the child constitutes an offence.⁴⁸

Where a child is in its care, a health board is to provide accommodation and maintenance for him in any one of the following ways as it thinks fit:

- (a) by placing him in foster care;
- (b) by placing him in an approved children's residential centre;
- (c) by placing him in a residential centre operated by the board or any other health board; or
- (d) by making such other suitable arrangements as may be approved generally or for the purpose of a particular case by the Minister.⁴⁹

It is not necessary in proceedings under Part IV (for a care order, supervision order or otherwise) for the child to whom the proceedings relate to be brought before the court or to be present for all or any part of the hearing unless the court, either of its own motion or at the request of any of the parties to the case, is satisfied that this is necessary for the proper disposal of the case.⁵⁰ Where, however, the child requests to be present during the hearing or a particular part of the hearing of the proceedings, the court is to grant the request unless it appears to the court that, having regard to the age of the child or the nature of the proceedings, it would not be in the child's interests to accede to the request.⁵¹

Barring Orders

1.13 A barring order, which is provided for by the *Family Law (Protection of Spouses and Children) Act 1981*, requires a spouse either to vacate or refrain from entering the place where the applicant spouse or a relevant child resides. Only a spouse may apply for such an order, and it is only against a spouse that such an order may be made. The order may be granted if the court is of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant spouse or any child so requires. The District Court has jurisdiction to make an order for up to twelve months, which may be renewed on application. The Circuit Court may make an order for an unlimited time.⁵²

The barring order may in addition, at the court's discretion, prohibit the responding spouse from using or threatening to use violence against, molesting or putting in fear the applicant spouse or any child, and may be made subject to such exceptions and conditions as the court may specify.⁵³

A barring order is not available on an *ex parte* basis. The respondent must be given notice of the proceedings. In practice it may be three or four weeks before a full hearing takes place. As we have seen, a protection order is available *ex parte* as an interim remedy, on the same basis as a barring order; it requires the respondent not to "use or threaten to use violence against, molest or put in fear the applicant spouse or the child".⁵⁴

When a barring or protection order is made, a copy of it is sent, not only to the respondent spouse but also to the Garda Síochána station for the area in which the residence in question is situated.⁵⁵ Breach of a barring or protection order is a criminal offence, and a Garda is entitled to arrest without warrant a person who he has reasonable cause to believe is committing or has committed a breach.⁵⁶

It is clear that barring and protection orders may be granted to protect a child in cases of physical or sexual abuse. Barring orders are most commonly granted in cases of actual physical abuse. However, they are also available to protect "welfare", and the concept of "welfare" covers "cases of neglect or fear or nervous injury" brought about by the respondent spouse.⁵⁷ In the case of the child the concept of welfare includes "moral welfare".⁵⁸ Thus sexual abuse which falls short of an assault would provide grounds for a barring order insofar as it constitutes a threat to the child's welfare. In *O'B v O'B*⁵⁹ O'Higgins CJ accepted the practice of giving the concept of welfare a very wide ambit, but at the same time he emphasised the need to establish that the respondent spouse has been guilty of serious misconduct.

"The making of a barring order requires serious misconduct on the part of the offending spouse - something wilful and avoidable which causes, or is likely to cause, hurt or harm, not as a single occurrence but as something which is continuing or repetitive in its nature."⁶⁰

A "child", for the purpose of granting barring or protection orders, means a child (including an adopted child) of the applicant or respondent spouse, or both, and a child in relation to whom either spouse or both spouses are in *loco parentis*. The age limit is eighteen, although an order may be obtained to protect a person over eighteen who is suffering from mental or physical disability.⁶¹

1.14 The *Family Law (Protection of Spouses and Children) (Amendment) Bill 1987* proposed in section 3 to give the court power to make a protection order as an alternative to, and separate from a barring order. The Bill has not become law and appears unlikely to do so. During its Committee Stage in the Senate, Senator Brendan Ryan moved amendments, drafted by Senator

Mary Robinson, which would have extended the terms of the Bill to enable health boards (or other designated bodies) to apply for barring orders or protection orders. The idea here was to provide supplementary machinery for excluding a parent (or other resident of the home) especially in cases of child sexual abuse. The amendments were withdrawn on the assurance of the Minister for Justice that these matters could more appropriately be considered in the context of the forthcoming child care legislation.⁶²

FOOTNOTES TO CHAPTER 1

- 1 Misprision of felony is itself a misdemeanour.
 2 [1961] 3 All ER 33.
 3 *Id.*, at p42.
 4 Kenny's *Outlines of Criminal Law*, para 422 (19th ed, 1966).
 5 Department of Health, *Child Abuse Guidelines* (Guidelines on Procedure for the
 Identification, Investigation and Management of Child Abuse), Revised Edition - July,
 1987 (henceforth referred to as *Guidelines*).
 6 *Guidelines*, para 2.1.
 7 Para 6.2.4.
 8 Paras 6.2.6 & 7.
 9 As to the general principles of liability for medical negligence, see B McMahon & W
 Binchy, *Irish Law of Torts*, ch 3 (1981), A Dugdale & K M Stanton, *Professional
 Negligence*, paras 204-206 (1982), R Jackson & J Powell, *Professional Negligence*, ch 6
 (1982), C W Quimby, *Law For the Medical Practitioner*, ch 3 (1979), M Whincup, *Legal
 Aspects of Medical and Nursing Services*, ch 3 (3rd ed, 1982), J K Mason & R A McCall
 Smith, *Law & Medical Ethics*, ch 10 (1983).
 10 *O'Donovan v Cork County Council*, [1967] IR 173; *Roche v Peilow*, [1986] ILRM 189,
Dunne, an Infant v Holles Street, Sup Ct, 14 April, 1989.
 11 See *Bradley v CIE*, [1976] IR 217, which also suggests (in the context of employer's
 liability) that other factors may have to be taken into account in such cases.
 12 Cf. Binchy, *The Good Samaritan at the Crossroads: A Canadian Signpost*, 25 N Ir LQ 147
 (1974).
 13 Cf, e.g., *Murphy v O'Brien*, 6 Ir L Times (ns) 75 (Circuit Ct, Judge Sheridan, 1987).
 14 Cf *Tarasoff v Regents of the University of California*, 17 Cal 3d 425, 551 P 2d 334, 131 Cal
 Rptr 14 (1976), where the Supreme Court of California imposed on a psychotherapist a
 duty to take reasonable care to protect the intended victim of a patient who had disclosed
 murderous tendencies relative to that person. The decision provoked much controversy
 in the United States (see Stone, 90 Harv L Rev 358 (1976)). Subsequent decisions in
 California sought to narrow the potential scope of the ruling (see M Franklin, *Tort Law
 and Alternatives: Cases and Materials*, 152-157 (3rd ed, 1983)) but in some other
 jurisdictions, the duty is stated in broad terms: Piorkowski, *Note, Between a Rock and a
 Hard Place: AIDS and the Conflicting Physician's Duties of Preventing Disease Transmission
 and Safeguarding Confidentiality*, 76 Geo LJ 169, at 184-185 (1987).
 15 See G Hogan & D Morgan, *Administrative Law*, 372-380 (1986).
 16 Sup Ct, 10 May 1988.
 17 P 26 of McCarthy J's judgment.
 18 *Id.* Cf Henchy J's judgment at pp 6-9. The authority of the English decision *Anns*, cited
 by McCarthy J, has been seriously weakened by subsequent decisions of the House of
 Lords (*Peabody Donation Fund (Governors) v Parkinson & Co Ltd*, [1985] AC 210) and
 the Judicial Committee of the Privy Council (*Yeun Kun-yue v AG of Hong Kong*, [1987]
 2 All ER 705) and the Supreme Court of Australia has refused to follow it (*Sutherland
 Shire Co v Heyman*, [1983] 60 ALR 1).
 19 Cf *Yeun Kun-yue v AG of Hong Kong*, *supra*, approved of by Blayney J in *McMahon v
 Ireland*, [1988] ILRM 610, but regarded with less apparent enthusiasm by McCarthy J in
Ward v McMaster et al, *supra*.
 20 Cf McMahon & Binchy, *op cit*, ch 15, G Hogan & D Morgan, *Administrative Law*, 369-
 392 (1986).
 21 Cf McMahon & Binchy, *op cit*, 278-282.
 22 These entitlements include the right of bodily integrity and of health. See generally
 Hogan & Morgan, *op cit*, 382-384. *Hosford v Murphy* [1988] ILRM 300 (High Ct,
 Costello J 1987) might be considered to be a precedent against recognising such a claim;
 it can, however, be argued that the negligent failure to prevent child sexual abuse, which
 involves intentional conduct on the part of the abuser, amounts to an improper
 unconstitutional interference, consistent with *Hosford*. It could also be argued that the
 State's legislative structure, which at present positively facilitates such abuse by reason of
 the absence of any mandatory reporting requirement, is also an improper unconstitutional

- interference, again consistent with *Hosford*. Whether the court would construe the absence of a mandatory reporting requirement as amounting to such a "positive" facility is, however, very doubtful.
- 23 As amended by the *Children Acts 1934 and 1931*, and the *Children (Amendment) Acts 1949 and 1957*.
- 24 The offences are those set out in Part II of the Act and those listed in the First Schedule to the Act. These include any offence under sections 27, 55 or 56 of the *Offences Against the Person Act 1861*, any offence against a child or young person under sections 5, 42 or 62 of the same Act or under the *Criminal Law Amendment Act 1885-1935*, offences under the *Dangerous Performances Acts 1879 to 1897* and any other offences involving bodily injury to a child or young person.
- 25 The Bill was presented by the Minister for Health on 20 May 1988. It is entitled: "*An Act to Provide for the Care and Protection of Children and for Related Matters*."
- 26 Section 10(1).
- 27 Section 10(2).
- 28 Section 11(1).
- 29 Section 11(2).
- 30 Section 11(3).
- 31 Section 11(4)(c).
- 32 Section 11(5).
- 33 Section 12.
- 34 *Family Law (Protection of Spouses and Children) Act 1981*, section 3.
- 35 *Children Act 1908*, section 58(1)(b).
- 36 Section 58(1)(e).
- 37 Section 58(1)(f).
- 38 Section 22.
- 39 It is unclear, however what standard or quality of evidence should be required so as to "satisfy" the court. A recent Supreme Court case has cast doubt on the current practice in care proceedings under the *Children Act 1908* of admitting expert testimony without producing to the court and to the defendant parent(s) the evidence on which that testimony is based (Irish Times, July 28th, 1989). At the time of writing, the reasons for the court's ruling are not available in full. A written judgment with reasons is expected in October of this year. See also para 7.088 below.
- 40 Child Care Bill 1988, section 15(2).
- 41 Section 15(3).
- 42 *Id.*
- 43 Section 15(4).
- 44 Section 16(1).
- 45 Section 16(2).
- 46 Section 16(5) and (6).
- 47 Section 16(3).
- 48 Section 16(4).
- 49 Section 25(1).
- 50 Section 22(1).
- 51 Section 22(2).
- 52 See generally the *Family Law (Protection of Spouses and Children) Act 1981*, section 2.
- 53 Section 2(2).
- 54 Section 3.
- 55 Section 5(1).
- 56 Sections 6 and 7.
- 57 *O'B v O'B*, [1984] IR 182, at 188 (*per* O'Higgins CJ).
- 58 *Id.*, at 194 (*per* Griffin J).
- 59 *Supra*.
- 60 *Id.*, at 189.
- 61 *Family Law (Protection of Spouses and Children) Act 1981*, section 9(1).
- 62 117 Seanad Debates, cols 237-248 (8 October 1987).

CHAPTER 2: PROPOSALS FOR REFORM

MANDATORY REPORTING OF SUSPECTED CHILD SEXUAL ABUSE

2.01 Should the law require certain persons, such as doctors and other health care professionals, social workers and teachers, to report cases of suspected child sexual abuse to the police or health authorities? Laws of this kind exist throughout the United States of America¹ and in all States in Australia save Victoria and Western Australia.² The types of law in Australia vary widely. In the Northern Territory, for example, the legislation applies to any person, while in Queensland only medical practitioners are required to report. Sanctions range from the complete absence of a penalty in Tasmania to a fine of \$1,000 or imprisonment for up to a year in New South Wales.

Arguments in Favour of a Compulsory Reporting Requirement

2.021. The principal argument in favour of mandatory reporting laws is that they may lead to the discovery by the authorities of some cases of child sexual abuse which otherwise would not come to their notice. In the United States of America, the introduction of mandatory reporting laws, beginning in the early 1960s, was followed by a dramatic increase in the number of reports of suspected child abuse of all kinds.³ One commentator has suggested that mandatory reporting laws, combined with public awareness campaigns, "have been strikingly effective".⁴

It could be argued that in Ireland the publicity given to child sexual abuse in recent years has by itself resulted in a very significant rise in reporting, with the result that mandatory reporting laws may appear unnecessary. The number of cases of child sexual abuse reported to the health boards rose from 475 in 1986 to 929 in 1987. The number of confirmed cases reported to health boards rose from 33 in 1984 to 456 in 1987.⁵ However, there may yet exist a substantial number of

unreported cases. A pilot survey of 500 adults carried out by the MRBI in 1987 in Dublin found that 6% admitted to have been sexually abused as children. About one third of the cases could be classified as extremely serious with the majority of the remainder being very serious. The average annual number of children sexually abused for a population of 395,000 was estimated to be 850 (from a group with a twenty-six year age spectrum).⁶ Even the most cautious reading of these statistics suggests that there still remains a significant number of child sexual abuse cases that go unreported.

2. Mandatory reporting laws can provide a clear structure and legal authority for submitting reports of suspected child sexual abuse. We have been told by a number of persons that the reluctance to report child sexual abuse shown by some professionals working with children derives in part from uncertainty about the legality of so doing or from the fear of facing possible legal action should the report prove unfounded. There may sometimes be other less worthy considerations which result in a preference not to report, such as unwillingness to confront a "distasteful" problem, or to begin a process which may subsequently be costly in time and energy. The Law Reform Commission of Victoria noted that:

"a survey⁷ of health professionals' attitudes towards reporting and being involved with cases of physical abuse found that among the most significant factors seen by the respondents as discouraging reporting were the 'fear of being sued' (51% of the sample saw this as relevant) and the 'time involved in court' (mentioned by 45% of the sample). A statutory duty to report may counterbalance a reluctance to get involved, where it is based on such considerations."⁸

To many professionals the most attractive feature of a mandatory reporting law is its "empowering" nature. It relieves them from some of the onus of discretion. A teacher or social worker is in a less invidious position if he or she is able to explain, perhaps to an aggrieved parent, that the making of the report was a matter of legal obligation rather than a purely personal decision.

3. A mandatory reporting requirement would "denote a public commitment and enable the community to become involved".⁹ It would amount to a clear declaration by society that child abuse is a matter for social concern and a broad social response.
4. Other arguments in favour of a mandatory reporting requirement are that it would secure consistency in the management of the disclosure of child abuse;¹⁰ would enable better assessment of the nature, incidence and location of child abuse which would result in an improved provision of services;¹¹ and would provide for shared responsibility in

managing cases by relieving professionals of the sole obligation to make case management decisions.¹²

Arguments Against Mandatory Reporting Laws

- 2.031. The principal argument against mandatory reporting laws is that they may give rise to over-reporting. The American Humane Association has estimated that 59% of reports of abuse (all forms) in the United States are unsubstantiated.¹³ This gives rise to a number of serious problems. Investigation of suspected abuse may often result in serious breaches of family privacy. The child thought to be at risk may suffer from unwarranted investigations or medical inspections. Scarce resources in the health boards may be wasted on investigation of a profusion of reports, and the risk of overlooking serious cases may increase.¹⁴ There are however counter arguments. The phenomenon of over-reporting is associated particularly with expanded or over-broad reporting laws.¹⁵ If mandated reporters are obliged to report potential as opposed to actual cases of abuse, or if the definition of abuse is vague or uncertain, professionals may seek to protect themselves and avoid prosecution or penalty by reporting every possible case of abuse, leaving it to the health board to distinguish between fact and fiction. The answer may lie in ensuring that the definitions of reportable elements of abuse be as specific and as simple as possible.¹⁶ By contrast over-reporting sometimes occurs in jurisdictions where no mandatory reporting laws exist. In this country, in 1987, 456 of the 926 reported cases of child sexual abuse were confirmed. It does not follow that the remainder were unsubstantiated; not all may have been investigated. Nevertheless, the figures suggest a significant number of unsubstantiated cases, despite the absence of a mandatory reporting law. It might even be argued that a mandatory reporting law which offers a precise definition of reportable circumstances may help to reduce the volume of unsubstantiated reports.
2. The fact that there is little evidence of the sanctions attached to mandatory reporting laws being brought into play has been advanced as an argument against their introduction.¹⁷ We are not impressed by this argument. The fact that a sanction is not invoked does not mean it lacks efficacy. The test of efficacy is the level of reporting not the number of prosecutions. If prosecutions for the abuse itself can be based on the evidence of the children abused, so can prosecutions for failure to report.
 3. A mandatory reporting requirement will be viewed by some as damaging the trust normally inherent in the doctor/patient or other professional relationship. It could discourage some parents from seeking medical attention for their children where they believe that the children's condition might lead the doctor -rightly or wrongly - to conclude that sexual abuse has taken place and thus report them to the

authorities. A school teacher, if under an obligation to report suspected sexual abuse, would not be able to promise confidentiality to a timid child wavering on the edge of disclosure. Similarly offenders may be reluctant to volunteer for treatment or therapy if they know that their admission may result in legal proceedings. As against this, there is the view that it is wrong for an adult to offer any irrevocable undertaking, especially to another adult, which would make it impossible to take action to prevent further harm to a child who is seriously at risk.

4. It has been suggested that there is no need for a legal sanction to force professionals to do what is already their professional duty. Dingwall, Eekelaar and Murray, speaking of the position in England, have observed that:

"anyone failing to report relevant information to the local authorities social services department is likely to face public censure and professional or organisational disciplinary action, sanctions which seem as likely to be effective as the rarely-invoked civil or criminal penalties prescribed in the USA, although the latter can be useful for inter-agency bargaining."¹⁸

5. Finally it has been argued that mandatory reporting laws are ineffective because there is evidence from jurisdictions which have accepted them that they continue to experience a substantial problem of under-reporting. In the United States of America the Department of Health and Human Services, in a study published in 1981,¹⁹ estimated that 68% of children who were identified as abused or neglected had not been reported.²⁰ (The same study found that 56% of cases reported were unsubstantiated). Such evidence certainly establishes that mandatory reporting laws are not a panacea. They are clearly not alone sufficient to resolve the problem of under-reporting. However, it does not follow that they have not improved the situation.

Canadian experience throws some light on the reasons for under-reporting despite mandatory reporting laws. In Ontario, a doctor who fails to report risks a fine of up to \$1,000, professional discipline and civil liability. Yet many doctors are still reluctant to report. Factors contributing to this situation have included uncertainty about what constitutes reportable abuse, and a lack of confidence that the relevant Canadian child welfare services will deal effectively with cases once reported.²¹

PROVISIONAL CONCLUSIONS

2.04 Mandatory reporting laws are clearly not a complete solution to the problem of under-reporting child sexual abuse. They can only be part of the solution. One of the most important factors likely to influence levels of

reporting is the degree of confidence which exists in child protection services, and we acknowledge the efforts made by the Department of Health and the health boards in recent years to improve such services. If doctors, teachers or social workers know that reports made by them will be followed up quickly, effectively and with sensitivity, they will be more likely to act. If that confidence does not exist, then even mandatory reporting laws are unlikely to have much impact, particularly if it is known that sanctions are seldom if ever applied.

Despite these cautionary words, we do believe that a mandatory reporting law may on balance do more good than harm. We believe that the current level of reporting is probably, despite increases in recent years, still low. The introduction of mandatory reporting would represent a clear and unequivocal public statement that child sexual abuse is something that society will not tolerate, and that its potential for damaging children is such that the uncomfortable feelings that many professionals have about reporting must be put aside. We think that the duty to prevent harm to a child overrides the normal obligation of confidence which may arise in a professional relationship. The existence of a mandatory reporting law would offer the clear guidance that many professionals desire as to where their duty lies and in what manner that duty must be performed. The existence of statutory exemptions would relieve bona fide reporters of any lingering fear of being sued or prosecuted.

We acknowledge the importance of avoiding the phenomenon of over-reporting, with its attendant danger of injustice and damage to innocent families. We think that a carefully and tightly drawn reporting law should reduce this risk to a minimum.

We appreciate that these are matters on which there will exist varying and sometimes strongly held views. We stress the provisional nature of our conclusions and invite comments.

The Elements of a Mandatory Reporting Law

2.05 The general principles which should inform a mandatory reporting law may be summarized as follows. The law should be specific enough to discourage over-reporting, whether by the over-zealous or the defensive reporter; it should, on the other hand, be broad enough to facilitate identification of children who are genuinely at risk. It should be based on a definition of child sexual abuse which lays down a minimum rather than an optimum standard of care towards children. This derives from the need to recognise that methods of child care may properly vary between different families, and that the capacity of the child care services to respond to reported abuse is limited by finite resources. Finally a mandatory reporting law should be readily understood and easily applied.²²

Six specific matters need to be addressed:

- (i) The persons to be placed under the obligation to report;
- (ii) The question of sanctions for failure to report;
- (iii) The question of immunity from legal action for making a report;
- (iv) How to report and to whom;
- (v) The nature of the obligation to report;
- (vi) Reportable conditions or what to report.

(i) *The Persons to be Placed Under an Obligation to Report*

2.06 "[I]f the reporting group as delineated by statute is large, the impact of the reporting requirement may be diffused, and everybody's duty may easily become nobody's duty."²³ *We consider that doctors, health workers and professional social workers should be placed under this obligation. Voluntary social workers present somewhat greater difficulties. On one view, their moral obligation to report is no less strong by reason of the fact that they are not paid. However, the scope of the obligation may be far less easy to determine in the absence of terms of employment and a structured allocation of responsibility among the team of social workers. On balance we believe that the legal obligation to report should be placed on them.*

Teachers also present some difficulties. It may be argued that they should be subject to the obligation to report because they often are the only people who have an opportunity to see the children in a natural environment outside the home. Visits to the doctor tend to be rare; and, if a parent is abusing the child, there may be a still greater reluctance to expose the child to medical scrutiny. But school attendance is compulsory and abusing parents may be somewhat less apprehensive about the risk of discovery in sending their children to school. It may well be that, properly informed as to the symptoms of possible sexual abuse, teachers would be in an excellent position to recognise abuse and to report cases that would otherwise never come to notice. Occasionally also a pupil may make a verbal disclosure of abuse to a teacher. As against this, some teachers will take the view that their main role is to teach, not to act as a surrogate law enforcer, social worker or doctor. The decision whether or not to report a suspicion of abuse should, on this view, be considered a matter for voluntary choice rather than legal compulsion. Also it is clear that teachers cannot be expected to make a medical diagnosis on a matter outside their competence. Moreover the behavioural indicators of child sexual abuse are controversial and may often have alternative explanations.²⁴

These limitations must be borne in mind, and teachers should certainly not be expected to perform functions for which they are not trained. Nevertheless, *there will remain occasions on which teachers will form a*

reasonable judgment that abuse has occurred. For example, a child may make a verbal disclosure in circumstances where the teacher has every reason to believe that the child is telling the truth. In our view the mandatory reporting requirement should apply to such circumstances.

As for the argument that a pupil may be deterred from making a disclosure to a teacher if he or she cannot be promised confidentiality, this is a risk; but it is one which may be reduced to a minimum by a sensitive approach on the part of the teacher and, perhaps, a promise that the matter will go no further without the pupil first being told. It is at any rate questionable ethically whether a teacher should promise absolute confidentiality to a child; the risk is that the teacher may be drawn into the web of silence which ultimately protects the abuser.

We are aware that work is currently being undertaken within the Department of Education, in consultation with the Department of Health, with a view to drawing up agreed guidelines for child-abuse reporting procedures in schools. These are likely to include a procedure whereby a teacher, who suspects abuse, would consult with a colleague, possibly the Principal, before further steps are taken. We welcome the development of such guidelines but *would emphasise that, under mandatory reporting laws, ultimate responsibility for deciding whether or not to submit a report generally rests with the individual teacher.*

The position of persons running pre-school groups and creches is somewhat similar to that of teachers, though not identical. The educational dimension, for younger children at least, may be far less central than at a school. The case in favour of mandatory reporting applies equally.

(ii) Sanctions for Failure to Report

2.07 As we have seen, the international experience is that sanctions for failure to report cases of suspected child abuse are rarely applied. The difficulty of proving the case is no doubt the reason for the lack of prosecutions, though the objective test of criminal responsibility should mitigate this problem. Where sexual abuse is alleged, and the vital evidence is that of a young child, prosecuting for failure to report is likely to be no less difficult than prosecuting for the abuse itself. Also we recognise that the primary objective of a reporting law is to encourage reporting by legitimising it and empowering individuals to act; the law can do much to achieve this objective without the application of sanctions.²⁵ *We nevertheless believe that sanctions should be provided to punish blatant cases of failure to report, and we provisionally recommend that an appropriate summary offence be created with a maximum penalty of 6 months imprisonment and/or a fine of £1,000. Prosecutions for failure to report should be subject to the consent of the Director of Public Prosecutions.*

(iii) The Question of Immunity from Legal Action for Making a Report

2.08 Should those placed under a mandatory reporting obligation be given immunity from legal action for making a report? Clearly, if there is to be a mandatory obligation, those placed under that obligation should be under no civil liability to any third party if their reported suspicions prove correct. If they have acted *bona fide* and with due care, they should also be protected where the suspicions prove to be unfounded. It may well be that they already are adequately protected by the civil law; qualified privilege would appear to afford them a good defence in actions for defamation,²⁶ and an action for malicious prosecution²⁷ would not appear to lie. They would not be liable for the tort of negligence, having acted with due care.

We see merit nevertheless in the statute expressly conferring immunity from liability for bona fide reports made with due care. This would be likely to give greater assurance to those placed under the mandatory reporting requirement. Although there are some precedents for conferring complete immunity on persons charged with specific statutory obligations,²⁸ we do not favour this approach in the present context. In its favour, it may be said that it would encourage the timid and the hesitant who had in fact good grounds to report to "take the plunge". As against this, it would remove any restraint from an incautious reporter and would increase the risk of over-reporting.

Should failure to comply with the mandatory reporting obligation give rise to civil liability? As we have seen, it is likely that, under present law, proceedings for negligence or breach of statutory duty may be brought in at least some cases of failure to report suspected child sexual abuse. The range of liability at present would almost certainly not extend to every health professional and social worker; where precisely the line should be drawn must await judicial decision.

Our provisional conclusion is that the courts should be left to develop the law of negligence or breach of duty in the context of the mandatory reporting obligation. We do not believe that it would be desirable for the legislation itself to include a provision rendering those who failed to comply with the obligation liable to pay damages to persons suffering reasonably foreseeable injuries or damage as a result of that failure. We are conscious of the danger of imposing automatic civil liability in complex areas such as this. Automatic liability encourages defensive and selfish strategies on the part of those under the duty; over-reporting is quietly seen as the safe and easy option. The pain, hardship and injustice this causes to innocent families should never be over-looked.

(iv) How to Report and to Whom

2.09 It has been said that "[c]ritical to well-functioning [mandatory reporting] legislation is facility in the reporting process and utility by the receiving agency".²⁹ It is therefore useful to sketch some of the main features of how the reporting law should operate.

We consider that the best course would be to require an initial oral report,³⁰ followed by a written backup account³¹ identifying the child and the nature and basis of the suspicion that he or she has been subjected to sexual abuse. We do not consider that there should be a mandatory obligation to report a suspicion that a child may at some future time be subjected to sexual abuse.

It has been noted in the United States that written reports have been criticised as a deterrent to reporting, "since many reporters, especially physicians, do not have the time to write reports or may not wish to 'go on the record'".³² We are however satisfied that written reports are necessary. Oral reports can tend to get lost in the system. There may be considerable uncertainty as to precisely what was said. Conflicts of evidence will arise. A written report commands action in a way that an oral report generally does not.

We further recommend, in line with the Department of Health Guidelines that the person to whom all reports should be made should be the Director of Community Care and Medical Officer of Health within each health board. It should also be open to a mandated reporter to submit his or her report to the Gardai.

(v) The Nature of the Obligation to Report

2.10 The obligation to report could be of an entirely subjective type; persons under the obligation could be required to report in cases where they have formed the conclusion, *bona fide*, that a child had been subjected to sexual abuse. The problem with this approach is that in cases where such persons ought reasonably to be aware that such sexual abuse has occurred but were not in fact so aware, they would be under no obligation to report. *An objective test would impose an obligation to report where a reasonable person would be so aware. This would remove the difficulty of the careless failure to detect cases of child abuse.* The price may be a tendency towards over-reporting. We think, nevertheless, that the objective test is the only realistic one, and that the danger of over-reporting should be reduced by the careful definition of reportable conditions.

(vi) Reportable Conditions

2.11 *It is vitally important that a mandatory reporting law provide reasonably clear guidance as to the circumstances in which reports should be made. If a mandated reporter is offered only vague guidelines, there is the danger of over-reporting resulting from an excessively cautious or defensive approach on his or her part. Reportable conditions need to be reasonably specific and readily understood.*

We suggest, as a definition of child sexual abuse for the purpose of care proceedings, that proposed by the Western Australia Task Force in its 1987 Report:

- " (i) *intentional touching of the body of a child for the purpose of the sexual arousal or sexual gratification of the child or the person;*
- (ii) *intentional masturbation in the presence of a child;*
- (iii) *intentional exposure of the sexual organs of a person or any other sexual act intentionally performed in the presence of a child for the purpose of sexual arousal or gratification of the older person or as an expression of aggression, threat or intimidation towards the child; and*
- (iv) *sexual exploitation, which includes permitting, encouraging or requiring a child to solicit for or to engage in prostitution or other sexual act as referred to above with the accused or any other person, persons, animal or thing or engaging in the recording (on video-tape, film, audio-tape, or other temporary or permanent material), posing, modelling or performing of any act involving the exhibition of a child's body for the purpose of sexual gratification of an audience or for the purpose of any other sexual act (referred to in subparagraphs (i) and (iii) above."³³*

We think that this could form the basis also of the reporting law. A mandated reporter would be under an obligation to report where he or she had reasonable grounds for suspecting that sexual abuse of a child, as defined above, had occurred. It would be possible for the legislation to go further, and to list standard indices of sexual abuse, such as those set out in the Department of Health Guidelines,³⁴ and to require a report where a child exhibits extreme or combined symptoms from the list. This, it could be said, would offer a more practical guide to reportable circumstances than a definition of sexual abuse such as that proposed. However, because sexual abuse indices "are not necessarily indicative of child sexual abuse"³⁵ (i.e. they may have alternative explanations) it would be wrong to require a report simply on the basis of their presence. They could be mentioned in the legislation as among the factors which may be taken into account by the reporter in reaching a reasonable judgment as to whether abuse has or has not occurred. But the legislation should make it clear that the foundation for making a report must be a reasonably formed suspicion that actual abuse has occurred.

2.12 We believe that the issue of the definition of reportable circumstances is central to the issue of whether mandatory reporting laws should be introduced. If it proves impossible to arrive at a reasonably clear statutory definition of reportable circumstances, then the case for mandatory reporting is considerably weakened. For this reason we would in particular welcome comments on the problem of defining reportable circumstances, and would emphasise that this remains a problem even in the context of the development of voluntary reporting procedures.

INVESTIGATION AND MANAGEMENT OF CHILD SEXUAL ABUSE

2.13 Procedures for the investigation and management of child abuse within health boards have undergone significant development and elaboration in recent years. In 1987 the Department of Health issued the revised *Guidelines on Procedures for the Identification, Investigation and Management of Child Abuse*.³⁶ The *Guidelines* are the product of careful thought and planning by a multi-disciplinary group of persons with considerable experience in child care and protection. We do not wish, nor would we be competent, to question the detailed procedures laid down in the *Guidelines*. We have given some thought to the general question of whether the *Guidelines* should as a whole be given regulatory or statutory force. Because they have no binding legal status, there is a danger that the *Guidelines* may from time to time be ignored or that individual health boards may vary in the degree to which they adhere to them. Indeed such variations have been drawn to our attention. However, we do not favour at present altering the status of the *Guidelines*. We believe that there are dangers in legal regulation on health boards in relation to the management of child abuse. If every aspect of management were to become the subject of legal regulation, scarce resources may be unduly focused on adherence to procedural niceties and record keeping. Child care and protection services are still undergoing development and it seems desirable that procedures maintain some flexibility and responsiveness to change. At the same time, we do think that there are certain key points within the health board decision-making process in respect of which it is appropriate to insist on the maintenance of certain minimum legal standards. There is a difference between flexibility and procedural laxity, and the danger of a completely discretionary procedure is that it may provide an excuse for inaction, delay or idiosyncratic decision-making. There should therefore be some measure of legal accountability for the key decisions and actions taken by health boards in response to reports of child sexual abuse. It is with a view to maintaining a reasonable balance between flexibility and accountability that the proposals in this section are made.

INVESTIGATION

2.14 At present a health board is not under a legal duty to investigate a report of suspected child sexual abuse. The Child Care Bill 1988 will not substantially alter this position. Section 3(2)(a) of the bill requires a health board to "take such steps as it considers requisite to identify children who are not receiving adequate care and protection". This gives the health board considerable discretion as to the means it may adopt in identifying children at risk. Section 14 requires a health board to institute care proceedings in respect of a child who has been or is being sexually abused; it is doubtful whether this implies a duty to investigate in any particular manner a report of alleged sexual abuse.

The Department of Health *Guidelines*, which are not legally binding, state:

"The initial steps must be to establish the relevant factual circumstances

of the child and the possible sources of harm or danger. Child abuse cases involve both child care and law enforcement issues and what is discovered may be relevant to decisions which have to be taken by both agencies. Close co-operation between these agencies is essential. Local arrangements should be agreed between the health board and the Gardai on the investigation of cases, including the extent to which each should be involved. The health board will need to pursue all cases while the involvement of the Gardai will depend on whether it appears that an offence has been committed.³⁷

The *Guidelines* also contain detailed advice on the action to be taken by the community care social worker following referral of all types of child abuse case.³⁸ These include speaking to the person who has made the complaint, checking the child abuse list, discussing the situation with the parent/guardian, checking with other community care personnel and agencies, visiting the child - on the day of the report if necessary - and assessing the child's appearance, behaviour and relationship with parents, seeking an explanation from parents/guardians and recording observations. In addition, in cases of alleged sexual abuse the *Guidelines* contain recommendations for liaison between the health board and the Gardai, and for the use of multi-disciplinary teams in the examination of children and the validation of alleged sexual abuse.³⁹

We recognise that great sensitivity is needed in investigating alleged child sexual abuse, and the *Guidelines* have been carefully devised by a multi-disciplinary working group, who were in a better position than the Law Reform Commission to judge the wisdom of specific investigatory procedures. We believe, nevertheless, that it is right for us to raise one matter of general legal principle relating to the legal status of the investigation procedures.

A STATUTORY OBLIGATION

2.15 The *Guidelines* are not binding on health boards, and in the absence of any other legal requirement relating to the investigation of alleged child sexual abuse, a health board is free to vary or depart from the agreed investigatory procedures. It is worth noting that in the United States of America the trend in recent years, in the context of mandatory reporting laws, has been to develop specific statutory guidelines governing investigation. The Arkansas Law is a typical example:

"The investigation shall include the nature, extent and cause of the child abuse, sexual abuse or neglect; the identity of the person responsible therefor; the names and conditions of other children in the home; evaluation of the parents or persons responsible for the care of the child; the home environment and the relationship of the child[ren] to the parents or other persons responsible for their care; and all other pertinent data."⁴⁰

One of the drawbacks in laying down strict statutory obligations relating to the investigation, and indeed the management generally of child abuse cases, is that health boards may find themselves having to abide by statutory procedures which in some cases they may deem to be unnecessary. Much time may also be taken up in filling out reports to ensure that a record is kept that statutory procedures have been followed. We recognise these dangers, but we think that the risks entailed by the present law may be greater. *It seems to us reasonable to place a statutory duty on health boards to take at least certain minimal steps in response to a report of alleged child sexual abuse.⁴¹ The obligation to investigate should not be absolute, but where a decision is made not to investigate following a report of alleged abuse, the onus should be on the health board to give reasons.⁴² The law should also specify in broad terms the matters to be investigated, along the lines of the Arkansas statute set out above.*

CO-OPERATION WITH THE GARDAI

2.16 We are concerned about the procedures whereby the Gardai are to be notified of cases of alleged child sexual abuse. Paragraph 6.2.1 of the *Guidelines* states:

"At any stage in the investigation where there are reasons for suspecting child sexual abuse the DCC/MOH should report the matter to the Gardai."

More discretion seems to be allowed in the case of hospital/ clinic personnel. Where an offence comes to their notice, they "should contact the DCC/MOH and, if the circumstances so warrant, they may initiate contact with the Gardai."

From our discussion with health care professionals it has become apparent to us that there is often a reluctance to involve the Gardai in the early stages of investigation of alleged child sexual abuse. The motives are understandable. In many cases the evidence is simply insufficient to warrant Garda involvement. In other cases there may be a fear that parental consent to further examination of, or interview with, a child will not be forthcoming, or will be withdrawn if the parents know that the Gardai are likely to be involved. There is also the prevailing ethos within the health care profession that the welfare of the patient/child should be the primary concern. Indeed this principle is embodied in paragraph 6.2.6 of the *Guidelines*, although the *Guidelines* do also remind investigators that child sexual abuse is a criminal offence and that "the community has an obligation to ensure that the necessary steps are put in motion to protect the child and to ensure that the perpetrator is deterred from further abusive acts."⁴³

One of the consequences of excluding Gardai from the early stages of investigation is that it may ultimately make it more difficult to mount a successful prosecution against the alleged offender. If disclosure by the child

is first made in the context of a purely therapeutic interview without Garda involvement, there is a danger that any subsequent formal statement made by the child to a Garda may be attacked in court as tainted by the earlier interview. Another disadvantage of not involving the Gardai at an early stage is that the number of interviews which the child may have to undergo is increased.

There is understandable concern about the very low rate of prosecution for child sexual abuse. The failure sometimes to involve the Gardai in the early stages of investigation may well, in our view, contribute to this situation. On the other hand, we appreciate the reluctance of health care professionals to set in train the criminal justice process precipitately or without proper regard for its potential consequences for the child. What may be needed is a procedure which allows the health care professional some degree of influence on the decision whether to institute criminal proceedings or not. One way of achieving this is suggested in the next section, i.e. to give to the multi-disciplinary case conference a role in advising on the question of prosecutions.

CASE CONFERENCES

2.17 The case conference occupies a central position in decision-making within health boards in relation to child abuse cases. The Department of Health *Guidelines* describe them as "an essential feature of inter-agency co-operation".⁴⁴ The case conference, called by the DCC/MOH, is the body which provides the forum for exchange of information concerning a child between the different professionals involved with the child and the family. It may include community care and health care professionals, teachers, Gardai and others. It is the case conference which reviews written and verbal reports about an individual case, determines the nature and degree of risk to which a child is exposed, decides whether a case should be listed as confirmed or suspected abuse, and what form of intervention is appropriate.

Despite the key position occupied by case conferences in the management of child sexual abuse, their procedures are not legally regulated. Even the non-binding Department of Health *Guidelines* make the DCC/MOH's decision to hold a case conference a matter of discretion, and the advice given to community care teams to "review and standardise case conference procedures" is in the form of a recommendation only. It would not be proper for us to review in detail the procedures regulating case conferences. However, we do wish to indicate certain areas, which have a legal significance, where we believe that there is a need for some tightening-up of the procedures.

- (a) *We think that the DCC/MOH should be under a general legal duty to hold a case conference in cases of suspected child sexual abuse which have not been rejected as "unfounded". When he or she decides not to hold a case conference, he or she should be obliged to record the reasons for the decision.*

- (b) *The case conference should, where a criminal offence is suspected, consider the question of whether criminal proceedings are appropriate. (This should not detract from the principle that in all cases where an offence is suspected the Gardai should be notified). There should be a Garda present at the case conference when this matter is under discussion. We believe that, so constituted, the case conference is a particularly well-equipped body to balance considerations of the child's welfare together with the needs of the criminal justice system, and to advise on the question of prosecution. As stated above, we believe that the involvement of case conferences in this way would give to health care professionals greater confidence in involving the Gardai in the earlier stages of the investigation. The role of the case conference could only be advisory. Ultimately it would be for the Director of Public Prosecutions to determine whether a prosecution was or was not appropriate.*
- (c) Parents should be informed of case conferences. They should, if available and as a general rule, be invited to attend for at least part of the conference and should be given an opportunity to comment on any action proposed by the conference. The conference should have the power to exclude parents only in exceptional circumstances.⁴⁵
- (d) Professional legal advice should be available to the case conference to assist it in assessing evidence, for the purpose of deciding whether care or criminal proceedings should be undertaken, and to give advice on other legal aspects of the case including the question whether, and in what form, a case should be "listed."⁴⁶

CHILD ABUSE LISTS

2.18 The Department of Health *Guidelines* require each DCC/MOH to supervise "lists of suspected and of confirmed cases of child abuse in his area".⁴⁷ The information contained in the relevant list includes source of referral, details of the child and his or her parents or guardians, the names of other children in the same household, a short description of the abuse to the child and of the suspected abuse. The case conference decides whether a case is to be listed as confirmed or suspected abuse. Lists are to be reviewed at least annually by the DCC/MOH. Where initial suspicion proves unfounded, details are deleted from the list. A case is listed as confirmed abuse only if there is:

- "(a) medical opinion to support this view, or, in a case of child sexual abuse, medical/social validation; *or*
- (b) an admission of abuse by the perpetrator; *or*
- (c) a successful prosecution against the perpetrator.

All other cases should be listed as suspected."⁴⁸

Disclosure of information from the lists is at the discretion of the DCC/MOH, though "the fullest possible information should be given having regard to the circumstances of the case, particularly where the information is needed for a case conference".⁴⁹ The guidelines make no provision for access by parents to information contained in the lists.

We have some concern about the legal safeguards surrounding the making and use of the lists of confirmed cases of child abuse. We are aware that the practice of keeping "lists" in different health board areas is not uniform, and that the method of listing cases may soon be reviewed. We wish to make provisional suggestions for changes in practice in relation to two matters:

- (1) The circumstances in which a case is listed as "confirmed" should be reviewed. In particular we question whether medical/social validation, in the absence of an admission of abuse, or successful criminal or civil proceedings in respect of the alleged abuse, is an adequate basis for listing a case as "confirmed". It may be appropriate to employ a more refined system of classification, reserving the description "confirmed" to cases where there has been an admission or a judicial determination that abuse has occurred.
- (2) We think that consideration should be given to informing parents of any entry or change in entry on a health board list in respect of them. This should certainly be done where the parents are listed as "confirmed" abusers, though the need for this could be less obvious if our proposal is accepted for a more restrictive definition of "confirmed" cases.

EMERGENCY CARE PROCEDURES

2.19 The law has for long recognised that there may arise exceptional circumstances requiring emergency action to protect a child at risk. Sometimes the risks of delay are such that the child's parents may not have an opportunity to object in advance. Such *ex parte* procedures can only be justified in cases of serious and imminent risk, and following such action, parents must necessarily be given an opportunity to state their case without any unnecessary delay. In cases of suspected sexual abuse, whether *ex parte* applications are justified or not will depend on the degree of risk to which the child is exposed. *Ex parte* emergency proceedings are not appropriate in every case, nor even in most cases, of suspected sexual abuse. To remove a child permanently from his or her home is an extreme form of State intervention which may have traumatic effects on the family as a whole, including the child thought to be at risk. It is a step which should never be taken lightly or as a matter of routine.

The Child Care Bill 1988 envisages two circumstances in which emergency action may be taken. First, where a member of the Gardai has reasonable grounds for believing that a child has been or is being sexually abused and

that there is an immediate and serious risk to the health or wellbeing of the child, he may without warrant move him to a place of safety.⁵⁰ Second, a District Justice may make an emergency care order authorising the removal of a child to a place of safety, where the Justice is satisfied that there is reasonable cause to believe that there exists an immediate and serious risk to the health or wellbeing of the child.⁵¹ In the first case, the child may be kept in a place of safety for a maximum of twenty-four hours, pending emergency care proceedings before a Justice. In the second case the Justice may make an emergency care order for a maximum of eight days.

We believe that the basic criteria employed by the Bill for emergency care proceedings, namely "immediate and serious risk"⁵² to the child, is a sensible one. We do, however, wish to make a number of detailed comments and recommendations relating to emergency care proceedings.

Duration of Emergency Care

2.20 The maximum period for which a child may be kept in a place of safety under section 11 of the Bill is eight days. It is right, as well as being constitutionally required,⁵³ that the period should be the minimum necessary to secure the safety of the child and to enable preparations to be made for a full hearing before the court to determine whether longer term measures are necessary. The period of eight days is therefore sensible. However, *some social workers have suggested to us that the period of eight days may in some cases allow insufficient time for the assessment of the child and the gathering of other evidence necessary for subsequent care proceedings. One way of resolving this problem would be to allow the relevant health board to apply to a Justice for an extension of the eight day period up to a maximum of a further eight days. In order to succeed in such an application the health board should be required to satisfy the Justice that preparations for care proceedings were advancing with all due speed, that an extension of the emergency care period was necessitated by the circumstances of the particular case and that no adequate alternative means of protecting the child were available. We would be very concerned that the application for an extension of the emergency care period should not become a matter of routine. For this reason we suggest that the application should be made on the basis of a sworn information, and that the right to apply should be confined to the DCC/MOH or a senior official of the health board acting on his or her behalf.*⁵⁴

The Application for an Emergency Care Order

2.21 We have no evidence of the excessive use of place of safety orders in this jurisdiction. Nevertheless, experience abroad suggests the need for safeguards to ensure that the making of such orders never becomes a routine matter. One of the major problems in the Cleveland episode was the over-deployment of emergency care orders. They were applied for too readily, and in a number of cases were used in the first stages of management and intervention, in situations where there was no immediate danger to the child.⁵⁵

The *Report of Enquiry into Child Abuse in Cleveland 1987* also concluded that it is an improper use of place of safety orders merely to facilitate "disclosure work".⁵⁶

We agree that the emergency care order should only be used in cases of serious and immediate risk to a child. The emergency care order may provide the opportunity for assessment of the child or for "disclosure work", but this alone does not justify its use in the absence of a genuine emergency. We also believe that the emergency care order should be viewed as a last resort, to be employed only where it is clear to the Justice that other adequate means of protecting the child are insufficient. This principle is implicit in section 11(1) of the Child Care Bill 1988, which allows the making of an emergency care order only where the risk to the child "necessitates his detention in a place of safety". *However, we feel that a more explicit rule might be preferable. The Justice should be placed under the positive obligation to consider whether there exist other adequate means of protecting the child. In practical terms this would mean that an applicant health board would have to demonstrate that it had considered less drastic alternatives and rejected them for good reasons.*

The person primarily responsible in this jurisdiction for controlling the use of emergency care orders will be the District Justice. He or she must be satisfied that there is reasonable cause to believe that the relevant degree of risk to a child is present. In determining this matter the District Justice is necessarily, in *ex parte* proceedings, heavily dependent on the information supplied (usually) by the applicant health board. The manner in which decisions to embark on legal proceedings are taken within the health board is therefore of importance in this context, and has already been referred to.⁵⁷ *The Child Care Bill will not require a health board, when applying for an emergency care order, to make a sworn information. We believe that the present procedure whereby all applications for place of safety orders are on the basis of a sworn information should be retained. We believe that this requirement assists the Justice in assessing the strength of the case, imposes a necessary discipline on the health board in presenting its case and helps to ensure accountability.* Apart from this, we believe that the procedures, because of their emergency nature, should be kept as simple as possible and we recognise that their successful operation depends to a large extent on the quality of decision making within health boards, and the degree of vigilance and commonsense exercised by District Justices.

Emergency Care Orders, Medical Inspections and Assessments

2.22 We have already stated that we do not think that it is proper for an emergency care order to be employed where the sole purpose is to obtain an assessment or medical examination of a child. On the other hand, it must be recognised that cases arise where, though there may be insufficient evidence of immediate risk to a child to justify an emergency care order, the level of suspicion of abuse is sufficient to justify examination of the child despite parental objection. *We believe that the District Court should be given a power*

to authorise a health board to arrange for the medical examination and other assessment of a child where the level of suspicion of abuse is sufficiently high. Where such an authorisation is granted the parent would be under an obligation to present the child for examination at a given place and at a certain time or times. It should be open to the health board to apply for the order on an ex parte basis.

We see a number of advantages in this proposal. It accords with the principle that intervention should be the minimum necessary to achieve the protection of the child. The existence of this new procedure will make it less likely that a health board will be tempted to use the emergency care order as a first step intervention.

The proposal may have another important and useful side effect. At present, in most cases where abuse is suspected, the medical examination and interviewing of children proceeds on the basis of parental consent or acquiescence. It is obviously preferable that this should continue to be the basis in the great majority of cases. However, in some cases consent may be difficult to obtain or, once obtained, difficult to sustain where, for example, a series of tests or interviews with the child is thought to be necessary. Professionals engaged in assessment will naturally in these circumstances seek to exclude factors which may influence a parent not to give, or to withdraw, consent. In particular, we have been told that knowledge that there will be a Garda present at the child's interview may act as a deterrent to the parents, and this is one of the reasons why health professionals have been reluctant to involve Gardai at initial diagnostic and assessment sessions. This is an unfortunate situation in which, in our view, the present legal balance is weighted too heavily in support of the parental right of veto. The balance would be redressed by giving the District Court a power, without making a full emergency care order, to order assessment and examination of the child.

We are also concerned that, where a place of safety order is granted (or an emergency care order under the new legislation), the law does not make clear its implications in relation to medical examination and assessment of the child. It is generally assumed that a place of safety order justifies the health board in arranging for an initial medical examination and assessment of the child, but it is not clear whether it would justify further protracted examinations and interviews with the child. In our view *the legislation should make it clear what are the minimum rights of medical examination and assessment implicit in an emergency care order and, where the health board proposes to go beyond those limits, specific authorisation from the District Justice should be necessary.*

Parental Rights in the Context of Emergency Care

2.23 Emergency care proceedings involve extreme abridgment of parental rights. A child may be removed from its parents without them having an opportunity to state their case. A District Justice should not allow such a procedure unless it is clearly shown to be necessary. For this reason, we

believe that *the District Justice should before making an emergency care order be satisfied that the risk to the child is such as to make ex parte proceedings necessary. In other words, the health board should have to convince the Justice not only that the relevant degree of risk exists, but also that the emergency nature of the situation justifies a hearing in the absence of the parents.* We are not suggesting that anything be done to attenuate emergency care proceedings; they must by their nature be heard as quickly as possible. However, if it is feasible to have the parents present at the hearing before the District Justice, and they are willing to be present, then they should be allowed to be present and to state any objections which they have. In most emergency situations it will no doubt continue to be necessary to proceed on an *ex parte* basis. But there is no reason why, if parents are prepared to be in court within the necessarily limited time constraints, they should be excluded.

When a child is made subject to a place of safety (or emergency care) order the present assumption is that his or her parents have no right of access to him or her while the order lasts. As a general principle this may be acceptable, but we have two concerns. First, *if denial of access is to be the rule, this should be made explicit in the legislation.* Secondly, there may be circumstances in which it would be wrong to deny both parents access during the period of emergency care. Where, for example, it is suspected that a child is being seriously sexually abused by its father, a court may be justified in granting an emergency care order and excluding the father from access, but it does not necessarily follow that the mother should also be excluded. Much will depend on the circumstances. In our view *it is worth considering whether the Justice, when granting the emergency care order, should be required to take the circumstances into account and to approve access where this would not jeopardize the child's safety.*

Protection and Exclusion Orders in Emergency Situations

2.24 In emergency situations at present, where the protection of a child necessitates separation from its parents, it is generally the child who is removed from the family home rather than the alleged abusing parent. The only mechanism for removing the parent on an *ex parte* basis is the injunction, a complex and sometimes costly remedy whose enforcement requires further court proceedings. A barring order is not available on an *ex parte* basis. A protection order is available, but it does not affect a physical separation between the abuser and the abused, and it is only available on the application of a spouse.

Often the removal of the child from the home may be more appropriate than the removal of the alleged abuser. Removal of the child may be necessary to guarantee his or her protection, and it may incidentally provide the opportunity for the child to be assessed and examined away from any pressures exerted by the home environment. However, it has been suggested to us that there may be some occasions on which it may be more appropriate to remove the suspected abuser rather than the child.

Feelings of guilt are common in the child who has been sexually abused, and the child's removal from its home may sometimes tend to reinforce her sense of responsibility for what has happened. The sudden removal from family members with whom the child has a strong bond of affection may also cause considerable distress both to the child and to its family, most of whom may not have been aware that abuse was taking place. The question therefore arises whether a legal procedure should be introduced whereby the alleged abuser may be excluded from the company of the abused child in circumstances similar to those which would justify a place of safety or emergency care order.

It is, of course, a very drastic measure to remove any allegedly abusive member of the family from his or her home on an *ex parte* basis (just as it is a drastic measure to remove the child) and should only be contemplated in the most extreme circumstances. There is also always some risk attached to leaving a seriously at risk child within its home. If the alleged abuser is the father, the child's protection will depend on the mother being prepared to enforce the order excluding the father. She may not be fit, willing or able to do so. There may also be occasion on which it would not be clear who the abuser is.

We nevertheless are of the opinion that *the District Court should, when dealing with an emergency situation, have at its disposal the option of removing the alleged abuser on an ex parte basis, as an alternative to an emergency care order. The grounds for such exclusion should be the same as the grounds for an emergency care order. Application for such an order should be restricted to a health board or a parent of the child. The order should be available against any member of the child's household, including siblings and perhaps against any other persons, such as babysitters, who are likely to be regularly in contact with the child. However, in any case where there is doubt as to the identity of the abuser, an emergency care order would be the more appropriate one.* The mechanism for the enforcement of an exclusion order should be the same as that applicable to a barring order under the *Family Law (Protection of Spouses and Children) Act 1981*. We think that a justice should be entitled to make an exclusion order as an alternative in proceedings for an emergency care order, and *vice versa*. However, the justice should not make an exclusion order unless he or she is of the opinion that it would, having regard to the circumstances, secure the safety of the child. The order would last for the same maximum period as an emergency care order (eight days), and would be renewable for a further eight days. It would be made in contemplation of a full hearing involving care and/or barring order applications.

For cases of alleged intra family abuse, where the risks are not sufficiently grave to justify an emergency care order or an exclusion order, we recommend certain modifications to the existing system of protection orders. We think that *a health board should be entitled to seek a protection order on an ex parte basis on the same grounds as those which at present apply where a spouse makes the application.* We also think that the class of persons against whom

protection orders may be sought should be expanded. *Any person who is a member of the household of the child against whom abuse is alleged, and any other person who is likely to have regular contact with the child, should be capable of being made subject to a protection order.* This would include for example an uncle, an elder brother or an unmarried partner of the child's mother.

GROUNDINGS FOR THE MAKING OF A CARE ORDER

2.25 We agree in broad terms with the grounds for making care orders which are proposed in section 15 of the *Child Care Bill 1988*, and in particular with the proposal that sexual abuse should be a specified ground.

Despite the difficulty of framing an adequate statutory definition of child sexual abuse, the arguments such as those put forward by the Western Australia Task Force (the adoption of whose definition is provisionally recommended above) in favour of attempting to do so, are strong. A statutory definition, indicating in outline those activities which are deemed to justify intervention, would not only assist a justice in determining an application for a care order, it would also offer guidance at an earlier stage for those faced with decisions about reporting or management of sexual abuse cases.⁵⁸

Section 15(1)(c) of the Child Care Bill may be of particular importance in certain intra-familial abuse situations. It will allow a justice to make a care order on the basis of anticipated abuse or neglect; it does not necessarily require proof that abuse or neglect has already occurred in relation to the child in question. When, for example, the child is a young girl within a family where other daughters have been sexually abused by their father, the protection of a care order may be needed. We recognise that a constitutional issue may arise here. It could be argued that Article 42.5 of the Constitution allows the State to intervene to protect a child only where there is existing evidence that the parent has failed in his or her duty towards that particular child.⁵⁹ This constitutional argument could be raised by a parent in care proceedings under section 15(2) of the Bill, which requires the court to have regard to the constitutional position of parents and children. We would like to make it clear that, in our view, the consequences would be most unfortunate if such an argument were accepted; section 15(1)(c) would in effect cease to be available as a ground for a care order. Perhaps the correct constitutional approach to the section would be to regard it as justifiable, not necessarily under the terms of Article 42.5 of the Constitution, but by virtue of the State's duty to protect the natural and imprescriptible rights of the child. The *KC*⁶⁰ case makes it clear that a "compelling" case based on the interests of the child may justify separating the child from its family unit, independently of any argument based on parental failure under Article 42.5.

We make one further comment on section 15 of the Bill. In the past, health boards have most frequently made use in care proceedings of the ground of

failure by a parent to exercise proper guardianship. We recognise the disadvantages of this formula. There is an element of vagueness in the term "proper guardianship" and, as a general principle, the basis for State intervention into family life should be reasonably clearly defined. We are, nevertheless, not aware of any sense that the ground has in the past been abused. Moreover, social workers sometimes find it helpful to be able to proceed on a basis which does not directly stigmatise a parent as being guilty of neglect, cruelty or abuse. We would be interested to receive comments on this matter.

THE SUPERVISION ORDER

2.26 We welcome the introduction of the supervision order, which will enable the court to direct a health board to have a child visited periodically in order that the child's welfare may be monitored and parents may be provided with any necessary advice. The additional power which the court has been given to give directions relating to the care of the child which may, for example, require the parents to present the child for treatment or attention at a hospital or clinic, provides a valuable option in certain sexual abuse cases.

Under section 15(5), where a health board applies for a care order, the court may instead make a supervision order if it thinks it proper to do so. Some social workers to whom we have spoken take the view that some justices may be inclined to make use of the supervision order as a too-ready alternative to a care order, with consequent risks for the child. On the other hand, where a justice is doubtful about the need for a full care order, at least s 15(5) gives him an alternative to refusing to make any order. *One possible amendment which we favour would be to place on the justice a positive obligation to be satisfied that a supervision order will adequately protect a child, where he or she proposes to make it in lieu of a care order.*

PROCEDURE IN CARE PROCEEDINGS

2.27 We agree with the general principle embodied in section 21 that proceedings should be otherwise than in public, but we think that specified exceptions should be made in the case of the press and *bona fide* researchers. The anonymity of the child is adequately protected by s 23, which prohibits publication of any matter likely to lead to the public identifying the child.

We believe that provision should be made for the appointment by the justice of an independent representative for the child where, in the opinion of the justice, this appears to be necessary in the interests of the child. In many cases the justice will take the view that the child's interests are adequately represented by the health board. However, cases sometimes arise where an independent voice on behalf of the child may assist the court in achieving a balanced view, and vindication of the child's personal rights may sometimes require such representation. In the case, for example, of an older child who has a strong objection to the plans being made for him by a health board, it is not right

that he should be without an independent voice in care proceedings.⁶¹ In this context, s 22(2) is to be welcomed, which gives the child a right to be present at the hearing on request, except where it appears to the court that this would not be in the child's interest. *We suggest that this principle should be extended to give the child a right to be heard in the proceedings, and on the same basis. As regards the nature of the representation accorded to the child in appropriate cases, we think that the person providing it should be legally qualified. He or she should be appointed by the court from among lawyers who by reason of training and experience are competent to represent children. A panel of such lawyers should be established. The criteria for appointment to the panel, including the possibility of specialist training, are matters which should be considered by the two professional bodies.*

PARENTAL ACCESS

2.28 Section 17 of the Child Care Bill allows the court on its own motion, or on the application of any person, to make and vary orders relating to access to a child who is the subject of a care order. *In our view there should be a presumption that the parents enjoy access rights unless the court otherwise decides. If a health board believes that it may be damaging to a child to see either parent while in care, or that access rights should be defined or limited in some way in the interests of the child, the onus should be on the board to convince the court of its case. The normal right of a parent to maintain contact with his or her child should not lapse by default, but only on the basis of a positive court ruling that the child's interests require suspension of parental contact.*

On the other hand, we are concerned that section 15(4) of the Bill may allow the health board too much discretion in relation to parental involvement and access. The sub-section is broad enough to allow a health board to return a child who is subject to a care order to the charge and control of his parent or parents. Such an action would not terminate the care order, and the health board could, if it felt it proper to do so, require the parent to return the child to its care and control. Nevertheless, *we think that there may be a danger, in a case where a court has formally determined that a child is at risk from a parent, in allowing the health board unilaterally, and without court approval, to return the child to his parents.*

Such a course should be possible only with the sanction of the court and on the basis of a positive ruling that it would not involve risk for the child.

BARRING ORDERS

Who may apply for a barring order?

2.29 A barring order is available only on the application of a spouse. A spouse may be unwilling to initiate barring proceedings to protect a sexually abused child. Yet it is not possible either for a third party, such as a health board, or for the child himself or herself (acting through a next friend) to

seek the protection of a barring order. A health board may therefore sometimes be obliged to seek an order committing a child to the care of a fit person, when an order requiring the abuser to leave the home may be more appropriate.

We have already considered this problem in the context of emergency procedures, and we have recommended that health boards be given power to seek *ex parte* barring and protection orders in an emergency on the same basis as justify the making of an emergency care order.⁶² *We now recommend that health boards be given power to seek a barring order as an alternative to a care order in non-emergency situations, and that the court be given power to grant a barring order as an alternative to a care order where the justice is satisfied that this is the most appropriate method of securing the protection of the child. Before making a barring order, the justice should be satisfied that the conditions have been met both (a) for the making of a care order, and (b) for the making of a barring order.*

Granting health boards the power to seek barring orders implies a radical broadening of the function of a barring order. At present a barring order constitutes a private law remedy available, if they wish to use it, to spouses. Our recommendations would bring the barring system into the public domain, giving health boards a power to initiate proceedings which may have serious effects on matrimonial relationships. In all cases the granting of a barring order will result in disruption of the marital relationship; in some, it may actually signal the beginning of its complete breakdown. The question must therefore be asked whether such a radical development is justifiable. We think that it is, provided that the District Court confines the grant of barring orders to appropriate cases. There undoubtedly do occur cases of parental abuse which may best be remedied by removing the abuser rather than the child. This may be particularly so where abuse of more than one child has occurred, or is likely to occur. If the non-abusing spouse is unavailable, unwilling or unable himself or herself to take the necessary measures to protect his or her children, it should be open to the health board to do it in his or her place. The court would, however, need to be satisfied that a barring order, in these circumstances, adequately protects the child or children at risk. If it is unlikely that the remaining parent will cooperate in keeping the barred parent out of the home, then a care order may be the safer alternative.

If neither spouse wishes the court to order one of them out of the family home, the question arises whether it is consistent with the constitutional guarantee of family privacy⁶³ that the court should be empowered to bar one of them. Arguably, this would be a case of intentional State interference with the matrimonial consortium of a type envisaged by Costello J in *Hosford v John Murphy and Sons Ltd.*⁶⁴ However, where the safety or welfare of a child is in question it seems probable that the constitutional duty to vindicate the right of the child by preventing further abuse would justify the grant of a barring order.

2.30 In relation to the absence of any capacity in the child himself or herself to seek a barring order, it may be recalled that in our *Report on Illegitimacy*,⁶⁵ we recommended that the right to seek a barring order should be extended to the child.⁶⁶ That recommendation was made in the context of proposals designed to ensure that the protection of the law would extend to all children regardless of their parents' marital status. We would like to revive this proposal in the context of sexual abuse. Once the principle is accepted that one parent may be barred for the purpose of protecting a child, there seems no good reason why that protection should be available only where the other parent invokes it. If, for example, a seventeen year old girl is being abused by her father, and if, for example, her mother finds herself unable to take legal action, it seems wrong that the girl should not be able independently to seek a barring order. It may be argued that this might lead to the disintegration of the family unit.

However, the continued abuse of the daughter or her forced retreat from the family home is a heavy price to pay for maintaining what in any case may be an unsatisfactory relationship between the mother and father.

Who may be barred?

2.31 At present only a spouse may be barred. A barring order is not available where a child is sexually abused by an unmarried parent, a step-parent, a cohabitee, a brother or a sister, an uncle or an aunt, or any other person who may be a member of the child's household. This in our view is an unnecessary limitation, and *we recommend that barring and protection orders be available in respect of any person who is or has been a member of the abused child's household. Indeed there seems to be no reason why such orders should not also be available against other persons who, while not members of the child's household, come into regular contact with the child.*

We are aware of several cases of sibling abuse. Where the sibling abuser is young, a barring order may not be appropriate, and care or even criminal proceedings (within the juvenile justice system) may have to be contemplated. But in the case of abuse by, for example, an adult brother, a barring order might well be appropriate. We are also aware of the significant problem of step-parent abuse. In Ireland, because of the absence of divorce, the "step-parent" will usually be a cohabitee rather than a spouse of the mother. Various studies⁶⁷ have found a significantly higher proportion of step-parents, relative to natural parents, who sexually abuse their spouse's children. It is generally step-fathers rather than step-mothers who are involved. For example, Dr David Finkelhor, head of the Family Violence Research Programme at the University of Hampshire, reported in 1980 the results of a study into sexual abuse of children which he made in respect of university and college under-graduates at six New England Educational Institutions. He stated that:

"One of the strongest risk factors, having a step-father, more than

doubled a child's vulnerability. Virtually half the girls with step-fathers were victimized. Moreover, this risk factor remained the strongest correlate of victimization, even when all other variables were statistically controlled. Apparently there is substance to the notion that step-fathers are more predatory towards their daughters than are fathers. In our study, a step-father was five times more likely to sexually victimize a daughter than was a natural father."⁶⁸

In view of such findings, the arguments for the extension of barring orders to step-parents, including unmarried persons cohabiting with a parent, seem unanswerable.

Other possible reforms

2.32 As we have seen, the court can attach to a barring order a non-molestation clause and such other conditions as it deems fit. These powers are extremely important in practice. An abusing parent may not confine his or her abusive behaviour to the place specified in the barring order. He or she may try to approach the child at school or in some other part of the neighbourhood which the child frequents. A non-molestation order may be directed against such unwelcome activity. Arguably the courts should be given an express statutory power to order the abuser to stay away from the home, neighbourhood, school or other place frequented by the child. It may also be appropriate in many cases to order the abuser to avoid communication, not only with the abused child and with other children in the home but also with any other children. We would welcome views as to whether these proposals are seen as necessary.

Finally, *it has been suggested to us that criminal courts should have power to make barring or protection orders, as appropriate, against persons found guilty of offences involving child sexual abuse. We think that there is merit in this suggestion.* If, for example, a court imposes a prison sentence on a father who has raped his daughter, it would seem not unreasonable to give the court a further power to ensure that, on release, the father is barred from any contact with his daughter.

FOOTNOTES TO CHAPTER 2

- 1 See generally US Department of Health, Education and Welfare, *Child Abuse and Neglect, State Reporting Laws*, DHHS Publication No.(OHDS) 80-30265. See also Fraser, *A Glance at the Past, a Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 Chi-Kent L Rev 641, at 649 (1978), Katz, Ambrosino, McGrath & Sawitsky, *Legal Research on Child Abuse and Neglect: Past and Future*, 11 Family L.Q. 151, at 157 (1977). See Weinstock & Weinstock, *Child Abuse Reporting Trends: An Unprecedented Threat to Confidentiality*, 33 J of Forensic Sciences 418, at 422 (1988), Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?* 24 J of Family L 149, at 164-165 (1985), Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 Harvard J of L & Public Policy 539, at 543 (1985). See also Mondale, *Child Symposium: Introductory Comments*, 54 Chi-Kent L Rev 635 (1978).
- 2 See generally the Child Sexual Abuse Task Force's *Report to the Government of Western Australia*, paras 4.69-4.79 (1987), the Law Reform Commission of Victoria's Report No 18, *Sexual Offences Against Children*, ch 4 (1988), paras 181 to 193, where they recommended there be a statutory duty on medical practitioners, nurses, psychologists, school, kindergarten and pre-school staff, social workers, welfare workers, probation and parole officers and child care workers to report to Community Services or the Police where they had reasonable grounds to believe that a sexual offence had been committed in relation to a child under 14 years who remains at risk. The maximum penalty proposed for failure to report is \$5,000. In contrast the Child Sexual Abuse Task Force of Western Australia, in their Report (para 4.79) stated that (with one dissentient) they did not recommend the introduction of mandatory reporting requirements.
- 3 In 1963, about 150,000 children came to the attention of the public authorities as cases involving suspected abuse or neglect. By 1972, the annual figure had risen to 610,000; and, in 1982, over 1.3 million children were reported.
- 4 Douglas J Besharov, *Child Protection: Past Progress, Present Problems and Future Directions*, 18 Family L Q 151, at 154 (1983).
- 5 Department of Health, *Statistics on Non-Accidental Injury to Children in 1985* (1984), and *Statistics on Child Abuse in 1987, Summary* (1986).
- 6 Market Research Bureau of Ireland, *Report on Child Sexual Abuse in Dublin. Pilot Survey Report*, March 1987.
- 7 Shambley *et al*, *Reporting Laws on Child Abuse*, 9 Australian Child Family Welfare No 1, p 3 (1984).
- 8 Law Reform Commission of Victoria's Discussion Paper No.12, *Sexual Offences Against Children*, para 109 (1988).
- 9 *Id*, para 97. See also the Child Sexual Abuse Task Force's *Report to the Government of Western Australia*, para 4.74, clause 3 (1987).
- 10 Cf the Child Sexual Abuse Task Force's *Report to the Government of Western Australia*, para 4.74, clause 4 (1987).
- 11 Cf *id*, clause 5.
- 12 Cf *id*, clause 7.
- 13 American Humane Association, *Highlight of Official Child Neglect and Abuse Reporting*, 1982, at p 18.
- 14 See generally Besharov, *op cit, supra*, fn 1.
- 15 See Weisberg & Wald, *Confidentiality Laws and State Efforts to Protect Abused or Neglected Children: The Need for Statutory Reforms*, 18 Family L Q 143, at 198 (1984).
- 16 See Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 18 Family L Q 141, at 167 (1986).
- 17 See Child Sexual Abuse Task Force, *Report to the Government of Western Australia*, para 4.77 (1987).
- 18 R Dingwall, J Eekelaar & T Murray, *The Protection of Children: State Intervention and Family Life*, 11 (1983).
- 19 US Department of Health and Human Services, *Study Findings: National Study of the Incidence and Severity of Child Abuse and Neglect*, DHHS Publication No.(OHDS) 81-30325 (1981).

- 20 Many of these were serious cases. See Besharov, *op cit, supra*. In 1.
- 21 See Bailey, *The Failure of Physicians to Report Child Abuse*, 40 U Toronto Fac of Law Rev 49 (1982).
- 22 See Meriwether, *op cit*, fn 16 *supra*.
- 23 M Paulsen, W Wadlington & J Goebel, *Domestic Relations: Cases and Materials*, 741 (2nd ed, 1974) (referring to reporting statutes for child abuse in general).
- 24 See Department of Health, *Guidelines*, Appendix A, para 1.3, which lists 8 sexual abuse indices, and states:
 "Although these symptoms are not necessarily indicative of child sexual abuse, if children exhibit extreme or combined symptoms from this list the possibility of sexual abuse should be considered and investigated".
 See also Sgroi *et al*, *Validation of Child Sexual Abuse*, Ch 2 of S Sgroi ed, *Handbook of Clinical Intervention in Child Sexual Abuse*, 41 (1982).
- 25 It is worth noting that, in the United States, "[s]ome early statutes contained no sanctions, basing their approach on the rationale that most persons would report anyway if they were adequately protected from possible legal actions against them": W Wadlington, *Cases and Other Materials on Domestic Relations*, 545 (1984). Similarly in Ontario, the reporting statute contains no sanction: Dickens, *Legal Responses to Child Abuse*, 12 Family LQ 1, at 14 (1978). See further Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 Family LQ 245, at 295-296 (1974).
- 26 As to qualified privilege generally, see M McDonald, *Irish Law of Defamation*, ch 8 (1987).
- 27 Cf B McMahon & W Binchy, *Irish Law of Torts*, ch 19 (1981).
- 28 Eg the Fire Services Act 1981, section 36.
- 29 Katz, Ambrosino & McGrath & Sawitsky, *Legal Research on Child Abuse and Neglect: Past and Future*, 11 Family LQ 151, at 162 (1977).
- 30 Cf, eg California's *Penal Code*, Art 2.5, *Child Abuse Reporting*, section 11167.
- 31 Cf *id*, section 11168.
- 32 Katz *et al*, *op cit, supra*, fn 29.
- 33 P 112 of the Report.
- 34 At Appendix A, para 1.3.
- 35 *Id*.
- 36 Department of Health, Revised Edition - July, 1987.
- 37 *Guidelines*, para. 3.2.
- 38 *Id*, paras 4.3 and 4.4.
- 39 *Id*, para 6.2.
- 40 Ark Stat Ann s42-813(b) (1977).
- 41 It is relevant to observe that this would place the health boards under a duty to investigate, while the Gardai have no corresponding statutory duty to investigate reports. This is perhaps unfortunate, particularly where reports relate to alleged offences against the person and the victim remains at risk of further harm.
- 42 See, for example, England's *Children and Young Persons Act 1969*, s 2(1):
 "If a local authority receives information suggesting that there are grounds for bringing care proceedings in respect of a child or young person who resides or is found in their area, it shall be the duty of the authority to cause enquiries to be made into the case unless they are satisfied that such enquiries are unnecessary."
- 43 *Guidelines*, para 6.2.7.
- 44 *Id*, para 4.17.
- 45 The *Report of the Inquiry into Child Abuse in Cleveland 1987* (henceforth referred to as the *Cleveland Report*) recommends (Part 3, para 4e) that parents should be invited to attend for all or part of conferences unless, in the view of the Chairman of the Conference, their presence will preclude a full and proper consideration of the child's interests.
- 46 A similar recommendation is made in the *Cleveland Report*, Part 3, para 4g.
- 47 *Guidelines*, para 5.1.
- 48 *Id*.
- 49 *Id*, para 5.3.
- 50 Section 10.
- 51 Section 11.

- 52 Sections 10(1)(b) and 11(1).
 53 Cf *The State (D.C.) v Midland Health Board*, unreported, High Ct (Keane J), judgment
 delivered July 31st 1986.
 54 Cf *Cleveland Report*, para 16.15, where an eight day initial order extendable to a maximum
 of fifteen days is advocated in line with the proposal in the British Government White
 Paper, the *Law on Child Care and Family Services*, Cmnd 62198. The proposal in the
 White Paper that an extension should be granted only in "exceptional" circumstances is,
 however, rejected.
 55 *Cleveland Report*, especially paras 10.6 to 10.9, 16.2 and 16.14.
 56 *Id*, para 16.12.
 57 *Supra*, pp 32-33.
 58 See *supra*, pp 39fi.
 59 Article 42.5 states: "In exceptional cases, where the parents for physical or moral reasons
 fail in their duty towards their children, the State as guardian of the common good, by
 appropriate means shall endeavour to supply the place of the parents, but always with due
 regard for the natural and imprescriptible rights of the child".
 60 *KC and AC v An Bord Uchuala*, [1985] ILRM 302, at 317 (*per* Finlay CJ).
 61 The Bill defines a child as a person under the age of 18. The possibility that a child may
 have a constitutionally protected right to self-determination when he reaches a certain
 level of maturity and understanding cannot be ignored. This would support the case for
 giving older children more standing in care and custody proceedings relative to them.
 See *The People (AG) v Edge*, [1942] IR 115, and Duncan, *The Child, the Parent and the
 State: The Balance of Power*, chapter 2 in W Duncan ed, *Law and Social Policy* (1987).
 62 Cf *supra*, p 42.
 63 See *McGee v AG*, [197] IR 284.
 64 [1988] ILRM 300.
 65 LRC 4-1982.
 66 *Id*, para 393.
 67 See eg Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual
 Abuse of Female Children*, 7 *Child Abuse & Neglect* at 140 (1983), Mrazek, Lynch &
 Bentovim, *Sexual Abuse of Children in the United Kingdom*, 7 *Child Abuse & Neglect* 147,
 at 151 (1983), Cantwell, *Sexual Abuse of Children in Denver, 1979: Reviewed with
 Implications for Paediatric Intervention and Possible Prevention*, 5 *Child Abuse & Neglect*
 75 (1981).
 68 Finkelhor, *Risk Factors in the Sexual Victimization of Children*, 4 *Child Abuse & Neglect*
 265, at 269 (1980).

Part II The Criminal Law

CHAPTER 3: OFFENCES: (1) THE PRESENT LAW

3.01 In this chapter, we summarise the criminal law which applies at present to sexual offences affecting the young. These offences can be divided into two categories. In the first, the essence of the offence is the commission of an act of a sexual nature without the consent of the young person affected. These are referred to as "non-consensual offences". In the second, the essence of the offence consists in the commission of such a sexual act where the young person concerned has consented. These are referred to as "consensual offences".

A : Non-Consensual Offences Generally**(i) Offences where there is no consent**

3.02 Where a child is alleged to have been sexually abused, the offences available for a prosecution of the alleged accused are exactly the same as those in the case of adults: i.e.

Females

- (1) Rape¹
- (2) Buggery²
- (3) Indecent Assault³
- (4) Indecent Exposure⁴

Males

- (1) Buggery⁵
- (2) Indecent Assault⁶
- (3) Indecent Exposure

In two of these cases - buggery and indecent assault - the offence can also be committed where there is consent.

(ii) Offences where the victim has consented but the consent is vitiated

Where consent to sexual intercourse or indecent actions is procured by fraud or where the activity in question takes place while the victim is insensible through drink or is unconscious for any other reason, consent is vitiated and the crime of rape or indecent assault is committed. In addition, a group of statutory offences is available where carnal knowledge is procured by threat or intimidation, fraud, drugs or alcohol.⁷ Prosecutions for these offences are virtually unheard of as the circumstances either warrant a prosecution for rape, buggery or indecent assault or no prosecution at all.

B : Consensual Offences Generally

3.03 Notwithstanding the fact that consent may have been given and there has been no threat or intimidation, the following sexual acts are criminal:

1. Incest;⁸
2. Buggery;
3. Gross indecency with a male;⁹
4. Carnal knowledge of a girl under the age of 17 years;¹⁰
5. Any physical contact of a sexual nature with a person, male or female, under the age of 15 years which would constitute an indecent assault were there no consent.¹¹

3.04 The offences of buggery and gross indecency can be committed by both parties once they are over the age of 7 years. Incest can be committed by both parties once the female is aged 17 years or over.

Consensual sexual activity between females over the age of 15 years is not criminal.

C : Indecent Assault¹²

3.05 An indecent assault is an assault and battery accompanied by indecency. Any consensual sexual contact with a person over 14 years, other than anal penetration, gross indecency between males or sexual intercourse with a 15 or 16 year old girl, is not criminal. Much conduct referred to as child sexual abuse does not constitute an assault but rather takes the form of the performance or procuring of an indecent action as a result of the abuse of authority, or bribery, or the giving of a gift. An indecent motive will not render indecent an assault otherwise not so.

3.06 A rape of or indecent assault on an adult is an abuse of that adult. The term "abuse" is used in the context of sexual offences with children to denote in particular the element of the old taking advantage of the trust, obedience, respect for authority and propensity to be inarticulate of the young for the purpose of sexual gratification. A rape of a young person or an indecent assault on such person is no less a rape or indecent assault than when the offence is committed on an adult. Rape or indecent assault cannot

be committed where there is consent. Where consent is forthcoming because of respect for authority, trust, or immaturity that consent can, in a sense, be said to be irrelevant. For this reason statutory "consensual" offences have been created for circumstances where consent, however immature or uninformed, is present.

D : Indecent Exposure

3.07 Indecent exposure is an offence at common law and also under section 4 of the *Vagrancy Act, 1824* and section 18 of the *Criminal Law Amendment Act, 1935*. It is essentially a public nuisance offence and usually consists of exposure of the penis to a female. The offence is colloquially referred to as "flashing" and is usually directed towards young girls. Although it is not an offence involving contact or battery, it can be as profoundly upsetting for its young victims as an assault. It would not encompass exposure in private e.g. by a father to his daughter. The offence is discussed in detail in the Commission's *Report on Vagrancy*, (LRC 11-1985), chapter 8.

E : Incest

3.08 Before 1908, incest was not a specific criminal offence. Incestuous intercourse was criminal to the extent that it offended against the general provisions relating to rape, indecent assault and the protection of minors, or the law relating to public morality.¹³

Section 1 of the *Punishment of Incest Act 1908*¹⁴ made it a criminal offence for a male to have:

"carnal knowledge of a female person who is to his knowledge his grand-daughter, daughter, sister, or mother".

The consent of the female is immaterial.¹⁵

The Act gives the court power to divest the offender "of all authority over such female",¹⁶ and to remove him from the position of being her guardian.

Section 2 of the Act (as amended) provides that:

"[a]ny female person of or above the age of 17 years who with consent permits her grandfather, father, brother or son to have carnal knowledge of her (knowing [the relationship])"

is guilty of an offence.¹⁷

Section 3 of the Act provides that "brother" and "sister" are to include half-brother and half-sister, whether the relationship is traced through marriage or otherwise. Section 5 provides that proceedings are in camera.

3.09 Where the incest is consensual between two adults,¹⁸ and only one is charged, the other may be treated as an accomplice. In such a case, as was stated by Chief Justice Kennedy, in *AG v O'Connor (No 2)*¹⁹:

"there is a fixed rule - whether a rule of law or of legal practice that a judge is bound to warn the jury that it is not safe to convict on the uncorroborated evidence of an accomplice [H]e may, [however,] tell the jury that, notwithstanding there being no corroboration, if they believe the evidence of the alleged accomplice, they are at liberty to convict only if they have received the proper instruction to which I have referred, warning them to be very careful, and that, generally speaking, such evidence is dangerous."

F : Competence and Compellability of Spouses

3.10 There are cases involving child sexual abuse in which one parent may be in a position to give material evidence implicating the other parent. This may indeed be critical in cases where the only other evidence is that of the child himself or herself and it may be, at the very least, dangerous for the court to convict in the absence of corroboration. In the case of a married couple, the question arises as to whether in such circumstances one spouse is a competent and compellable witness against the other.

At common law, a spouse was neither a competent nor a compellable witness against the other spouse in criminal proceedings except where the charge was one involving assault, battery or other corporal violence by one spouse against the other, in which case he or she was competent but not compellable. The *Criminal Justice (Evidence) Act 1924* provided that a spouse could be a competent witness for the prosecution against the other spouse where the prosecution was for an offence listed in the Schedule to that Act. But although the offences of rape, abduction and indecent assault were scheduled under the 1924 Act, the offences of incest and buggery were not. In our *Report on Competence and Compellability of Spouses as Witnesses*,²⁰ we recommended that spouses should be competent witnesses against each other in all criminal proceedings, but should not be compellable. None of the recommendations in that Report have been implemented, but there has been an important development in the law in the form of the decision of the Court of Criminal Appeal in *D.P.P. v T*.²¹ The Court held that in a case where one spouse was charged with a sexual offence against his or her child, the common law rule which precluded the other spouse from testifying against the spouse so charged had not survived the enactment of the Constitution. Delivering the judgment of the court, Walsh J said:

"It would completely frustrate the obligation placed upon the State to protect the family if the very person upon whom the obligation is said to rest should be prevented or inhibited from testifying in a prosecution against the offending spouse".¹⁸

3.11 In that case, the question as to whether the spouse in such circumstances would also be compellable did not arise. It is stated in the judgment, however, to be a logical consequence of the court's decision that the spouse in such circumstances must also be compellable and that the decision of the House of Lords to a different effect in *Hoskyn v The Commissioner of the Police for the Metropolis*²² would not be applicable in this jurisdiction. However, it would seem that the observations of the court on this aspect of the law must be regarded as *obiter*. The decision also leaves open the question as to whether a spouse would be competent and compellable in a case where the other spouse was charged with a sexual offence against a child from outside the family.

FOOTNOTES TO CHAPTER 3

- 1 A common law offence defined in the *Criminal Law (Rape) Act, 1981*, section 2.
- 2 *Offences Against the Person Act, 1861*, section 61.
- 3 A common law offence for which a penalty of 10 years is provided by the *Criminal Law (Rape) Act, 1981*, section 10.
- 4 See p 61 *infra*.
- 5 *Offences Against the Person Act, 1861*, section 61.
- 6 *Id.*, section 62.
- 7 *Criminal Law Amendment Act 1885*, section 3, as amended by the *Criminal Law Amendment Act, 1935*, section 8.
- 8 *Punishment of Incest Act, 1908*.
- 9 Section 11, *Criminal Law Amendment Act, 1885*.
- 10 Sections 1 and 2 of the *Criminal Law Amendment Act, 1935*. If the girl is under 15 the maximum penalty is penal servitude for life. If she is aged between 15 and 17, the maximum penalty is five years penal servitude.
- 11 Section 14 of the *Criminal Law Amendment Act, 1935* provides that consent is no defence to a charge of indecent assault on a child under 15.
- 12 See *DPP v Rogers*, [1953] 2 All ER 644, *Beal v Kelley*, [1951] 2 All ER 763, *R v Sutton*, [1977] 3 All ER 476, *R v McCormick*, [1969] 3 All ER 371, *R v George*, [1956] Crim L R 52, *R v Court*, 84 Cr App Rep 210 (1956).
- 13 But see Cleveland, *Indictments for Adultery and Incest Before 1650*, 29 LQ Rev 57, at 59 (1913), who refers to a record of an indictment for incest in 1584 probably on this general ground.
- 14 8 Edw 7, c 45, section 1(1).
- 15 *Id.*, section 1(2). Where the girl is under the age of 15, the offence is punishable by penal servitude for life: *id.*, section 1(1), as amended by the *Criminal Law Amendment Act 1935*, section 12.
- 16 *Id.*, section 1(4).
- 17 The section was amended by the *Criminal Law Amendment Act, 1935*, section 12, which raised the age from 16 to 17 years.
- 18 The precise effect of the *Age of Majority Act 1985* on this matter has yet to be determined. By virtue of section 2 of that Act, a person attains full age on reaching 18 or the date of marriage, if earlier. Thus a 16 year old child (or even in theory at least, one younger) could have reached full age. There seems no reason why this should necessarily affect the policy of the rule discussed in *AG v O'Connor (No 2)*, *infra*.
- 19 [1936] Ir Jur Rep 37, at 38 (Ct Crim App) (emphasis omitted).
- 20 LRC 13 - 1985.
- 21 Unreported, Court of Criminal Appeal, 27th July 1988.
- 22 At page 40.
- 23 [1974] AC 474.

CHAPTER 4: OFFENCES : (2) PROPOSALS FOR REFORM**A : General Considerations**

4.01 At the outset, we gave serious consideration to the creation of a distinct code of the sexual offences which could be committed with children or young persons. However, our researches disclosed that, apart from clarifying and broadening to some extent the range of sexual activity to be captured by the criminal law, no particular advantage was to be derived from changing existing definitions and providing a complete new range of offences. If there are too few prosecutions for child abuse at the moment, this should not be attributed to an absence of appropriate offences. Nevertheless, we are satisfied that the law can be improved in certain respects and in this chapter, provisional proposals are made for reforms in this area. Even in making such tentative proposals, we would prefer not to recommend a change where there is no problem of which we are aware under the existing law. If, as a result of consultation, it comes to our notice that any such problem exists, we will naturally address it at that stage.

4.02 It should also be observed that the Commission has already made proposals for reform of the law relating to sexual offences in its *Report on Rape*.¹ Most of these recommendations are reproduced in the *Criminal Law (Rape) (Amendment) Bill 1988*. In the present context, it is relevant to note that, if the Bill becomes law in its present form, three of the Commission's recommendations will not be implemented:

- (1) the scope of the definition of rape and therefore of consent will remain as it is;
- (2) sexual assault will not specifically become "aggravated" because of the abuse of authority;

- (3) intimidation will not be specifically highlighted as negating consent.

4.03 The tenor of the *Report on Rape* was in favour of gender neutral sexual offences and this has been reproduced in the Bill. We will continue the gender neutral approach in this Paper in so far as we can.

B. Non-consensual Offences

4.04 In the area of non-consensual offences, *there is clearly a need for an offence of procuring an act of indecency with a young person*. A child may be compelled as a result of a threat, or of having been otherwise put in fear, to perform an indecent act with an adult, e.g. fellatio, which would not strictly speaking constitute an indecent assault by that adult. At present, such acts have to be charged as assaults or not at all. This class of activity has a "consensual dimension" also and at the moment the similar offence of gross indecency under s.11 of the *Criminal Law Amendment Act, 1885* may be charged against males only.

In England, after a recommendation from the Criminal Law Revision Committee, the *Indecency with Children Act, 1960* was passed. Section 1(1) of that Act provides:-

"Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable"

There should be a provision proscribing such conduct in Irish law. We will return to matters of age and definition.

C. Consensual Offences

4.05 In the area of consensual offences, there would doubtless be general agreement that the objective of the existing criminal law, i.e. to protect the young against premature and potentially damaging sexual experience where the consent of at least one of the participants can be regarded as immature and uninformed, should be maintained. The present law is, however, also arguably in need of reform on a number of fronts.

(a) It can be regarded as encompassing far more than merely the prevention of the abuse of authority, since it extends to consensual sexual intercourse (between teenagers, for example) where both the participants, and not merely the female, can be regarded as immature.

(b) The age limits by reference to which certain offences are defined or penalties fixed appear to be arbitrary and merit careful re-examination.

(c) The absence of any defence to any of the relevant offences of reasonable mistake as to the age of the girl is capable of producing serious injustice, particularly where the age of the girl is close to the age of consent.

(d) The law can be said to be unfairly discriminatory between the sexes, since only males can, for example, be convicted of gross indecency or of unlawful carnal knowledge under s2 of the *Criminal Law Amendment Act 1935* where the girl is over 15 but under 17.

(e) The law addresses itself primarily to consensual heterosexual activity, since, of course, all homosexual activity is criminal, except for females where both have attained the age of 15 years.

4.06 Before examining these substantive objections, certain questions of terminology should be addressed. As we have seen, the law makes it an offence for a male to have "carnal knowledge" of a girl under the age of 17 with or without her consent.

Under s63 of the *Offences Against the Person Act 1861*, the somewhat old-fashioned expression "carnal knowledge" refers to vaginal sexual intercourse which is regarded as complete on proof of penetration only. Section 2(1) of the *Criminal Law (Rape) Act 1981*, in its definition of rape, uses the expression "unlawful sexual intercourse", which again is defined by reference to s63 of the 1861 Act. It would seem desirable to maintain consistency of definition and, accordingly, we would recommend the use of the expression "sexual intercourse" in the legislation we are proposing, defined in the same manner as in the 1981 Act.

4.07 We must then consider how sexual conduct other than vaginal sexual intercourse should be defined for the purposes of the proposed legislation.

Sexual activity other than vaginal sexual intercourse is encompassed by s 14 of the 1935 Act which provides that consent cannot be a defence to a charge of indecent assault on a person under the age of 15 years. From the point of view of legal clarity and consistency, it is probably unhelpful to juxtapose assault and consent in this manner: if consent is truly vitiated by age, it was unnecessary to create the offence of "unlawful carnal knowledge" in s1. Writing about the similar legislation in England, the Criminal Law Revision Committee said:

"We all consider that the law on this subject should be reformulated so as to deal in a more realistic way with acts to which a girl under 16 has in fact consented but to which the present law by a legal fiction presumes she has not."²

However, the difficulties of replacing the present offence of "indecent assault with consent" should not be underestimated. In our *Report on Rape*, we

recommended that the offence of "indecent assault" be replaced by one of "sexual assault". That is a practical solution for cases in which there is an element of genuine assault, but for the type of offence now under consideration, where consent by definition is irrelevant, some other expression would be desirable. To render unlawful "sexual conduct" below a certain age presents difficulties since much of what could be described as "sexual conduct" would be quite harmless and probably necessary for normal development. A range of unlawful sexual conduct might have to be specified, and while it might be preferred to avoid this approach, it could be done, if necessary: as, for example, by proscribing bodily contact with the breasts, buttocks, anus, or sexual organs of another person or masturbation in the presence of another.

The alternative would seem to be to retain the expressions "indecent" or "gross indecency" without the element of assault. Several objections can be advanced against this approach. The activities are to be proscribed not because they are indecent in themselves but because participation in them at too young an age is perceived to be premature and ill-informed and may be obtained by exploitation of a position of authority or trust. The offence of gross indecency provided in s11 of the *Criminal Law Amendment Act, 1885* is confined to males only, and the absence of a clear definition of indecency has given rise to difficulty in at least one recent prosecution.

The best approach may be to create and define a new offence in general terms and to provide that, without prejudice to the generality of the definition, it would include the specific activities listed above.

At paragraph 2.11 above, we provisionally recommend the adoption of the Western Australian Task Force's definition of child sexual abuse for the purposes of civil care proceedings. It would be highly desirable to maintain, where possible, consistency of definition between the civil and the criminal law in this area. One could, for example, use the Western Australian terminology and create an offence of sexual "exploitation", defining it in general terms as the doing or procuring of an act other than sexual intercourse or anal penile penetration with a person of a specified age for the purpose of sexual gratification. We welcome views.

4.08 We now come to the general criticisms that may be advanced of the present law in relation to consensual heterosexual offences, i.e. principally the offences of unlawful "carnal knowledge" and "indecent assault with consent". It should be said at the outset, however, that the Commission is not aware of any demand to change the essence of these offences. It is generally accepted that the law should seek to ensure that young people do not have their childhood "stolen" from them by unwanted pregnancy or premature participation in a complete sexual relationship.

Notwithstanding the absence of a vocal demand for change, an argument may be advanced that the present law relating to carnal knowledge is unjust. The Comment on s213.1 of the Model Penal Code of the American Law Institute

says:

"Punishing every instance of intercourse with a girl in her late adolescence is plainly unwise; it raises the spectre of imposition of felony sanctions on a boy of 18 who engages in sexual intercourse with a willing and socially mature girl of like age. This result reflects an extravagant use of the penal law to bolster community norms about consensual behaviour, and it ignores social reality in assuming that sex among teenagers is necessarily a deviation from prevailing standards of conduct. Moreover, imposition of sanctions for statutory rape in these circumstances contains no small element of unfairness, for it is difficult to see why the male should be regarded as the exclusive villain for behaviour voluntarily undertaken by both parties. Indeed, the literal reach of some older statutes extends to the youth who is actually seduced into sexual relations by an underage prostitute."³

4.09 It is generally accepted that the carnal knowledge offences were created to protect young girls from men and from themselves. An extract from a judgment in a Virginia case perhaps typifies the rather quaint thinking which lay behind a typical "statutory rape" offence in the 1930s:

"The purpose of the [statutory rape] statute is to prohibit a girl, while passing through the years of adolescence, from voluntarily becoming the author of her own shame, and set her apart from the lusts of men. The effect of the statute is to render her in law incapable of giving her consent ... and to punish the man for gratifying his passion with one who in law is incapable of becoming the medium through which the lecherous desire is appeased."⁴

Most cases in Ireland concern a boy and girl of roughly the same age. The girl becomes pregnant, the boy or his family fail to reach an amicable settlement with the girl's family and the girl's family then report the matter to the Gardai. This is made all the more easy for the girl's family because of the fact that only the boy commits an offence in these circumstances.

4.10 The primary object of the law in this area should be to prevent the abuse of authority and trust, not to render criminal the exploratory sexual activities of young persons of the same age. Ideally, the law should confine itself to sexual activity by persons in authority, inside or outside the family, with children, or perhaps by any person a specified number of years older than the victim. However, while it would seem possible to provide a workable definition of "persons in authority" for this purpose, seeking to establish differences in age which would render consensual sexual activity unlawful presents far greater problems in practice. We also think that it would be generally regarded as unacceptable that children under a certain age should be exposed to risks of pregnancy and/or disease even where that is the result of consensual sexual activity with people of their own age.

4.11 We start from the premise that, under a specified age, all sexual activity with children, whether it consists of sexual intercourse, anal penile penetration or some lesser form of sexual conduct, should be unlawful. It is beyond argument that sexual intercourse with a girl aged, say, 7 or sexual activity falling short of sexual intercourse with a girl of that age should always be unlawful. Accordingly, the first matter to be addressed is the age below which all such sexual activity should be unlawful.

At present, as we have seen, it is an offence to have sexual intercourse with a girl under the age of 17. Where the girl is under the age of 15 years, the maximum available penalty is penal servitude for life. Where the girl is between 15 and 17 years of age the maximum available penalty is 5 years penal servitude. It will also be recalled that in the case of a girl under 15, it is no defence to a charge of "indecent assault" that she consented and accordingly all sexual activity with a girl of that age is prohibited".

Under our law, accordingly the age of consent is at present 17. In some other countries with similar legal systems and broadly comparable social conditions, it is lower. Thus, in the United Kingdom, it is 16,⁵ as it is in the Model Penal Code in the United States.⁶ The Commission has no particular competence to advise in this area and we think it is probably sufficient to point out the disparity between this and other jurisdictions and to draw the attention of those concerned to the obvious fact that much has changed since the age was last fixed by the Oireachtas in 1935. The law, however, does not appear to be presenting any particular problems in practice in this area.

4.12 The age at which the penalties should become more severe is more problematical. Under the present law, it is 15. We cannot say what reasons prompted the Oireachtas to fix this age level in 1935: it had been fixed at 13 by the *Criminal Law Amendment Act 1885* but was increased to 15 in 1935 when the upper age limit was increased to 17.

Most people would agree that there is a major qualitative difference between an offence which consists in a man having sexual intercourse with a girl aged 7 and with a girl just short of her 15th birthday. It is not simply that the first offence is inherently and significantly more repellant than the second. The question of consent is crucial in this context: the innocent 7 year old does not consent in any meaningful sense, since she lacks a fundamental appreciation of what the act is all about. The 14 year old, in the typical case, consents in a meaningful sense, but the law denies efficacy to her consent for reasons of policy. If this analysis is correct, the law should fix the dividing line for determining the gravity of the offence at the median age of puberty, as it did prior to 1935. Thus, in the United Kingdom, the age is fixed at 13. (The Criminal Law Revision Committee in their 15th Report on *Sexual Offences* considered a proposal to lower it to 12, as more accurately reflecting the age of puberty, but rejected it on the ground that girls at the age of 12 normally began to attend senior school and hence were at a vulnerable stage in their lives since there was a risk that they would imitate the behaviour,

including the sexual ways, of older girls).⁷ The U.S. Penal Code fixed the age at 10: below that age sexual intercourse is treated as rape.⁸

Since the onset of puberty cannot be definitively fixed by reference to a particular age, any age limit must be a somewhat crude measure of criminal liability. The Model Penal Code rejects 12 - normally, it would seem, accepted as the median age for the onset of puberty - on the ground that it would be illogical to set the age limits so high that half the individuals in the class defined would fall outside the rationale for its definition.

4.13 Although age limits in this area are necessarily arbitrary, the age in this country of 15 on one view seems particularly difficult to justify. It cannot, on any view, be related to the onset of puberty and it exposes, theoretically at least, the 18 year old boy to penal servitude for life if he has intercourse with a girl nearing her 15th birthday. This, of course, is the position although the girl may have been the instigator of the intercourse and will escape scot free. Moreover, as we shall see in a moment, under our existing law it is no defence for the boy to plead in such circumstances that he genuinely believed the girl to be older than she was and this even in circumstances where a jury would be entitled to conclude that he had reasonable grounds for his belief and may have been misled by her. No doubt, prosecutorial discretion and flexible sentencing can, and probably does, avoid the grosser injustices which such a law could produce: nonetheless, its retention on the statute book in this form is at least questionable. At the same time, we recognise the practical problems involved in actually lowering an age limit of this nature, at a time when many parents are understandably concerned by the perils to which children are exposed to-day.

The difficulty, of course, in having two "age bands" for offences of this nature is that there is bound to be a sharp "lurch" from one range of penalties to another, no matter where the age is fixed. Thus, the concern that might legitimately be voiced at exposing a young person to a sentence of penal servitude for life for intercourse at the upper end of the scale, just short of 15, must be balanced by the concern that would equally be felt by providing a maximum sentence of 5 years penal servitude for a mature man who had intercourse with a girl of 13. Accordingly, if it were thought desirable to fix the age for the more serious offence at a more realistic and appropriate level, such as 13, one would also have to consider the desirability of increasing the maximum penalty for the lesser offence to, say, 10 years.

We do not know whether the age limits fixed by the 1935 Act are giving rise to problems in practice. We welcome views on the matter generally and we would be particularly concerned to ascertain whether there is a justification for the age limit of 15 which may have escaped us. We would also be concerned to know how the law is operating in practice. It may be that the queries we have raised as to the appropriateness of the age limits are academic. There are, as we have said, sound pragmatic reasons for leaving them unaltered.

4.14 Surprisingly enough, the age limit for sexual conduct with young girls falling short of vaginal sexual intercourse, i.e.15, is *lower* than in the United Kingdom, where it is the same as for unlawful carnal knowledge, i.e.16. This is another, and even more puzzling, consequence of the 1935 legislation, the general policy of which was, of course, to *increase* the age of consent for heterosexual intercourse.⁹

While no one would wish to criminalize teenage "petting" between the ages of 15 and 17, it might seem unjustifiable to allow all sexual conduct short of vaginal sexual intercourse between older men and girls of this age. As we have had occasion to point out, prosecutions resulting from teenage sex only arise in practice when the girl becomes pregnant, so that the criminalisation of teenage "petting" is more theoretical than real. It might be considered desirable, in these circumstances, having regard to the need to protect girls of this age from older men, to make sexual activity other than sexual intercourse criminal where there is a significant age difference between the under-age girl and the older man, but no relationship based on authority or care. The contrary argument would be that the present age limit is not presenting any problems in practice and that the risk arising from such conduct between older men and young girls will be met by our proposal that it would be an offence for a person in a position of authority to engage in such acts. Again we welcome views.

4.15 The next question that arises is as to whether the law should provide a defence to charges of this nature where the man is genuinely mistaken as to the age of the girl. In the case of the carnal knowledge offences, the position at common law was that a man who mistakenly believed, even on reasonable grounds, that the girl was over the relevant age, had no defence.¹⁰ The proviso to section 5 of the *Criminal Law Amendment Act 1885*, however, allowed a defence where the man had reasonable cause to believe that the girl was above the age of 16 (then, as we have seen the age of consent in Ireland). This proviso was removed, without any debate, in the 1935 Act. In England, in 1922, an attempt had been made to remove it which resulted in a legislative compromise known as "the young man's defence". This provides that a man charged with such an offence has a defence if he is under 24 and proves that he believed on reasonable grounds that the girl was aged 16 or over, provided that he had not been previously charged with a "like" offence.

The dilemma posed where a court fixes a necessarily arbitrary age limit of this nature has led to much discussion among commentators. Generally speaking, in the case of serious crime, our law requires proof of *mens rea* which, for the purposes of this discussion, can be crudely and somewhat inaccurately described as an *intention* to commit the acts which make up the offence with which a person is charged. Under the present law, the offences we are considering can be committed by a person who has no intention of committing them. That, at first sight, would appear to be a serious defect in the law. It has been pointed out, however, that one should perhaps distinguish in this context between cases in which the accused simply does not

address his mind in any way to the question of the girl's age and those in which he does so but is mistaken, on reasonable grounds, as to her age. It is obviously the second category of cases that gives rise to concern.

In England, the Criminal Law Revision Committee have recommended the abolition of "the young man's defence" and, given that it was clearly a flawed and unsatisfactory compromise in the first place, it has little to commend it. Consistently with our view that, while age limits for the victims are unavoidable, age limits for the accused present major and avoidable difficulties, we do not recommend its adoption. The Criminal Law Revision Committee have proposed in its place a general defence of mistake as to the girl's age, not dependant on the age of the accused.¹¹

4.16 The Model Code provides that

"Whenever in this article the criminality of conduct depends on a child being below the age of 10, it is no defence that the actor did not know the child's age, or reasonably believed the child to be older than 10. When criminality depends on the child being below a critical age other than 10, it is a defence for the actor to prove by a preponderance of the evidence that he reasonably believed the child to be above the critical age".¹²

The sharp distinction drawn here - confining absolute liability to the more serious crime - has much to commend it. However, if the age were to be fixed higher - e.g. at 13 or upwards - the reasons for making such a distinction are less coercive. Thus, under the English existing and proposed law, the defence is available throughout the spectrum, for the obvious reason that in the lower age reaches it would be next to impossible for the accused plausibly to claim that he mistakenly thought the girl to be over 16. A passage in the commentary on the Model Penal Code is nonetheless of considerable interest:

"As one commentator expressed the common law notion, exculpation for mistake 'rests ultimately on the defendant being able to say that he has observed the community ethic...' The actor who is mistaken as to the age of a child under 10 can make no such claim, for no credible error of perception would be sufficient to re-characterise a child of such tender years as an appropriate subject of sexual gratification.

Of course, it is debatable whether the rule of strict liability is satisfactory even in this circumstance. Wherever the line is drawn between licit and illicit behaviour, the actor who reasonably believes in the existence of facts that, if true, would render his conduct non-criminal has substantial claim for exculpation. Even if society chooses to set the age of consent very low, the actor who reasonably believes that his partner is above that age lacks culpability with respect to the factor deemed critical to liability. Punishing him anyway simply because his intended conduct would have been immoral under the facts as he

supposed them to be postulates a relation between criminality and immorality that is inaccurate on both descriptive and normative grounds. The penal law does not try to enforce all aspects of community morality, and any thorough-going attempt to do so would extend the prospect of criminal sanctions far into the sphere of individual liberty and create a regime too demanding for all save the best among us.

But whatever the merits of strict liability with respect to an age of 10 or 12, the traditional disallowance of mistake in the law of statutory rape has been rendered intolerable by legislative extension of the age of consent to 16, 17, or 18. A girl of 15 may appear to be 18 or even older. A man who engages in consensual intercourse in the reasonable belief that his partner has reached her 18th birthday evidences no abnormality, no willingness to take advantage of immaturity, no propensity to corruption of minors. In short, he has demonstrated neither intent nor inclination to violate any of the interests that the law of statutory rape seeks to protect. At most, he has disregarded religious precept or social convention. In terms of mental culpability, his conduct is indistinguishable from that of any other person who engages in fornication".¹³

This is an impressive argument which requires careful consideration. It could, however, be said that the same man who engages in consensual intercourse with young girls without even enquiring as to their age is at least displaying recklessness if, basing his judgment on purely physical considerations, he takes the risk that they may be under-age. Society's prohibition is based on considerations of emotional rather than of physical maturity. To change the present absolute offence and provide a defence based on physical appearance would turn the complainant into an exhibit as well as a witness and reduce the protection afforded at present to the more physically mature complainant by making a prosecution in respect of her exploitation "defendable" as distinct from a prosecution in respect of exploitation of a girl who "looks her age". It could, no doubt, be urged that sexual offences with young persons belong to so serious a category of crime that the legislature is fully justified in making them absolute offences. It should also be said that we are not aware that the present law has in practice produced any cases of serious injustice. We await views, however, as to whether there is indeed room for an improvement in the law.

4.17 If the law were changed, a further question would arise as to how the *mens rea* is to be defined. We have considered similar problems in our Consultation and Discussion Papers on *Receiving Stolen Property*, *Rape* and *Malicious Damage*. Again, we have to consider whether a defence of this nature should be subjective or objective. A subjective defence would result in an acquittal where the accused, in the opinion of the judge or jury, genuinely believed the girl to be over the requisite age, although there were no reasonable grounds for that belief. This is the position recommended by

the Criminal Law Revision Committee and it will be noted at once that it closely parallels the approach to a similar problem in rape favoured by a majority of the House of Lords in *Morgan*¹⁴. In the case of rape, the issue is, of course, different, namely, as to whether the woman was consenting to the intercourse. It will be recalled that the majority opinion in the House of Lords was that, where the accused genuinely believed that the woman was consenting, the fact that there were no reasonable grounds for that belief was irrelevant. An objective defence would only allow of an acquittal where the accused genuinely believed that the girl was over the relevant age and there were reasonable grounds on which he could hold that belief. It will be recalled that the *Criminal Law (Rape) Act 1981* in this jurisdiction provided a compromise between the subjective and objective positions: the accused is entitled to be acquitted if he genuinely believed the woman was consenting, but in arriving at a conclusion as to whether he did so believe, the court is entitled to take into account whether there were reasonable grounds on which he could hold such a belief. Our provisional view is that a similar approach should be adopted to the problem under consideration, but we of course welcome views as to whether this achieves the correct balance. We would also favour a provision, again similar to that which we have proposed in the cases of Receiving Stolen Property and Malicious Damage, which would treat a reckless indifference on the part of the accused as to whether the girl was under or over age as providing the necessary *mens rea*.

4.18 The question of drunkenness also inevitably arises in the context of this defence. We have pointed out on more than one occasion (most recently in our Report on *Malicious Damage*) that this whole problem of drunkenness as a defence will have to be ultimately addressed by us, but is probably best considered in the context of the criminal law as a whole. The Commission are at present considering, as part of their next programme of law reform, a project for the codification of the entire criminal law and that would seem to be the appropriate context in which this subject, along with other general questions of criminal responsibility, should be examined in depth.

4.19 The present law appears deficient in other respects:

- (i) It draws no distinction between sexual activity taking place between young people of the same age and cases where one person is significantly older than the other or in a position of authority over him or her;
- (ii) It exposes the male only to criminal liability, although where the participants are of the same age, the girl may often be the instigator.

Apart from these deficiencies, there will be a further lacuna if the judgment of the European Court in *Norris v Ireland*¹⁵ is given effect. Homosexual activity among males and females between the ages of 15 and 17 will be lawful, unless new offences are created.

4.20 The first of these difficulties could be met by providing higher penalties in the case of a person in a position of authority over the other participant or significantly older than him or her. We think that there would be general agreement as to the desirability of such a distinction being drawn by the law. However, while there should be no insurmountable difficulty in defining in this context who "persons in authority" are, establishing a difference in ages sufficient to attract liability for an offence or greater penalties is far more problematical. While fixing an age limit in the case of the victim also presents difficulties, since whatever age is chosen, it is bound to appear to some extent arbitrary, that is an inescapable feature of the sort of law with which we are concerned. It seems to us, however, that such problems should be avoided wherever possible, and, accordingly, we would not favour the creation of a necessarily arbitrary age band between victim and offender which would involve the incurring of liability or the infliction of greater penalties.

4.21 The second difficulty can be met by providing that any person who engages in sexual intercourse with another person between these ages is guilty of an offence, irrespective of their sex. It would, of course, follow that where a girl had intercourse with a boy between the ages of 15 and 17, the girl would be guilty of an offence and, where she was in a position of authority in relation to the boy, e.g. a school teacher, would be liable to the high penalties.

While this latter consequence might be considered reasonable, some would have serious reservations as to whether in the case of sexual intercourse with very young people, say between the ages of 8 and 15, the girl or boy should also be liable to criminal prosecution. An attempt to make the girl liable in such circumstances as an accomplice was rejected in *Tyrell*,¹⁶ Lord Coleridge CJ declaring:

"It is impossible to say that the Act, which is absolutely silent about aiding or abetting or soliciting or inciting, can have intended that the girls for whose protection it was passed should be punishable under it for the offences committed upon themselves."

There are undoubtedly arguments for maintaining the law as it is. Section 3 of the *Criminal Law Amendment Act, 1935* provides that on a trial for rape of a girl between 15 and 17 years of age, the jury may convict the accused of carnal knowledge under s2 of that Act if not satisfied that he is guilty of rape. If the proposed alteration were made, a jury so finding could be perceived, in effect, as finding the complainant guilty of the same offence as the accused. Under the law of rape as it stands with its subjective approach to the guilt of the accused, a jury can acquit an accused of rape and convict him of the lesser offence while still being satisfied that the girl did not consent to sexual intercourse. Fear of being disbelieved is a very real element in discouraging some *bona fide* victims of rape from coming forward. If a fear of being exposed or of being perceived as exposed to criminal liability were added to existing fears, one could, for the best possible motives, create a highly

unwelcome deterrent. The imposition of equal criminal liability where, for example the girl is very young and the man significantly older might be perceived as unfair and unduly severe on the girl. An exceedingly high premium would be placed on the use of prosecutorial discretion. Prosecutorial discretion appears to cope well with the anomalies that undoubtedly arise from time to time under the present law and our provisional view is that the law should remain as it is.

4.22 If an offence based on abuse of authority were introduced, it would render incest to that extent less necessary and relevant an offence. We welcome views as to its retention as a specific offence, independent of the ordinary criminal law, e.g. for brothers and sisters.

It would also seem desirable that it should be an offence when a person in authority sexually exploits a girl between the ages of 15 and 17. At present, provided there is no sexual intercourse or buggery, any other consensual heterosexual activity is permissible with girls of 15 and 16. While girls of that age should be better able to cope than younger girls, nonetheless they are still vulnerable, particularly within the family.

4.23 There remains the question of homosexual activity. At the time this Paper is written, it seems probable that a decision will be taken in the relatively near future to introduce legislation bringing our law into conformity with the ruling of the European Court of Human Rights in *Norris v Ireland*.

In *Norris v Attorney General*,¹⁷ the Supreme Court by a majority decision rejected the challenge by the plaintiff to the constitutionality of ss61 and 62 of the *Offences Against the Person Act 1861* and of s11 of the *Criminal Law Amendment Act 1885* which render criminal acts of buggery and gross indecency between male persons, whether committed consensually or otherwise. However, in *Norris v Ireland*, the European Court of Human Rights found that the retention on the statute book of these offences constituted a breach by the State of Article 8 of the European Convention of Human Rights. In reaching its decision, the Court noted that:

"It is inevitable that the court's decision will have effects extending beyond the confines of this particular case, especially since the violation found stems from the contested provisions and not from individual measures of implementation. It would be for Ireland to take the necessary measures in its domestic legal system to ensure the performance of its obligations under Article 53"¹⁸

Following the decision, the Government announced that the implications of the judgment of the Court of Human Rights were being considered in the Department of Justice. At the time this Paper is written, there has been no announcement as to the form any legislation which might be thought to be necessary in the light of the decision might take. The Commission assumes, however, that the State will wish to continue as a party to the Convention

and accordingly the Paper proceeds on the hypothesis that the sections referred to in *Norris v Attorney General* will in due course be repealed and replaced.

4.24 In considering what legislation should be introduced in this area, the Commission finds it instructive to refer to one of the judgments delivered in the Supreme Court in *Norris v Attorney General*. In the course of his dissenting judgment, Henchy J said:

"One way or the other, the impugned provisions seem doomed to extinction. Whether they be struck down by this court for being unconstitutional or whether they be deemed invalid elsewhere in accordance with the *Dudgeon*¹⁹ decision for being in contravention of the (European Convention), they will require to be replaced with appropriate statutory provisions. It would not be constitutional to decriminalise all homosexual acts, any more than it would be constitutional to decriminalise all heterosexual acts. Public order and morality; the protection of the young or the weak-willed, of those who may readily be subject to undue influence and of others who should be deemed to be in need of protection; the maintenance inviolate of the family as the natural, primary and fundamental unit of society; the upholding of the institution of marriage; the requirements of public health; these and other aspects of the common good require that homosexual acts be made criminal in many circumstances. The true and justifiable gravamen of the complaint against the sections under review is that they are in constitutional error for overreach or overbreadth. They lack necessary discrimination and precision as to when and how they are to apply."²⁰

4.25 In the view of the Commission, this passage forms the essential framework within which any new legislation must be enacted. It may be said at the outset that it would be clearly insufficient to leave the impugned offences on the statute book while providing that a congenital disposition to homosexuality should be a defence. Apart from other objections, it would obviously be difficult to prove or disprove the presence or absence of such a disposition. We think the proper approach is to treat consensual homosexual activity as *prima facie* lawful, but to provide for carefully defined circumstances in which, for diverse reasons, it should be unlawful. This, of course, is the manner in which the law at present approaches consensual heterosexual activity. The difficulty which has to be confronted is whether the exceptions in the case of homosexual conduct should be different from those in the case of heterosexual conduct and, in particular, whether the age at which the criminal law ceases to regulate sexual conduct should be any different in the case of homosexual acts.

In this context, it should be noted that Henchy J, in listing the criteria which he considered could be relevant in determining whether homosexual acts should be made criminal, referred to the maintenance of the family and the

upholding of the institution of marriage. The learned judge almost certainly did not intend to convey in this passage that homosexual activity by married persons should be rendered criminal. It would clearly be illogical and anomalous for the criminal law to outlaw homosexual activity by a married person on the ground that it is damaging to the institution of marriage but to permit adultery which is also seriously damaging. It would seem that the references to the protection of marriage and the family refers to the desirability of confining homosexual activity to adults, thereby enabling the young to develop as heterosexuals without being diverted into homosexuality.

4.26 We accordingly approach our consideration of this area of the law on the basis that

- (a) in general, consensual sexual activity should not be the subject of criminal sanctions;
- (b) nevertheless, in order to protect vulnerable persons, the law should define circumstances in which either or both parties to sexual activity are guilty of a criminal offence;
- (c) with the possible exception of the age at which sexual autonomy should be allowed, the constraints imposed by the criminal law on consensual sexual activity should be the same for homosexuals as for heterosexuals.

In considering whether a different age should be fixed at which consensual homosexual activity ceases to be criminal, the approach to the problem in other jurisdictions should be noted.

4.27 In England and Wales, the *Sexual Offences Act 1967*, which implemented the recommendations of the Wolfenden Committee on Homosexual Offences and Prostitution, provided that homosexual acts between consenting adults in private were not to be criminal. Adults were persons who had reached the age of 21, at that stage the age of majority in many other important areas of the law. In *X v The United Kingdom*,²¹ the European Court of Human Rights had to consider a complaint by the applicant that the fixing of the homosexual age of consent at 21 rather than at 18 was an interference with the applicant's right to privacy and that the fixing of different ages of consent for homosexual and heterosexual relations constituted discrimination under Article 14. The European Commission of Human Rights rejected the complaint and the following passage in their decision is of interest:

".... The applicant submitted that as a result of the considerable development in the prevailing moral opinion in the United Kingdom since 1957 when the Wolfenden Committee reported, young men between the ages of eighteen and twenty-one could no longer be said to be in need of protection from the pressures of homosexual relationships.

The legal system in establishing the contractual age of majority at eighteen has recognised that they had sufficient maturity to take important decisions and accept their consequences. Accordingly, their private consensual homosexual relationships ought to be a matter of legitimate personal choice beyond the reach of the criminal law.

The Commission considers that the age limit of twenty-one may be regarded as high in the present era, especially when contrasted with the current position in other member States of the Council of Europe. The Commission is also aware that current trends throughout Europe in relation to private consensual homosexual behaviour tend to emphasise tolerance and understanding as opposed to the use of criminal sanctions. Moreover, as far as the legislative position in the United Kingdom is concerned, the Commission considers that it may be seen as inconsistent to have an age of majority applicable to voting and other legal transactions, which is lower than the age of consent for homosexual behaviour.

However, the Commission cannot disregard the fact that this question was examined by the Wolfenden Committee and that their recommendations were seen fit to be adopted by Parliament and incorporated in the 1967 legislation. Nor can it ignore the fact that the issue has been before Parliament again in a Private Member's Bill which was not accepted and that it is being currently re-examined by the Criminal Law Revision Committee and the Policy Advisory Committee on Sexual Offences.

In addition the Commission takes the view that there is a realistic basis for the respondent Government's opinion that, given the controversial and sensitive nature of the question involved, young men in the eighteen to twenty-one age bracket who are involved in homosexual relationships would be subject to substantial social pressure which could be harmful to their psychological development.

In this connection, the Commission does not consider that the respondent Government has gone beyond its obligation under the Convention in finding the right balance to be struck.

Accordingly, the Commission finds that the interference in the applicant's private life involved in fixing the age of consent at twenty-one is justified as being necessary in a democratic society for the protection of the rights of others."²²

4.28 It is interesting to note that subsequently the Policy Advisory Committee recommended²³ that eighteen rather than twenty-one should be the age of consent for homosexual relations and the Criminal Law Revision Committee²⁴ adopted their advice without further discussion.

J Clifford Hindley has analysed the findings of the Policy Advisory Committee in some detail.²⁵ Whereas ten of the Committee were in favour of eighteen as the age of lawfulness and five in favour of sixteen as the appropriate age, two of that ten would have supported sixteen as the correct age had there been in addition a special offence relating to the abuse of authority or "special relationships" in the Committee terminology.

Hindley proceeds to analyse the medical evidence furnished to the P.A.C. The majority view was against sixteen and in favour of eighteen but the Royal College of Psychiatrists, which seemed to the author "to have been the only institutional submission to discuss seriously the question of maturation in young people and its bearing on the age of consent",²⁶ came out in favour of the age of sixteen for male homosexuals. They referred to the argument that sex at the age of sixteen is likely to have less traumatic potential for a young man than for a young woman (who runs the risk of an unwanted pregnancy). While acknowledging that biological development is somewhat slower in boys than in girls, and that homosexual relationships may be more difficult to maintain (particularly in the face of society's disapproval), they on balance rejected the idea that homosexual seduction at a later stage could reverse a person's basic sexual orientation which is settled early in life. They considered that the Wolfenden legislation had largely undermined the moral argument against homosexual practices, and that stigmatisation of homosexuals caused distress and increased the risk of blackmail. They concluded that the age of consent should be the same for heterosexual and homosexual practices.²⁷

Hindley also refers to the following:

"1. As early as 1957 the Wolfenden Committee accepted the view of the majority of their medical witnesses that sexual orientation was usually fixed by the age of 16 (many thought much earlier) and concluded (at variance with their final recommendation) that on this ground 16 would be the appropriate age of consent.

2. In 1968 the Dutch government set up a committee of experts to advise on the age of consent for homosexual acts. Its report was made available in this country through a translation commissioned by the Sexual Law Reform Society. Out of 17 experts who gave evidence in the exhaustive inquiries conducted by this (the Speijer) committee, only one thought that (in a small number of cases) a 16 year old might be 'converted' to homosexuality through seduction. The committee concluded that there was no significant possibility of changing a person's sexual orientation after the age of 16, and on its advice the age of consent for male homosexuals in the Netherlands was reduced to 16.

3. Expert committees in two other European countries have concluded that sexual orientation is fixed by age 15 (Switzerland) or 'long before 15-18' (Denmark)."²⁸

4.29 In *X v Federal Republic of Germany*,²⁹ the European Commission of Human Rights considered and rejected a claim that a provision of the German Criminal Code rendering a man over the age of eighteen who committed an indecent assault on a man under twenty-one liable to punishment was contrary to the Convention. The Commission noted that at the time of the application, masculine homosexuality was no longer criminal in the Federal Republic and said that:

"the purpose of the German legislature ... is to prevent homosexual acts with adults having an unfortunate influence on the development of heterosexual tendencies in minors. In particular it was feared that on account of the social reprobation with which homosexuality is still frequently regarded, a minor involved in homosexual relationships with an adult might in fact be cut off from society and seriously affected in his psychological development.

The Commission is not unaware that the danger to which an adolescent is exposed as a result of homosexual relations with an adult is a subject of controversy in several countries. It also notes that several states have undertaken a study of the complete decriminalisation of homosexuality and a committee of experts of the Council of Europe is studying this problem.

The fact remains that the action of the German legislature was clearly inspired by the need to protect the rights of children and adolescents and enable them to achieve true autonomy in sexual matters. This need is broadly admitted in a large number of member states of the Council of Europe. In so far as the protective measure enacted by the legislature can be considered to affect the applicant's private life it falls under the protection of the rights of others within the meaning of paragraph 2 of Article 8 of the Convention.

The only difficulty which remains is therefore to decide up to what age the protection of an adolescent is necessary and justifies making homosexuality a criminal offence. Opinions on this point are very varied; some consider that the age of consent to homosexual relationships must be the same as that of puberty or the same as that required for heterosexual relationships. Some states have fixed at 16 and others at 21 the age after which homosexual relations cannot give rise to criminal proceedings. Ideas are developing rapidly in this field.

It can therefore be admitted that the age above which homosexual relationships are no longer subject to the criminal law may be fixed within a reasonable margin and vary depending on the attitude of society. In the instant case it would not seem that the age limit of 18-21 although relatively high and since lowered can be considered as going beyond this reasonable margin.

At all events the applicant was convicted for having had homosexual relationships with adolescents under 16.

As applied to the applicant the German legislation would therefore appear to comply with the provisions of Article 8(2) of the Convention as being a measure necessary in a democratic society for the protection of the rights of others. It follows that this complaint must be rejected as manifestly ill-founded within the meaning of Article 27(2) of the Convention.³⁰

4.30 The Law Reform Commission of Victoria has the following to say on these questions:

"A number of jurisdictions have a different age of consent for heterosexual and homosexual intercourse. For example, in the Northern Territory the age of consent to heterosexual intercourse is 16 and male homosexual intercourse is 18. In England, the age of consent to heterosexual intercourse is 16, and 21 for male homosexual intercourse. The justification for the difference appears to be the belief that youthful experience of homosexuality may determine a child's sexual orientation toward homosexuality, and this is seen as undesirable. This Commission does not accept that reasoning. The criminal law should not distinguish between the treatment of homosexual relations and the treatment of heterosexual relations."³¹

4.31 It may finally be noted that homosexual relations are permitted in the following countries at the following ages:

The United Kingdom	}	
Canada	}	21
South Australia	}	
France	}	
Germany	}	18
Australian Capital Territory	}	
California	}	
Holland	}	
Italy	}	16
Norway	}	
Denmark	}	
Poland	}	15
Sweden	}	

4.32 The age at which the criminal law should cease to regulate consensual sexual activity is, as we have said, not a topic on which a body such as the Commission can offer any particularly informed view. It is, however, clear

that any law which discriminates between heterosexual and homosexual activity in this context at the very least requires justification. Anomalous distinctions of this nature between the rights of men and women should, if possible, be avoided. We have been unable to discover any compelling argument for fixing the age at which homosexual consensual conduct should be permitted at, for example, 18 or 21 while maintaining the age in respect of heterosexual activity at 17. *Our provisional conclusion is that, assuming the age for consensual heterosexual activity remains at 17, no case has been established for fixing a higher age for homosexual activity.* We welcome views.

4.33 As we have already said, our approach is to impose the same constraints on homosexuals and heterosexuals. Clearly all homosexual activity with children under 15 or by persons in authority with children between the ages of 15 and 17 should be proscribed. The question remains as to whether there should be an offence for homosexuals which mirrors the present offence of unlawful carnal knowledge of girls between the age of 15 and 17. We accept that the primary motivation behind the creation of the latter offence was the protection of young girls from unwanted pregnancy. Nevertheless, in the light of the age of consent in other jurisdictions and of our desire to impose the same constraints on homosexuals and heterosexuals, we propose the creation of the appropriate "mirror" offence for homosexuals, i.e. engaging in anal penile penetration where one of the parties is over the age of 15 but under the age of 17. The alternatives would be to legalise consensual buggery with boys between 15 and 17, or to prohibit all homosexual conduct between those ages. The first would mean a significantly lower age for consensual buggery than in many other countries and would probably be an impractical recommendation. It could also have implications for the spread of AIDS. The second would unreasonably discriminate between heterosexual and homosexual activities. In making our tentative proposal, however, and in equating anal with vaginal intercourse for that purpose, the Commission does not intend to diminish or alter the significance of vaginal sexual intercourse in any other context. Again, to preserve consistency in the treatment of heterosexual and homosexual activity, it should be an offence for acts of a homosexual nature to be committed by a person in authority with persons over the age of 15 but under the age of 17.

D : Provisional Recommendations

4.34 Our provisional conclusions may, accordingly, be summarised as follows:

- (1) *Sections 61 and 62 of the Offences Against the Person Act, 1861 and section 11 of the Criminal Law Amendment Act, 1885, which render criminal acts of buggery and gross indecency between male persons, whether committed consensually or otherwise, should be repealed.*
- (2) *The expression "carnal knowledge" used in the Criminal Law Amendment Act, 1935 should be replaced by the expression "sexual intercourse" as defined in Section 1(2) of the Criminal Law (Rape) Act, 1981.*

- (3) *It should continue to be an offence to have sexual intercourse with a girl under the age of 17. The maximum penalty available for the offence should continue to depend on the age of the girl involved. However, consideration should be given to altering the age bands in respect of which certain maximum penalties are fixed and the penalties themselves should be re-examined.*
- (4) *The girl herself should not be made liable for the offence at (3) at any age.*
- (5) *In relation to the offence at (3), consideration should be given to the provision of a defence of reasonable mistake as to age, where the accused genuinely believed at the time of the act, on reasonable grounds, that the girl had attained the age of consent or an age attracting a less serious penalty.*
- (6) *It should be an offence to engage in anal penile penetration where one of the parties is under the age of 17 years. As with the offence at (3), the maximum penalty available should vary with the age of the person under 17. Consideration should be given to the provision of a defence to this offence similar to that suggested for consideration at (5). Consent would not be a defence.*
- (7) *Section 14 of the Criminal Law Amendment Act, 1935, which provides that consent is no defence to a charge of indecent assault on a young person, should be repealed.*
- (8) *An offence of sexual exploitation should be created which would encompass the doing, procuring or inciting of an act, other than sexual intercourse or anal penile penetration, with a person below a specified age for the purpose of sexual gratification. Without prejudice to the generality of the offence as defined, specific acts could be set out as included in the definition. Consent would not be a defence.*
- (9) *It should be an offence for a person in a position of authority as defined in (10) below to engage in acts of sexual exploitation with a person who has reached the age specified for the offence at (8) but is under 17. Consent would not be a defence.*
- (10) *A person in authority should be defined as a parent, step-parent, grandparent, uncle or aunt, any guardian or person in loco parentis or any person responsible, even temporarily, for the education, supervision or welfare of a person below the age of 17.*
- (11) *Except where provision is already made for a maximum sentence of life imprisonment, there should be a greater penalty where the offences at (3) (6) and (8) above are committed by a person in authority.*

FOOTNOTES TO CHAPTER 4

- 1 LRC 24-1988.
 2 15th Report on Sexual Offences, para 7.4.
 3 *Id* at p 326.
 4 See *Parsons v Parker*, 160 Va 810, at 811, 170 SE 1, at 2 (1933).
 5 S.6 of the Sexual Offences Act 1956.
 6 S.213.3 of the Model Penal Code.
 7 Para 5.5.
 8 S.213.3 of the Code.
 9 There was virtually no debate on any of the provisions of the Bill in the Dail apparently as a result of an agreement between the Government and the opposition. In the Seanad, one member said with engaging candour:
- "The details of this measure are not known to the public and the less that is known about it the better".
- The Bill was dealt with in a special committee whose proceedings and report are not published in the official report. One Senator queried the fixing of the age of consent to indecent assault at 15 and was told by another Senator that she had misunderstood the position, since a person guilty of indecent "assault" where the girl was over 15 could be convicted under the carnal knowledge section. This was, of course, wholly wrong. The Minister told the Seanad that he did not know the reason for the provision but presumed that the committee were doing the right thing. This appears to have been the extent of the legislative knowledge, at least so far as the Seanad was concerned, as the enactment passed into law.
- 10 *Prince* (1875) LR 2 CCR 154.
 11 15th Report on Sexual Offences, para 5.10.
 12 Model Penal Code, s.213.6.
 13 Model Penal Code and Commentaries, Part II, pp 414-415.
 14 [1976] A.C. 192.
 15 Eur Court H R, *Norris* judgment of 26 Oct 1988, Series A No 142.
 16 [1894] 1 Q B 710.
 17 [1984] IR 36.
 18 *Supra*, fn 1, para 50, p 22.
 19 Eur Court H R, *Dudgeon* judgment of 22 Oct 1981, Series A No 45.
 20 [1984] IR, at p 18.
 21 Application No 7215/75, Eur Comm H R, *Decisions and Reports*, Vol 19, p 66.
 22 Pp 77-8.
 23 *Report on the Age of Consent in Relation to Sexual Offences*, (1981).
 24 15th Report on Sexual Offences, para 6.2, (1984).
 25 Hindley, *The Age of Consent for Male Homosexuals*, [1986] Crim L Rev 595.
 26 *Id*, at 599.
 27 Cmnd 247, para 68.
 28 [1986] Crim L Rev, at 601.
 29 Application No 5935/72, Eur Comm H R, *Decisions and Reports*, vol 3, p 46.
 30 *Id*, pp 54-5.
 31 Law Reform Commission of Victoria Discussion Paper No.12, *Sexual Offences Against Children*, para.38 (1988).

CHAPTER 5: EVIDENCE: (1) THE COMPETENCE OF CHILDREN AS WITNESSES

5.01 In this chapter, we consider the present law as to the competence of children to give evidence, a matter obviously of crucial importance in prosecutions for alleged sexual abuse of children. However, while we are examining the question in the context of the criminal law, it should be remembered that many of the problems considered are common to both criminal and civil litigation. It is also as well to stress at the outset that because of the general requirement of the law that all oral evidence must take the form of sworn evidence, the competence of children as witnesses has generally been determined by a judicial assessment as to whether they know the nature and consequences of an oath. Manifestly, that is not the only criterion by which the competence of any one, adult or child, to give evidence can be ascertained. Having set out the present law, we accordingly go on to examine the general question as to whether there should be a specific threshold requirement as to competence in the case of children. We then proceed to consider, on the assumption that there should be such a threshold, how competence is to be determined in the case of children. This in turn necessitates a critical examination of two requirements of the present law, i.e. the requirement that in certain circumstances the evidence of a child be corroborated before it is accepted and the general requirement that oral evidence should only take the form of sworn evidence.

A : THE PRESENT LAW

General Principles

5.02 The competence of a child to give sworn evidence "is a question, not of age, for there is no precise limit of age fixed by any rule within which the evidence of children on oath is to be excluded, but it is a question of the intelligence and actual mental capacity of the child witness, its sense and

reason of the danger and impiety of falsehood.¹ⁿ²

In *R v Brasier*,³ in 1779, the relevant principles at common law were first clearly laid down. The court was unanimously of opinion that:

"no testimony whatever can be legally received except upon oath and ... an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath, for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence, but the admissibility of their evidence depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court; but if they are found incompetent to take an oath their evidence cannot be received."

In *Brasier*, the oath was understood as an appeal to God to witness the truth of what was being said, in the belief that lies would be met with divine retribution. Therefore it was considered appropriate in later cases for the trial judge to enquire of a child whether he or she had a belief in God and in the religious consequences of lying. At times, however, the enquiry tended to concentrate on, or limit itself exclusively to, the question whether the child had a consciousness of the moral obligation to tell the truth.

5.03 In England the issue came to a head in *R v Hayes*⁴ in 1976. There the enquiry in relation to a boy of 12 had involved his being asked if he had religious instruction at school, to which question he shook his head. Then the judge said: "You don't? Do they teach you about the Bible? Have they told you about God or Jesus?" The boy answered "No". The judge asked: "Do you know what I mean by God? Have you heard of God? The boy replied "No".

Later the following series of questions and answers took place:

- | | | | |
|----|---|----|------|
| Q. | Do you think there is a God? | A. | Yes. |
| Q. | You know what it means to tell the truth, don't you? | A. | Yes. |
| Q. | You know it's important to tell the truth? | A. | Yes. |
| Q. | Not to tell lies. You understand that it is important particularly today when you are here? | A. | Yes. |
| Q. | Will you promise before God that you will tell the truth? | A. | Yes. |
| Q. | And you will stick to that? | A. | Yes. |

The boy was then permitted to take the oath.

The Court of Appeal, Criminal Division, held that the boy's evidence had properly been admitted. Bridge LJ delivering the judgment of the Court, said:

"If the series of questions and answers started with the question, 'Do you think that is a God?' and the answer, 'Yes', there would really be no substance in counsel's complaints, but the fact that the earlier questions and answers, on their face, reveal the boy declaring that he is wholly ignorant of the existence of God does lend some force to the submission that if the essence of the sanction of the oath is a divine sanction, and if it is an awareness of that divine sanction which the court is looking for in a child of tender years, then here was a case where, on the face of it, that awareness was absent. The court is not convinced that that is really the essence of the court's duty in the difficult situation where the court has to determine whether a young person can or cannot properly be permitted to take an oath before giving evidence. It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct."⁵

Commenting on this approach, Ryan and Magee observe that:

"Irish judges may take the view that the test propounded in *Hayes* is more easily operated than one which has its origins in the more simplistic theology of earlier centuries."⁶

Conducting the Enquiry

5.04 The enquiry by the judge as to whether the child has the capacity to give sworn evidence must take place before the jury. In *R v Dunne*⁷ in 1929, a child of seven in a prosecution for incest had been brought to the judge's chambers for the purpose of examining her capacity to understand the nature of the oath. The Court of Criminal Appeal quashed the defendant's conviction, which had been supported by the child's evidence. Lord Hewart CJ said:

"It goes without saying that what the judge did in that matter was suggested purely by feelings of kindness and consideration for the youthful witness. The question for this court is, can a conviction stand after an incident of that kind has occurred? It is admittedly an incident without parallel. Admittedly, nobody in this court, either from his own experience or from researches into the authorities, can adduce any parallel case. In the result, something was said to or by this witness which was not in the hearing or presence of the jury or of the accused. The court is clearly of opinion that, in these circumstances, the appeal must be allowed and the conviction quashed."⁸

5.05 The same view was taken by the Court in *R v Reynolds*⁹ in 1950, where, in a charge of indecent assault against an 11-year-old child who was attending a school for mentally handicapped children, the chairman of Quarter Sessions had ordered the jury to retire while evidence about the child was being given by a school attendance officer on the issue of whether she was possessed of sufficient intelligence to justify the reception of her unsworn evidence. The Court of Criminal Appeal held that this evidence should have been given in the presence of the jury and that accordingly the conviction should be quashed.

Lord Goddard CJ said:

"The reason why the court decided in *R v Dunne* that the evidence of the child must be given in the presence of the jury was because, although the duty of deciding whether the child may be sworn or not lies on the judge and is not a matter for the jury, it is most important that the jury should hear the answers which the child gives and see her demeanour when she is questioned by the court, for that enables them to come to a conclusion as to what weight they should attach to her evidence. If that be the reason why the court in *R v Dunne* held that it was essential that the evidence should be given in the presence of the jury, it is *a fortiori* so, it seems to me, when some witness is called to assist the court by relating his experience of the child and the impression he may have formed of her. The jury then would have all the facts before them with regard to the child's truthfulness or reputation for truthfulness and all the information showing whether the child was a witness on whose evidence they could rely."¹⁰

Expert Testimony as to the Child's Mental Capacity

5.06 In *R v Reynolds*¹¹ the Court of Criminal Appeal also addressed the question whether a witness (expert or otherwise) may be called to assist the court in determining the child's mental capacity. What Lord Goddard CJ went on to say on the admissibility of this evidence is of some interest:

"No member of this court has ever known of a case in which a witness has been called to inform the court whether or not a child is fit to give evidence. I am not saying that there may not be cases - perhaps this is one - in which the judge or chairman may want some such assistance, especially if he hears that the child is at a particular sort of school. It is not on that ground that the court thinks that there has been a fatal mistake here."¹²

Unsworn Testimony by Children

5.07 It is useful at this point to note that the unsworn evidence of children may be heard by the court in some circumstances.

Section 30 of the *Children Act 1908*¹³ enables the court to hear the unsworn evidence of a child "of tender years" who is "tendered as a witness", even though of opinion that the child cannot understand the nature of the oath, if the court is of opinion that the child is "possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth".

Section 30 goes on to provide that a person is not liable to be convicted of the offence unless the unsworn testimony given on behalf of the prosecution is "corroborated" by some other material evidence in support thereof implicating the accused.

The Relationship Between the Enquiries as to Capacity to Give Sworn and Unsworn Evidence

5.08 The relationship between the enquiries carried out by the court as to the child's capacity to give sworn and unsworn evidence, respectively, was addressed by the Court of Criminal Appeal in *AG v O'Sullivan*¹⁴ in 1930.

In this case the appellant had been convicted of attempted sodomy on the basis, in part, of the sworn evidence of a boy aged about ten years. This evidence had been received without protest during the trial.¹⁵ Counsel for the appellant, on appeal, argued that under section 30 of the 1908 Act (as amended) the court should have held a preliminary examination to satisfy itself that the child, whom it was proposed to examine on oath, was competent to give evidence at all and if so whether he could do so under oath. He contended that the definition of "child" in section 131 of the Act indicated that a child under 14 years should be regarded as being "of tender years".

The Court of Criminal Appeal rejected these contentions. Kennedy CJ, delivering the judgment of the Court, said bluntly that counsel for the appellant had "quite misread"¹⁶ section 30.

"The purpose of that section is to enable a child 'of tender years' (age not defined by the statute) who does not, in the opinion of the Court, understand the nature of an oath, to give evidence not upon oath if, in the opinion of the Court, the child has sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Counsel for the applicant cited cases in which it was held that before the unsworn testimony of a child could be received under the provisions of the section enabling departure from the ordinary law requiring that evidence be given on oath, there must be a determination of the fact that the child does not understand the nature of an oath. The section does not, in our opinion, alter the previous law as to the reception of the evidence of children given on oath, that is to say, it was and is a question, not of age, for there is no precise limit of age fixed by any rule within which the evidence of children on oath is to

be excluded, but it is a question of the intelligence and actual mental capacity of the child witness, 'its sense and reason of the danger and impiety of falsehood'.¹⁷ Strictly speaking, the objection (if any) to the reception of the child's evidence on oath should be taken, and the witness should be interrogated by the Court on the *voir dire* or *vraie dire*, but the practice became established that the objection might be taken upon facts elicited (after the person was sworn as witness) during the direct examination or even during the cross-examination and, if the objection prevailed, the Judge would strike out the evidence and withdraw it from the jury'.¹⁸

In the present case, the boy made a deposition on oath and was cross-examined by the solicitor for the accused in the District Court; he was again, in the Circuit Court, sworn and examined for the prosecution, cross-examined by counsel for the defence, and questioned by the Judge, and from first to last no objection was taken or suggested against the boy's evidence on the ground that he was incompetent to give evidence on oath. He must have presented an appearance of such intelligence as to discredit any objection on this ground. We have before us the record of the boy's evidence, intelligent, coherent, and credible, the fact that he was not broken down upon his story by a severe cross-examination, that he had been at school for several years, and that he had been admitted to his first Holy Communion two years previously. In these circumstances, the attempt to raise in this Court an objection to his competence as a witness on oath cannot, in our opinion, be sustained.¹⁹

This passage may give rise to some difficulty in its practical application. It fails to address the question of what should be done in a case where under the law as it stands the child is sworn and gives his evidence but during cross-examination his capacity to give sworn evidence is successfully challenged. If the judge is to "strike out the evidence and withdraw it from the jury", is there any procedure for saving the evidence under section 30, and treating it as unsworn testimony, assuming, of course, that the child fulfils the requirements of section 30 so far as unsworn testimony is concerned? To allow the child's evidence to stand, thus retrospectively recharacterised, might raise constitutional difficulties.

B : SHOULD THERE BE A THRESHOLD REQUIREMENT AS TO COMPETENCE?

General Considerations

5.09 The issue to be considered goes deeper than the adequacy of the present test of competence, based on capacity to understand the nature of the oath. A more fundamental policy question is whether there should be any threshold requirement of competence for children.

It may be thought to be self-evident that courts should always satisfy themselves as to the competence of children to give evidence. But this does not mean that children should be subjected to a *distinctive* test as to competency. It is useful to note Wigmore's proposal to abolish competency requirements for children:

"A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure *a priori* the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable.

The desirability of abandoning this attempt and abolishing all grounds of mental or moral incapacity has already been noted, in dealing with mental derangement. The reasons apply with equal or greater force to the testimony of children. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth. To this result legislation must come. To be genuinely strict in applying the existing requirement is either impossible or unjust; for our demands are contrary to the facts of child-nature."²⁰

We should at this point make it clear that, in determining what principles as to competence should apply, we are not affected by any argument based on the need to change the principles because this would increase the number of successful prosecutions. The short answer to such an argument is that pragmatism is no substitute for justice. It is obvious that any relaxation of the present restrictions on evidence may well increase the level of convictions; but, unless the particular relaxation is justified on principle, it would be quite wrong to introduce such a change.

Some Preconceptions Examined

5.10 Before we proceed further we consider it necessary and useful to examine and confront some preconceptions about the reliability of the evidence of young children.

(a) That children's intellectual and memory immaturities make them unreliable witnesses

5.11 Children's intellectual and cognitive development does not proceed in a steady linear way. There are very considerable differences among children within the same age range. Thus, predictions based on age-related competence are very difficult to make. Even children as young as three or

four, if questioned appropriately, can show impressive perceptual and memory skills and can make reliable witnesses.

With regard to memory, older children perform better at memory tasks than younger children, but not in all circumstances. Younger children may remember events but have difficulty retrieving these events from memory. Prompts and cues will significantly improve their recall. But while questioning may improve their recall this may be accompanied by more errors. The errors will tend however to be in relation to peripheral rather than central events. Since memory depends on specific skills for recall as well as general cognitive development, a child may perform inconsistently from one task to another. When events are familiar and important to a child, recall is good. Children's spontaneous recall improves steadily with age. For younger children it is the completeness of their account not the accuracy that is deficient. For all ages the number of errors and fabrications remains low and does not increase for the younger age groups. Like adults, children remember central events better than peripheral events. Their recall of persons or incidental detail is less accurate. Children may experience difficulty putting events in the order in which they occurred. However, for events of central importance, even very young children can record them in the correct temporal sequence. Children's memory deteriorates when they are asked to use internal cues that require systematic searches of their memory or to recall only those items that fit specific criteria, (for example asking a child how many times or in what circumstances did her father put his finger inside rather than outside her vagina). Sensitive and appropriate questioning techniques can significantly improve a child's recall. The most productive interviewing techniques include establishing a rapport with the child, encouraging the recall sequence to begin prior to the critical incidence and allowing children to recall at their own pace. The most non-productive interviewing techniques include the interviewer reaching premature conclusions and through a series of legal questions and suggestions attempting to get the child to conform to that belief. Careful questioning, particularly when the material is familiar to them, can result in children's recall that is equal to or better than adults.

With regard to identity recall, the research is more limited. The available research suggests that children typically report very little information on the physical appearance of an unfamiliar person but that the detail they report is accurate. Being questioned about detail can increase the risk of inaccurate recall but this is true of adults too. Children's ability to make identifications from photographs or identification parades is not good. But again adults are also liable to be misled in this kind of task.

(b) That children are highly suggestible

5.12 There is little evidence to support the belief that children of five or older are more suggestible than adults. Suggestibility is not solely related to age. Age differences in suggestibility between children and adults may not be found if an event is understandable and interesting to both adults and children

and if their memory for it is equally strong. But if delay weakens a child's memory relative to an adult's, age differences in suggestibility may be found. In that case the remnants of the event in the child's memory may not be strong enough to resist suggestions especially from authoritative others.

Adults and children are much less suggestible regarding the details of central rather than peripheral events. Children as young as three years will resist suggestions that try to alter their memory for central events. Children are much less suggestible regarding events that are familiar and lie within their own range of experience. When children yield to suggestion it may represent their willingness to comply with a powerful adult rather than representing a real change of mind. Children are likely to later revert to the truth or will simply be unsure of the correct answer. This implies that even if children have been coached in their evidence or if their evidence has been distorted by leading questions it is likely that later questioning immediately preceding or during the trial will expose the problem.

Young children may be easily misled by the status or authority by the person questioning or making the suggestion. But these status effects are at least equally strong for adults. The desire to conform socially can also influence a child particularly the very young age groups and make them more liable to suggestions. But studies show that conformity effects are stronger for peripheral rather than central events. The risks of suggestion through leading questions may be higher for cognitively sophisticated children who understand the subtler nuances of language. A child whose memory for an event is strong will be more resistant to suggestions than a child whose memory for the same event is weak. The problem of children's suggestibility could be largely resolved by reducing the number of interviews a child is subjected to. Some children report after repeated interviews with different lawyers that they no longer had any independent memory of the events that transpired. A video-taped recording of the child's first and all subsequent interviews could be scrutinized for evidence of the child yielding to suggestion.

(c) That children are unable to distinguish between fantasy and reality

5.13 Children do not consistently confuse fantasy with realities. It is very unusual for children to fabricate completely a series of events or to fantasize about a sexual assault. The few documented cases reveal a host of undesirable interviewing practices. Children do sometimes recall details that were not actually part of an event, a phenomenon known as "elaborated recall". However this may be a greater problem with adults and older children who tend to draw inferences from what they experience. For example, adults are more likely than young children to recall that a room became dark when told that a light-switch was turned off.

(d) That children lie about sexual abuse

5.14 The widespread belief that children lie about sexual abuse was largely

based on the belief that sexual abuse was rare and when it occurred was perpetrated by pathological strangers. The data now available on the incidence of child sexual abuse, particularly intra-familial abuse, seriously undermines that belief. Recent developmental studies indicate that children who recant their disclosures or change their stories generally do so not because they are lying but because of family pressure, faulty interviewing practices and undue delays in investigating and bringing their cases to trial. There is some evidence that parents involved in bitter custody disputes may fabricate stories of child sexual abuse. Proper investigative procedures together with children's difficulties in sustaining a coaxed story should reveal those false allegations. In addition recent developmental studies indicate that children of three years or less are incapable of systematic lying due to their limited cognitive resources. The research commissioned by the Badgley Committee on Sexual Offences Against Children and Youth in Canada showed that the vast majority of sexual assaults on children were considered by the police to be "founded" and that the reports of young children were typically perceived by the police to be both truthful and sufficiently detailed. "It would appear that, at least in the context of child sexual abuse, the requirement of corroboration for a very young child's testimony has traditionally been based on both untested and unfounded assumptions about the intrinsic reliability of children's evidence".²¹

5.15 The reviews of the psychological evidence have come to broadly similar conclusions regarding children's competence as witnesses:

"Although many significant areas still are under-researched, the body of established knowledge on child development and dynamics does suggest that children's ability to answer questions about witnessed or experienced events is better than both law and common belief formally recognised, and that even very young children can respond to the demands of testimony when questions are posed in a developmentally appropriate way."²²

"Objective research on children's testimony suggests that their witnessing powers may have been seriously under-estimated by the law."²³

5.16 Although expressing caution about relying on the uncorroborated evidence of children under five, the Hederman Report concluded that:

"the general implication of the studies reviewed is that children need not be de-barred from giving evidence simply on the basis of age. Their individual abilities and circumstances should be considered in deciding whether they would make competent and credible courtroom witnesses and whether they would sustain any psychological damage by so doing. A general legal requirement that children's evidence be corroborated does not appear to be necessary."²⁴

5.17 Finally, an American legal researcher, on the basis of his review of current research has concluded:

"Children's statements are likely to be more accurate if obtained by direct questioning, the temporal sequence of events is closely followed, external memory aids are used and the questioner assumes responsibility for clarifying the child's understanding of inquiries and for clearing up inconsistencies in the child's account. Conversely, the same children are likely to perform poorly when a global narrative of the account is solicited or the temporal order of events is violated. Furthermore, the child's familiarity and ease with the role of the examiner, the purpose of the enquiry, and the setting in which it occurs are also part of the context that is likely to be predictive of children's testimonial competency and credibility. Because cross-examination occurs at the end of a series of pre-trial interviews, the quality of the children's evidence can be undermined or bolstered depending on the skill of these early interviews. If the investigators are sensitive to the needs of the child, to the impact which the task demands, to the importance of a relaxed and informal setting and to the need for confirming and checking as the child goes along, the child's evidence could be more complete and accurate by the time of reaching the trial. The jury needs also to be sensitive to the techniques that might be used by the defence to undermine the child's confidence and to confuse the evidence. The extent to which this happens is an important area for future research."²⁵

5.18 We do not consider it desirable to remove completely a competence test for children, though we accept that this test need not have to be a distinctive one. Several options present themselves. We will set them out in turn, considering their respective strengths and weaknesses, before finally stating our conclusions.

The Options Considered:

(a) Prescribing a Specific Minimum Age for Competence

5.19 According to this option, the legislation would prescribe a specific minimum age competence. Below this age, children could not give sworn evidence; above this age children would be competent unless the court held otherwise.²⁶

An advantage of this approach would be the degree of certainty it would introduce, as well as bringing a greater sense of realism into the process since there is something unconvincing about a rule which cannot say clearly that a one-year-old child, for example, is not a competent witness.

5.20 There are, however, significant disadvantages to prescribing a specific minimum age for competence. Most obviously, there would be much debate as to what age should constitute the dividing line. That debate would reveal

the futility of attempting to state when *children* acquire competence when what is at issue is whether *this child* has acquired competence. Whatever age is prescribed, there will always be some children who mature at a faster or slower pace than the norm. As regards children of slower pace there would not be a problem, since the court would be able to examine them for competence; but children developing at a faster pace than the norm would be excluded merely because *other* children tend to acquire competence at a later age. This would defeat the whole purpose of providing a legislative test for competence.

5.21 Another complicating factor, militating against the prescription of a specific minimum age, is that the empirical research relating to children indicates that competence is a contextual rather than an absolute quality:

"During the pre-operational stage (i.e. approximately 2-7 years) a child's inferential activity is limited, his ability to make classifications is poor, and he has not yet mastered the concept of logic. The only questions the child is likely to understand are simple questions requiring simple, factual answers such as 'What colour was the bus?' It would seem, therefore, that the child's competency to testify should be limited to answering such questions as these, and that he should not be considered competent to testify in abstract notions such as time or distance. A major strength of Stephen's test²⁷ is that it defines competency in terms of the questions asked of the witness. The test properly recognises that psychological competency is not a mental state which is absolute."²⁸

(b) *Letting Experts Decide*

5.22 According to this option, the task of determining a particular child's competence would be discharged by an expert. We have seen that psychologists have for many years played an important role in a number of continental European countries in relation to the question, *inter alia*, of the child's competence. One Australian commentator has observed that leaving the determination of the issue of the competence of a child under the age of eight years to a pre-trial clinical evaluation by experts:

"has the advantage of having the issue determined out of court, thus relieving the child of the need to be questioned by the judge."²⁹

The objection to this approach is that it would enable experts to usurp the decision-making role of the court.³⁰ A *via media* would enable the court to have access to such expert assessment, but leave the ultimate decision as to competence to the court. This would already appear to be the position under present law; indeed, we have already noted that in an English decision³¹ in 1950, the Court of Criminal Appeal had no objection to the admissibility of evidence by a school attendance officer on the question of the child's capacity to give evidence.

(c) *Letting the Court Continue to Decide*

5.23 The third option would let the court continue to determine the competence of child witnesses. This option clearly suffers from none of the deficiencies of the other options.³² Two possible disadvantages, however, present themselves. First, the matter is one in relation to which the court has no particular expertise thus increasing the likelihood of subjective and widely varying determinations. Second, the court is involved in a tiresome exercise every time it is proposed that a child should give evidence. As to the first of these disadvantages, the reply must be that the whole of the judicial process involves the court - judge and jury - making findings on matters of considerable scientific complexity. As to the second, we do not consider that it amounts to a serious objection. Judicial enquiries are the hallmark of a sensitive and sophisticated system of justice.

Provisional Recommendations

5.24 We have come to the conclusion that the first of these three options should be rejected. It would do little good, and would be likely to do harm unless the minimum age were reduced so low that it would lose all efficacy. As to the second option, we would not support the proposal that the function of assessing a child's competence to give evidence should be handed over to experts. However, we believe that, in appropriate cases, experts could give useful evidence in this question for the guidance of the court. As we shall see, this appears to be the position already.³³ *We are of the view that the best approach is to continue to reserve to the court the task of making the ultimate decision as to competence, and we so recommend.* This does not mean, however, that the present *manner* in which the court discharges the task should continue to apply; it is to that question we now turn.

C : HOW SHOULD COMPETENCE BE DETERMINED?**The Approach in Other Jurisdictions**

5.25 At present, as we have seen, the court determines a child's competence to give sworn evidence by assessing his or her ability to understand the oath. This approach has come under attack in other jurisdictions. In Spencer's view, the distinction between a child's sworn and unsworn evidence "is now a distinction without difference. Yet on this technicality often turns the possibility of convicting a child molester."³⁴

(a) *CANADA*

5.26 The Badgley Committee³⁵ concluded that "the legal tests for the reception of children's evidence either upon oath [sworn] or not upon oath [unsworn] had come very close together in practice, notwithstanding that the corroboration requirements are completely different depending on whether the child gives *sworn* or *unsworn* evidence. The Committee consider this an arbitrary distinction". The Canadian Law Reform Commission was also

critical of the use of the oath by courts as an indirect test of children's competence to give evidence.

(b) *AUSTRALIA*

5.27 A sustained assault on the distinction perceived between sworn and unsworn evidence has come from the Law Reform Commission of Australia, who describe it as "far from satisfactory".³⁶ Their analysis merits extended quotation:

"The common law test ... is essentially one of moral and religious understanding. The test does not appear to meet directly the real issues of psychological competency.

Factors such as memory, the ability to make inferences and the capacity to be appropriately informative and relevant are not considered. Only the criterion that the witness should have the capacity to be truthful is tested by the common law formula. The capacity to understand which information is required, extract it from other stored information and express it clearly, is not tested as it would be if the test were framed in terms of cognitive development.

It might be argued, however, that this may not be as unsatisfactory as it appears at first sight. The child's understanding of the nature of a lie depends upon his cognitive development. If a child has the ability to grasp the concept of dishonesty, then it is likely that he has acquired the other characteristics of the concrete operations stage (approximately 7-11). It might be argued, therefore, that although indirect, the test of whether the child understands the nature and consequences of the oath is adequate to determine whether he has reached the stage of concrete operations and, therefore, an appropriate level of competency.

Two considerations seem to militate against accepting this latter argument:

- (a) one is simply that it is better to use a direct and complete test if one is available rather than to employ an indirect test such as this one;
- (b) in many cases it is not until the child is in the final phase of the concrete

operations (i.e. about 10-11) that he will fully grasp the meaning of dishonesty. According to Piaget, a child of six equates a lie with saying naughty words and with untrue statements. For eight and nine year olds a lie is a statement that departs from objective facts. A child's statement that he saw a mouse as big as an elephant is a big lie because mice are never as big as elephants. There are wide variations

in the age at which a child comprehends the notion of dishonesty, which may perhaps be attributed to the great differences in religious and moral training which are given to children. Thus an older child might be a more able witness yet be prevented from giving his testimony because the child has had minimal ethical training."³⁷

5.28 Several Australian States - Queensland, Western Australia, Tasmania, Victoria and New South Wales - permit a child to give unsworn evidence if he or she is of sufficient intelligence to justify the reception of the evidence and to understand the duty of speaking the truth.

5.29 In South Australia the *Oaths (Children) Amendment Act 1985* provides that the unsworn testimony of a child may be received in court proceedings where the person authorised to administer the oath is satisfied that the child is of sufficient intelligence to justify the reception of evidence and that the child understands the duty of speaking the truth and the child promises "to tell the truth at all times". A child is defined as a person under the age of 12 years.

Among three Bills introduced into the South Australian Parliament in December 1987 was the *Evidence Act Amendment Bill*. This Bill deals with the competence of children to give evidence before the courts. It lowers the age for a child to give evidence on oath to 7 years, as compared with 10 years under current law. It also allows for the evidence of young children under 12 years to be admitted as if it were under oath where a judge is satisfied the child can:

- (i) understand and respond rationally to questions; and
- (ii) give an intelligible account of his or her experiences, and
- (iii) provided the child promises to tell the truth and appears to the judge to understand the obligation of that promise.

The effect of this new provision will be to allow more children to give evidence in court, and for such evidence to be treated on an equal basis with the evidence of adults.

The Bill also provides for a support person to be present while the child is giving evidence. Under the amendments, certain out-of-court statements of a child may also be admissible, provided the child would be available for cross-examination on the contents of the evidence.

5.30 In New South Wales the *Oaths (Children) Amendment Act 1985* provides that the evidence of a child may be received in court proceedings where the court, Justice of the Peace or person authorised to administer an oath is satisfied that:

"having regard to the child's age and any other matter which the court, Justice of the Peace or person thinks relevant, [the] child is not

competent to take an oath but

- (i) the child is of sufficient intelligence to justify the reception of evidence from the child or the making of a statement, affidavit or deposition by the child, and
- (ii) the child understands the duty of speaking the truth before the court, Justice of the Peace or person.³⁸

The child may be asked whether or not he will make the promise, expressed as "I promise to tell the truth at all times in this court."³⁹ If he gives an affirmative response, this will suffice.⁴⁰

A child who, having made this declaration, wilfully -

- (a) gives any false evidence before the court, Justice of the Peace or person to whom the declaration was made;
or
- (b) makes a false statement in the information, complaint, proceeding, affidavit or deposition in respect of which the declaration was made,

knowing the evidence or statement to be false, is deemed to be guilty of perjury if the giving of the evidence or the making of the statement, had it been upon oath, would by law have been perjury.⁴¹

5.31 The Law Reform Commission of Australia is not happy with a requirement as to intelligence either. They consider that:

"the emphasis on the child's intelligence as a test of the child's competency is difficult to justify. The meaning of intelligence is left at large for the judge to interpret and each judge might have a different notion of what he understands as intelligence. Is it 'the ability to carry on abstract thinking', 'the ability to acquire capacity' or 'the power of good responses from the point of view of truth or fact'?"

It would be preferable to frame a test of competency in terms of cognitive development, rather than in terms of intelligence - i.e. to assess the child's actual state of mental functioning rather than to concentrate on his potential. A highly intelligent child of five - for example, one who has great potential for abstract reasoning and who performs well on standard IQ tests - will be a poor witness if he is still at the pre-operational stage compared with an eight year old of lesser intelligence who is in the concrete operations stage."⁴²

When they came to report, they recommended a competence test for witnesses of any age which provides that:

"A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence, is not competent to give evidence.

A person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact."⁴³

(c) U.S.A.

5.32 The general rule is that "[a] child of any age who possesses the requisite characteristics may testify. There is no minimum age below which children are automatically disqualified from service as witnesses".⁴⁴ To be competent, a child must possess sufficient intelligence to understand the obligation to tell the truth,⁴⁵ have "sufficient power of recollection to enable [him or her] to remember a perceived event at trial",⁴⁶ and be able to communicate in an intelligible manner.⁴⁷

The approach of the courts in the last century was well captured in the following passage from the United States Supreme Court decision in *Wheeler v United States*:⁴⁸

"That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligation to tell the truth. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review, unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions, and there seems to be no dissent among the recent authorities [T]o exclude from the witness stand one who shows himself capable of understanding the difference between truth and falsehood, and who does not appear to have been simply taught to tell a story, would sometimes result in staying the hand of justice."

5.33 The trend in the present century has been towards the removal of testimonial disabilities.⁴⁹ Rule 601 of the *Federal Rules of Evidence* (which became effective on 1 July 1975) goes so far as to provide that "[e]very person is competent to be a witness". This does not mean what it appears to say however: the court is free to exclude a patently incompetent child on the basis of lack of minimum credibility or lack of relevancy.⁵⁰ In *United States v Lightly*,⁵¹ it was accepted that the words of Rule 601 should be read subject

to the gloss that a witness is *not* presumed competent if he cannot be shown to have personal knowledge of the matters about which he is to testify, that he does not have the capacity to recall, or that he does not understand the duty to testify truthfully".

At State level, some jurisdictions follow the example of Rule 601, sometimes modified by express statutory language⁵² drafted on the lines broadly similar to *Lightly*. Others⁵³ require that a child understand the nature of an oath (or affirmation) as a condition of competence. A third group⁵⁴ of States prescribes a minimum age - usually between ten and fourteen - below which children are presumed incompetent but enabling them to testify where the trial judge determines, after questioning,⁵⁵ that they possess capacity. In States adopting this approach "the great majority"⁵⁶ of children over the age of five are found competent to testify.

5.34 A significant development has taken place in the past few years. The American Bar Association's National Legal Resource Center for Child Advocacy and Protection proposed that:

"Child victims of sexual abuse should be considered competent witnesses and should be allowed to testify without prior qualification in any judicial proceeding. The trier of fact should be permitted to determine the weight and credibility to be given to the testimony."⁵⁷

Legislatures in "a growing number"⁵⁸ of States have enacted statutes on those lines. An important *caveat* should however be noted. Professor Myers counsels that whether these statutes will completely eliminate the traditional judicial role:

"remains to be seen. There is little argument about the need for testimony by victims of sexual offenses, but the courts will not ignore defense arguments that abolition of any competency requirements may offend principles of basic fairness and due process of law in some cases."⁵⁹

The role of interpreters should also be noted. In 1979, the New Jersey Supreme Court, in *State ex rel RR*,⁶⁰ held that some young children may adopt such unusual speech patterns or engage in such idiosyncratic gestures as to warrant the use of an interpreter. Normally the interpreter should be an individual with no interest in the outcome of the case; but, said the court, it was recognized that situations might arise where it was necessary to appoint an "interested" interpreter, such as a person related to the witness or having an interest in the case. However, it noted that there was agreement in the decisions on this matter that such an "interested" person:

"should not be utilized unless and until the trial judge is satisfied that no disinterested person is available who can adequately translate the primary witness' testimony. Even if this requirement is satisfied,

however, the trial judge must still interrogate the 'interested' interpreter in order to gauge the extent of his bias, and to admonish him that he must translate exactly what the primary witness has said." ⁶¹

(d) SCOTLAND

5.35 The position as regards the competence of children "appears to be somewhat uncertain".⁶² Up to recently it was assumed that very young children were to be regarded⁶³ as incompetent unless the judge formed the view that they had sufficient understanding to appreciate the duty to speak the truth. The Scottish Law Commission endorsed such an interpretation as recently as 1980. However, the Commission stated this year that they had:

"the impression that nowadays many judges tend to approach the question of competency from the other end. That is to say, they assume that a child is *prima facie* a competent witness but may, upon a preliminary conversation with the child, reach the conclusion that the child is either incapable of giving intelligible evidence or is not yet able to understand the difference between right and wrong, and so is unable to undertake to tell the truth." ⁶⁴

The decision as to whether a child should be put on oath is one for the judge's discretion, depending on the child's maturity and intellectual capacity. It seems that twelve years affords a rough dividing line; the issue is one of little controversy, however, since in Scotland a child's evidence is entitled to be treated in "exactly the same way"⁶⁵ regardless of whether or not it is given on oath. In general, the oath is not taken from persons under 17.

The Requirement as to Corroboration

(a) The Present Law

5.36 Corroborative evidence is credible evidence which supports or confirms the evidence of the complainant against the accused and is independent of the complainant's evidence.⁶⁶

There can be no conviction without corroboration on the unsworn evidence of children of tender years. In the case of sworn evidence, the jury must be warned of the dangers of convicting on the uncorroborated evidence of :

- (i) the complainant in a sexual offence;
- (ii) children and young persons (in all cases).⁶⁷

"A child's sworn evidence may thus require corroboration for one or more reasons, either because it simply is the evidence of a child or additionally because he is the victim of a sexual assault or an accomplice."⁶⁸

It will be recalled that in relation to rape and allied offences we have already recommended⁶⁹ that there should be no requirement of corroboration; nor

should the trial judge be *required* to warn the jury of the danger of convicting where there is no corroboration.

(b) Criticism of the Present Law

5.37 A significant body of research is now available which shows that many of the assumptions pertaining to the special corroboration requirements for children's evidence are largely unfounded. This evidence has been reviewed in a number of recent Reports⁷⁰ and has resulted in a move away from mandatory corroboration requirements in many countries. The Law Reform Commission of Victoria has proposed the abolition of the corroboration requirements.⁷¹ Section 34 of the *Criminal Justice Act, 1988* in England has abolished the corroboration requirement for child witnesses as have the New South Wales⁷² and Queensland⁷³ Governments. Southern Australia⁷⁴ has also abolished the corroboration requirement. The matter is still under review in Canada and Western Australia. All States in the U.S.A. have now abolished the corroboration requirement for child witnesses.

At present the judge is required to warn the jury of the danger of convicting the accused on the uncorroborated evidence of a child. This mandatory warning has been abolished in several jurisdictions.

Many statutes provide that the judge should retain the discretion to comment upon the reliability of the child's evidence where the circumstances make comment appropriate. Some proposals for reform have suggested that the judge should not be permitted to comment in this way. However, that would be contrary to the general rule which permits a judge to comment on the evidence in any case, not just in cases involving children and sexual offences. It is the responsibility of a judge to use this discretionary power to ensure that an accused gets a fair trial.

The substance of all the arguments against abolishing the mandatory warning to the jury is that children are so inherently unreliable and their witnessing abilities so frail that the procedures and rules that apply to adult witnesses are not sufficient and that further safeguards are required.

5.38 The arguments in favour of abolishing the requirement to warn are as follows:

- As we have seen from the research evidence, the warning is based on largely untested and unfounded assumptions about the competence of children as witnesses.
- The distinction between the tests for sworn and unsworn evidence in practice are quite arbitrary.
- The right of an accused to a fair trial is adequately protected by the

duty of the judge to comment when necessary on the weight to be given to a particular testimony.

- In jurisdictions where the corroboration requirement has been removed, there are no reports of miscarriages of justice.
- Rigorous cross-examination of the complainant will take place whether there is an obligation to warn or not.
- As Glanville Williams has pointed out: "criminal justice is possible only on the assumption that a court can distinguish between true and false evidence or at any rate can decide what part of the prosecution's evidence is true beyond a reasonable doubt".⁷⁵ He is in favour of abolishing the corroboration rules and warnings and instead suggests that the trial judge should be required to review the whole evidence at the close of the defence case, directing an acquittal if he feels that a conviction would be unsafe. As Spencer has pointed out:

"this would be a considerable change in the present practice of withdrawing cases from juries, under which the judge reviews the evidence not at the close of the defence but at the close of the prosecution case, he does so not on his own initiative but where the defence makes a submission of no case, and in deciding whether to stop the trial he is expected only to consider whether evidence covering all the elements of the offence charged has been called, not whether any of it is credible."⁷⁶

The Badgley Committee agreed with what they called the "common-sense" approach to witness credibility espoused by Mr Justice Dixon of the Supreme Court of Canada [now Chief Justice of Canada]:

"rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If in his judgment the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be untrustworthy, then ... no warning is necessary."⁷⁷

(c) Provisional Recommendations

5.39 Whatever test of competence may be adopted we find the present warning requirement unnecessary. Once any person, of whatever age, is found to be competent, he or she is competent and no special conditions should apply to his or her evidence.

Accordingly, we provisionally recommend the abolition of the corroboration and warning requirements, whatever option is adopted for assessing competence.

The Requirement that Evidence be Given on Oath

(a) Options

5.40 Three options present themselves:

- (1) To retain the status quo.
- (2) To provide a parallel test of competence while retaining the oath.
- (3) To abolish the oath and substitute a new test of competence in all cases.

(b) The Options Considered

OPTION 1

5.41 The oath, swearing, false witness and perjury (with both its moral and criminal sanctions), are all entities and concepts familiar to Irish people. A religious sanction is superimposed on the sanction afforded by the common law offence of perjury. The ability to understand the meaning of an oath is employed as the test of competence for a young witness before he or she is sworn. It is this function with which we are particularly concerned in this Report. If the attainment of this same level of competence could be ascertained by means not necessarily dependent on a belief in God or a knowledge of religious precepts, there is no logical reason why this means should not be universally adopted, particularly as a person who objects to being sworn on the grounds of absence of belief or who has a religious objection to taking an oath can give evidence, having solemnly affirmed under the *Oaths Act, 1888*. Nobody in the State is required to believe in any God and we see no reason why the evidence of a young, ignorant or unbelieving but competent witness should have any less weight or efficacy than the evidence of a young, believing, competent witness. In fact, the present dispensation might have difficulty in surviving constitutional scrutiny.

OPTION 2

5.42 It is perfectly possible in law to have twin, co-existing tests of competence, or reliability. In fact, that is the situation for adults at the moment under the Oaths Act. Under this option, one would be promoting the ability to affirm, using an appropriate formula, for the young as well as for adults. It would be preferable for all if one could simply opt to affirm rather than have to proclaim an absence of belief or an objection to taking the oath. At the same time, a person wishing to call on God to witness the truth of what he or she is saying would still be able to do so if the oath option were preferred.

The argument against this option is that, given the fact that religious practice and awareness of the significance of an oath are such a feature of Irish life, many jurors consciously or unconsciously would attach greater weight to sworn evidence than to affirmed evidence. This perception would not necessarily be alleviated by the judge's holding the adjudication on competence in the absence of the jury or by subsequent judicial warning against making a distinction between the two methods of assessing competence.

OPTION 3

5.43 *Under this option the oath would be replaced by a form of affirmation for all made after an adjudication on competence on lines similar to those suggested by the Australian Law Reform Commission, i.e. an approach which ascertains the potential witness's cognitive ability.* This option has the great attraction of absolute universality. Furthermore, it is not new law as any person, not being of tender years, can affirm, albeit after proclaiming objection to the oath. The objection to this option is the fact that the oath would not be available to those who wished to call on God to witness the truth of their evidence.

(c) Provisional Recommendations

5.44 It must be remembered that we are examining this question in the relatively limited context of child sexual abuse. While *our provisional conclusion is in favour of option 3*, it would clearly be anomalous and unjustifiable to confine the proposed alterations in the law to prosecutions for child abuse. At the same time, to propose such a change in the criminal law generally is probably outside the terms of the matters referred to us by the Attorney General, even more so if we were to extend the enquiry, as we logically should, to the desirability of retaining the oath in all other forms of litigation.

However, as it happens, the Commission's first programme of law reform expressly commits the Commission to examining the question of the desirability of retaining the oath for witnesses and for jurors. Accordingly, while, as we have said, our provisional preference is for option 3, we propose, having received submissions from interested bodies, to accompany our final Report with a separate Report which will contain our proposals as to the retention of the oath for witnesses and for jurors in all proceedings, criminal and civil.

FOOTNOTES TO CHAPTER 5

- 1 *R v Brasier*, 1 Leach 199, at 200, 168 ER 202, at 202 (1779).
- 2 *AG v O'Sullivan*, [1930] IR 552, at 556 (CCA, *per* Kennedy CJ (for the Court)). See generally E Ryan & P Magee, *The Irish Criminal Process*, 319-322 (1983). Jerrard, *The Evidence of a Child*, 134 New LJ 109 (1984). Cartwright, *The Prospective Child Witness*, 6 Crim LQ 196 (1963). Bigelow, *Witness of Tender Years*, 9 Crim LQ 298 (1966).
- 3 1 Leach 199, at 200, 168 ER 202, at 292 (1779).
- 4 [1977] 2 All ER 288 (CA, Cr Div, 1976).
- 5 *Id.*, at 290-291. See also *R v Campbell*, *The Times*, 10 December 1982, cited and discussed by Jerrard, *op cit.* at 109.
- 6 *Op cit, supra*, fn 1, at p 322.
- 7 143 LT 120 (CCA, 1929).
- 8 *Id.*, at 337.
- 9 [1950] 1 All ER 335 (CCA).
- 10 *Id.*, at 337.
- 11 *Supra*, fn 9.
- 12 *Id.*, at 337.
- 13 Section 30 originally applied only to proceedings for an offence under Part II of the Act or for any of the offences mentioned in the First Schedule. This restriction was removed by the *Criminal Justice Administration Act 1914*, section 28(2).
- 14 [1930] IR 552 (CCA).
- 15 Counsel for the appellant sought to justify the absence of objection at trial by saying that, due to his knowledge of a ruling in another case by the trial judge, he was able to anticipate the futility of doing so. This received short shrift from the Court of Criminal Appeal: *id.* at 557.
- 16 *Id.*, at 556.
- 17 Citing *R v Brasier, supra*, at 200 and 202 respectively.
- 18 Citing *Reg v Whitehead*, LR 1 CCR 33.
- 19 [1930] IR, at 556-557.
- 20 Wigmore, *Evidence*, vol 1, para 509 (1940), cited by Warner, *op cit*, pp 53-54. See further Morey, *Comment, The Competency Requirement for the Child Victim of Sexual Abuse: Must We Abandon It?*, 40 U Miami L Rev 245, at 278-283 (1985).
- 21 *Badgley Report*, p 381.
- 22 Murray, Research Paper on Evidence from Children, *Alternatives to In-Court Testimony in Criminal Proceedings in the United States of America*, 58 (1988).
- 23 Davies, *Afterword*, in G Davies and J Drinkwater Eds, *The Child Witness - Do the Courts Abuse Children?* 70, at 71 (Issues in Criminological and Legal Psychology, vol 13, British Psychological Society for the Division of Criminological and Legal Psychology, 1988).
- 24 C Hederman, *Children's Evidence: The Need for Corroboration*, at 28 (Home Office Research and Planning Unit, Paper 41, 1987).
- 25 G Melton and R Thompson, *Getting Out of a Rut: Day Tours to Less Travelled Paths in Child Witness Research* in Ceci, Toglia and Ross eds, *Children's Eye Witness Memory*, (1987) cited in Murray, *op cit*, at 70-1.
- 26 The precise basis on which the court would make such a holding is, of course, a matter for discussion. It would be possible, for example, for the court to continue to apply the present test of competence in relation to such children; or a new test on the lines of one of the options considered below could be adopted. For the purposes of present discussion, this question does not greatly matter: what is of central relevance is whether children below a specified minimum age should be completely excluded from giving sworn evidence, regardless of this particular capacity.
- 27 J F Stephen, *A Digest of the Law of Evidence*, Arts 106-7 (1876).
- 28 Law Reform Commission of Australia's *Interim Report on Evidence*, vol 1, para 242 (Report No 26, 1985).
- 29 Law Reform Commission of Tasmania's Discussion Paper No 1, *Child Witnesses in Sexual Assault*, p 59 (by Kate Warner, 1987).
- 30 *Id.*
- 31 *R v Reynolds*, [1950] 1 All ER 335 (CCA).

- 32 The question of relative, rather than absolute, competence, considered in relation to the
 33 first option, does admittedly presents some complexities in relation to the third option.
 34 Ch 6, *infra*.
 35 Spencer, *Child Witnesses, Corroboration and Expert Evidence*, [1987] Crim L Rev 239, at
 36 243.
 37 See fn 21 *supra*.
 38 *Interim Report on Evidence*, vol 1, para 243.
 39 *Id*.
 40 Section 3 and Schedule 1 of the Act, inserting section 33(2) in the *Oaths Act 1900*.
 41 *Id*, inserting section 34 and a Tenth Schedule in the *Oaths Act 1900*.
 42 *Id*.
 43 *Id*, inserting section 35 in the *Oaths Act 1900*.
 44 *Interim Report on Evidence*, vol 1, para 244.
 45 The Australian Law Reform Commission, Report No 38, *Evidence*, 150.
 46 Myers, *The Testimonial Competence of Children*, 25 J of Family L 287, at 288-289 (1986).
 47 *State v Singh*, 586 SW 2d 410, at 415 (Mo Ct App, 1979).
 48 Myers, *op cit, supra*, fn 43, at 290.
 49 *Id*, at 291.
 50 159 US 523, at 524-525 (1985).
 51 Cf Myers, *supra*, at 295-296. See also Fote, *Comment, Child Witnesses in Sexual Abuse*
 52 *Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13
 53 *Pepperdine L Rev* 157, at 162-163 (1985).
 54 Myers, *op cit, supra*, fn 43, at 298-300.
 55 677 F 2d 1027, at 1028 (4th Cir 1982).
 56 Eg, Kentucky and Massachusetts: cf Myers, *op cit, supra*, fn 43, at 305.
 57 Eg Georgia: *id*, at 306.
 58 Eg Idaho: *id*, at 306-307.
 59 Whether the defendant has a constitutional right to question the child during the
 60 competence examination is not clear. The right of confrontation suggests that he should,
 61 but there is a long tradition of treating preliminary rulings as falling outside the range of
 62 protection afforded by this right: *id*, at 334-335.
 63 *Id*, at 307.
 64 *Recommendations for Improving Legal Intervention in Intra-Family Child Sexual Abuse Cases*,
 65 30 (1982, 1985).
 66 Myers, *op cit, supra*, fn 43, at 307, referring to legislation in Alabama, Colorado,
 67 Connecticut, Missouri, Tennessee and Utah.
 68 *Id*, at 308.
 69 79 NJ 97, 398 A 2d 76 (1979).
 70 398 A 2d, at 86.
 71 Scottish Law Commission Discussion Paper No 75, *The Evidence of Children and Other*
 72 *Potentially Vulnerable Witnesses*, para 2.1 (1988).
 73 Whether this should be characterised as a presumption has been doubted (*id.*, para 2.2)
 74 since "it is the judge (and not the party addressing the child as a witness) who has to
 75 initiate the necessary enquiries [as to the child's competence]".
 76 *Id*, para 2.3.
 77 *Id*, para 2.3.
 78 *Id*, para 2.4.
 79 *R v Baskerville*, [1916] 2 KB 658, *AG of Hong Kong v Wong Muk-ping*, [1987] 2 All ER
 80 488.
 81 *The People (AG) v Travers*, [1956] IR 110, at 114 (Ct Cr App, 1954). See also *The People*
 82 *(AG) v Powell*, [1945] IR 305, *AG v Williams*, [1942] IR 195.
 83 *Phipson on Evidence*, para 1637 (12th ed).
 84 In our *Report on Rape*, para 32 (LRC 24-1988).
 85 See G Davis and J Drinkwater eds, *The Child Witness, Do the Courts Abuse Children?*
 86 (Issues in Criminological and Legal Psychology, No 13, The British Psychological Society
 87 for the Division of Criminological and Legal Psychology, 1988), K Murray, Research Paper
 88 on Evidence from Children, *Alternatives to In-court Testimony in Criminal Proceedings in*
 89 *the United States of America*, (The Scottish Law Commission, April 1988), Flin, *Child*
 90 *Witnesses, The Psychological Evidence*, 138 NLJ, 608 (1988), The Australian Sturgess

- Inquiry, *An Inquiry into Sexual Offences Involving Children and Related Matters*, 106, C Hedderman, *Children's Evidence: The Need for Corroboration*, (Research and Planning Unit, Paper 41, Home Office, London 1987).
- 71 Law Reform Commission of Victoria's Report No 18, *Sexual Offences Against Children*, para 242 (1988).
- 72 *Crimes (Child Assault) Amendment Act 1985*.
- 73 *Criminal Code Evidence Act (Amendment Bill) 1988*.
- 74 *An Act to amend the Evidence Act, 1929*, section 50.
- 75 Williams, *Video Taping Children's Evidence*, 137 NLJ, 108 at 112 (1987).
- 76 Spencer, *Child Witnesses: Corroboration and Expert Evidence*, [1987] Crim L. Rev 239, at 246-7 (footnote omitted).
- 77 *Vetrovec v The Queen*, [1982] 1 SCR 811 at 823, cited in the *Badgley Report*, p 383.

CHAPTER 6: EVIDENCE: (2) EXPERT WITNESSES IN CHILD ABUSE CASES

A. The General Law

6.01 As a general rule, a witness is not permitted to state an opinion unless he or she is an expert in the subject matter of his or her evidence.¹ In *McFadden v Murdock*,² Pigot CB adopted the language used in Starkie's text³ to the effect that:

"Where the inference requires the judgment of persons of peculiar skill and knowledge on the particular subject, the testimony of such, as to their opinion and judgment upon the facts, is admissible evidence to enable the jury to come to a correct conclusion."

The Chief Baron went on to say:

"When a physician gives evidence, that according to his skill and experience a particular symptom proves the existence of a particular disease, he in effect says nothing more than this - that, according to his skill and experience, it has been found, that where the symptom appears, there the disease exists. Where ... an engineer deposes, that in his judgement the stepping up of a harbour was caused, not by a particular embankment, but by the situation of the banks, the course of tides and winds, and the shifting of sands, he states, in effect, that according to his skill and experience, where such causes operate, it is found that harbours are filled up.

The subjects to which this kind of evidence is applicable are not confined to classed and specified professions. It is applicable wherever peculiar skill and judgment, applied to a particular subject, are required to explain results, or trace them to their causes. And so, in the present case, when the *ex parte* witness states, that according to his judgment

and experience as to sales in smalls, the sales of certain losses, he proves that, according to his experience, where such articles are so sold, such losses arise. Such evidence ought, as all evidence of opinion ought, to be received and considered with narrow scrutiny and with much caution. But, without such evidence, a jury will in some cases find it difficult, and in some almost, if not wholly, impossible to arrive at a just conclusion; because the subject may be, to a great extent, or altogether, without the range of their own observation and experience, and not belonging to the ordinary occurrences or transactions among men."⁴

6.02 Conversely, matters of human nature and behaviour within the limits of normality are not susceptible to expert evidence, according to a number of English decisions. In *R v Turner*,⁵ the English Court of Appeal, Criminal Division, held that the trial judge in a murder prosecution had rightly refused to admit evidence of a psychiatrist, designed to help the jury to accept as evidence the defendant's account of what had happened and to seek to explain to them why the defendant had, as he claimed, been provoked. Lawton LJ delivering the judgment of the Court, said:

"The first question in both these issues is whether the psychiatrist's opinion is relevant. A man's personality and mental make-up do have a bearing on his conduct. A quick-tempered man will react more aggressively to an unpleasing situation than a placid one. Anyone having a florid imagination or a tendency to exaggerate is less likely to be a reliable witness than one who is precise and careful. These are matters of ordinary human experience. Opinions from knowledgeable persons about a man's personality and mental make-up play a part in many human judgments. In our judgment the psychiatrist's opinion was relevant. Relevance, however, does not result in evidence being admissible: it is a condition precedent to admissibility. Our law excludes evidence of many matters which in life outside the courts sensible people take into consideration when making decisions. Two broad heads of exclusion are hearsay and opinion. As we have already pointed out, the psychiatrist's report contained a lot of hearsay which was inadmissible. A ruling on this ground, however, would merely have trimmed the psychiatrist's evidence; it would not have excluded it altogether. Was it inadmissible because of the rules relating to opinion evidence?"

... An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary. In such a case if it is given dressed up in scientific jargon it may make judgment more difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits

of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.

What, in plain English, was the psychiatrist in this case intending to say? First, that the appellant was not showing and never had shown, any evidence of mental illness as defined by the *Mental Health Act 1959* and did not require any psychiatric treatment; secondly, that he had had a deep emotional relationship with the girl which was likely to have caused an explosive release of blind rage when she confessed her wantonness to him; thirdly, that after he had killed her he behaved like someone suffering from profound grief. The first part of his opinion was within his expert province and outside the experience of the jury but was of no relevance in the circumstances of this case. The second and third points dealt with matters which are well within ordinary human experience. We all know that both men and women who are deeply in love can, and sometimes do, have outbursts of blind rage when discovering unexpected wantonness on the part of their loved ones; the wife taken in adultery is the classical example of the application of the defence of 'provocation'; and when death or serious injury results, profound grief usually follows. Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life. It follows that the proposed evidence was not admissible to establish that the appellant was likely to have been provoked. The same reasoning applies to its suggested admissibility on the issue of credibility. The jury had to decide what reliance they could put on the appellant's evidence. He had to be judged as someone who was not mentally disordered. This is what juries are empanelled to do. The law assumes they can perform their duties properly. The jury in this case did not need, and should not have been offered, the evidence of a psychiatrist to help them decide whether the appellant's evidence was truthful."⁶

The Court distinguished the Privy Council decision in *Lowery v The Queen*⁷ where the evidence of a psychologist on the issue of credibility had been held admissible. The evidence was designed to throw light on the respective qualities of dominance and submission in the personalities of two co-defendants charged with murder. The case of one of the defendants, Lowery, was that the other defendant, King, had committed the murder, and furthermore that Lowery himself was not the sort of person who would have committed the murder. The Privy Council held that King was entitled to adduce the psychologist's evidence as being relevant and necessary to his case, which involved negating what Lowery had claimed.

Lord Morris, on behalf of the Judicial Committee, said:

"In all these circumstances it was necessary on behalf of King to call all relevant and admissible evidence which would exonerate King and

throw responsibility entirely on Lowery. If, in imaginary circumstances similar to those of this case, it was apparent that one of the accused was a man of great physical strength whereas the other was a weakling it could hardly be doubted that in forming an opinion as to the probabilities it would be relevant to have the disparity between the two in mind. Physical characteristics may often be of considerable relevance ... The evidence of Professor Cox, the expert witness, was not related to crime or criminal tendencies; it was scientific evidence as to the respective personalities of the two accused as, and to the extent, revealed by certain well-known tests. Whether it assisted the jury is not a matter that can be known. All that is known is that the jury convicted both the accused. But insofar as it might help in considering the probabilities as to what happened at the spot to which the girl was taken, it was not only relevant to and indeed necessary for the case advanced by King, but it was made relevant and admissible in view of the case advanced by Lowery and in view of Lowery's assertions against King.

The case being put forward by counsel on behalf of King involved posing to the jury the question 'which of these two men is the more likely to have killed this girl?' and inviting the jury to come to the conclusion that it was Lowery. If the crime was one which was committed apparently without any kind of motive, unless it was for the sensation experienced in the killing, then unless both men acted in concert the deed was that of one of them. It would be unjust to prevent either of them from calling any evidence of probative value which could point to the probability that the perpetrator was the one rather than the other."⁸

In *Turner*, the Court of Appeal, Criminal Division, adjudged *Lowery* to have been decided on its special facts. The Court did:

"not consider ... it ... an authority for the proposition that in all cases psychologists and psychiatrists can be called to prove the probability of the accused's veracity. If any such rule was applied in our courts, trial by psychiatrists would be likely to take the place of trial by jury and magistrate. We do not find that prospect attractive and the law does not at present provide for it.

In coming to the conclusion we have in this case we must not be taken to be discouraging the calling of psychiatric evidence in cases where such evidence can be helpful within the present rules of evidence. These rules may be too restrictive of the admissibility of opinion evidence. The Criminal Law Reform Commission in its Eleventh Report thought they were and made recommendations for relaxing them. The recommendations have not yet been accepted by Parliament and until they are, or other changes in the law of evidence are made, this court must apply the existing rules ... We have not overlooked

what Lord Parker CJ said in *Director of Public Prosecutions v A & BC Chewing Gum Ltd*⁹ about the advance of science making more and more inroads into the old common law principle applicable to opinion evidence, but we are firmly of the opinion that psychiatry has not yet become a satisfactory substitute for the common sense of juries or magistrates on matters within their experience of life."¹⁰

6.03 In *A & BC Chewing Gum*,¹¹ the Queen's Bench Division, in a prosecution under the Obscene Publications legislation, had held that the evidence of psychiatrists was admissible at common law and under the legislation, to show what sort of effect certain cards distributed in chewing gum packets, would have on children of different ages, what it would lead them to do, and whether what they were led to do was a sign of corruption or depravity. Lord Parker, CJ said:

"What was submitted to the justices and has been submitted to this court is that, as a general rule, a long standing rule of common law, evidence is inadmissible if it is on the very issue which the court has to determine. For my part, and I am only dealing with this case, I cannot think that the evidence tendered was on that very issue. There were really two matters for consideration. First, what sort of effect would these cards singly or together have on children, and no doubt children of different ages, and what would it lead them to do? Secondly, was what they were led to do a sign of corruption or depravity? As it seems to me, it would be perfectly proper to call a psychiatrist and to ask him in the first instance what his experience, if any, with children was, and to say what the effect on the minds of children of different groups would be if certain types of photographs or pictures were put before them, and indeed, having got his general evidence, to put one or more of the cards in question to him and ask what would their effect be on the child. For myself, I think that it would be wrong to ask the direct question whether any particular cards tended to corrupt or deprave, because that final stage was a matter which was entirely for the justices. No doubt, however, in such a case the defence might well put it to the witness that a particular card or cards could not corrupt and, no doubt, whatever the strict position may be, that question coming from the defence would be allowed, if only to give the defence an opportunity of getting an answer from the expert 'No'. On that ground alone, as it seems to me, the evidence in the present case was admissible.

I myself would go a little further, in that I cannot help feeling that, with the advance of science, more and more inroads have been made into the old common law principles. Those who practice in the criminal courts see every day cases of experts being called on the question of diminished responsibility, and, although technically the final question 'Do you think he was suffering from diminished responsibility?' is strictly inadmissible, it is allowed time and time again without any

objection. No doubt when dealing with the effect of certain things on the mind, science may still be less exact than evidence as to what effect some particular thing will have on the body, but that, as it seems to me, is purely a question of weight.

I said that I was confining my observations to this particular case, because I can quite see that, when considering the effect of something on an adult, an adult jury may be able to judge as well as an adult witness called on the point. Indeed, there is nothing more that a jury or justices need to know; but certainly when dealing with children of different age groups and children from five upwards, any jury and any justices need all the help that they can get, information which they may not have, as to the effect on different children."¹²

6.04 In *Toohey v Metropolitan Police Commissioner*¹³ the House of Lords held that medical evidence was admissible on the question whether an hysterical condition on the part of the alleged victim of assault was the result of an assault or, on the other hand, did the alleged victim make a false allegation of assault.

Lord Pearce said:

"It is common knowledge that hysteria can be produced by fear. The hysteria of the victim of an alleged assault may, if he is a person of normal stability, confirm a jury in the belief that he has been assaulted. When, however, the victim is unstable and hysterical by nature, the hysteria can raise a doubt whether in truth an assault ever occurred or whether it was the figment of an hysterical imagination. Here the real question to be determined was whether, as the prosecution alleged, the episode created the hysteria, or whether, on the other hand, as the defence alleged the hysteria created the episode. To that issue medical evidence as to the hysteric and unstable nature of the alleged victim was relevant. It might be that, on a careful examination of the medical evidence, the pre-disposition to hysteria and instability was not enough to create an episode of this kind without some assault to provoke it; but, equally, that evidence might have created a real doubt whether there was any assault at all and might have inclined the jury to believe the account given by the accused. On that ground the defence was entitled to have the evidence considered by the jury ...

Human evidence shares the frailties of those who give it. It is subject to many cross-currents such as partiality, prejudice, self-interest and, above all, imagination and inaccuracy. Those are matters with which the jury, helped by cross-examination and common sense, must do their best. But when a witness through physical (in which I include mental) disease or abnormality is not capable of giving a true or reliable account to the jury, it must surely be allowable for medical science to reveal this vital hidden fact to them. If a witness purported to give

evidence of something which he believed that he had seen at a distance of fifty yards, it must surely be possible to call the evidence of an oculist to the effect that the witness could not possibly see anything at a greater distance than twenty yards, or the evidence of a surgeon who had removed a cataract from which the witness was suffering at the material time and which would have prevented him from seeing what he thought he saw. So, too, must it be allowable to call medical evidence of mental illness which makes a witness incapable of giving reliable evidence, whether through the existence of delusions or otherwise.

It is obviously in the interests of justice that such evidence should be available. The only argument that I can see against its admission is that there might be a conflict between the doctors and that there would then be a trial within a trial; but such cases would be rare. And if they arose, they would not create any insuperable difficulty, since there are many cases in practice where a trial within a trial is achieved without difficulty. And in such a case as this (unlike the issues relating to confessions) there would not be the inconvenience of having to exclude the jury, since the dispute would be for their use and their instruction."¹⁴

In the New Zealand Court of Appeal decision of *The Queen v B*¹⁵ in 1987, McMullin J interpreted *Toohey* as an authority for the proposition that:

"evidence which makes the event in issue more probable than not or *vice versa* is admissible in the same way as evidence of personal factors directed to that end."¹⁶

6.05 An Australian commentator has summarised the position of expert evidence in relation to child sexual abuse as follows:

"Where there is some physical evidence of sexual interference, the examining doctor may give evidence as to his findings. This is unexceptional. A doctor may also say that in his opinion the facts are consistent, e.g. with penile penetration or digital penetration. To support that opinion he can relate the history if otherwise proved. The doctor, therefore, may be allowed to say that the child told him that penile or digital penetration occurred, if and only if the child confirms those statements by evidence in court. The doctor may also state what the child said at the medical examination as to contemporaneous physical sensations or symptoms (e.g. pain, tenderness), to prove the existence of those sensations or symptoms, but the child's statements as to cause are inadmissible under this rule (the *res gestae* doctrine). Any witness, including a doctor, may give evidence of a child's statement as to contemporaneous state of mind or emotion, e.g. fear or distress, where that is considered relevant, but the child's statement as to cause is not admissible under this rule. A psychiatrist could give

expert opinion about the psychological state of an alleged child victim of sexual assault, but no statements by the child as to cause would be admissible. The rules of evidence would not permit a doctor to go further and relate what a child said about a sexual assault to support his opinion that the assault occurred when there is no evidence of physical trauma.

The extent to which an expert can assist the court in evaluating the evidence and behaviour of a child who is allegedly a victim of sexual assault is limited. A doctor or other person with professional expertise in child sexual assault cannot be asked to give his opinion on the competence or veracity of a child's evidence. Nor, it seems, would such an expert be permitted to give an opinion on the likely psychological reaction of a child who is sexually assaulted. Nor can an expert give the courts general information about research and learning on matters such as the reliability of children as witnesses or the behaviour of sexually abused children after abuse. Such evidence would be rejected on the ground that such matters as competence, credibility and behaviour under stress are matters of common knowledge of ordinary human nature and behaviour which the relevant tribunal can decide for itself. The subject matter of the evidence is not an area for expert evidence. They are not matters beyond the courts' expertise.¹⁷

Whether the Irish Courts would follow this approach is not certain. It may be that they would prefer to leave open, as the New Zealand Court of Appeal did in *The Queen v B*,¹⁸ the possibility that, in future, experts in child psychology will be able to provide evidence that persons subjected to sexual abuse act in particular ways and that these actions amount to supporting evidence of sexual abuse. However, the "child sexual abuse syndrome" as yet lacks clear scientific empirical validation.

B. Expert Testimony in Child Abuse Cases

6.06 Expert testimony is increasingly used to assist the courts in cases involving sexually abused children, though more so in civil rather than criminal proceedings. In the U.S. the use of expert testimony from psychiatrists, psychologists and social workers relating both to the child victim and the accused is one of the most controversial and significant innovations in the courts there. The expert witness testimony can have different functions:

- (i) To assist the court in determining the child's competence and reliability as a witness by assessing the individual child's intelligence, memory, suggestibility, truthfulness and verbal ability. The expert witness could also offer opinions as to the general cognitive and emotional capabilities of children at different stages of development.
- (ii) To offer testimony on child sexual abuse, i.e. on children's typical behavioural and emotional reactions to child sexual abuse. The expert

witness could offer explanations as to why, for example, sexually abused children may delay in making disclosures, be unable to describe specific instances of abuse or recant prior evidence. The expert witnesses' testimony can be used to counter the defence arguments that behaviour such as delayed disclosure or recantation are signs that the child is not telling the truth.

- (iii) To offer testimony that a particular child's behaviour is consistent with being sexually abused.
- (iv) To offer an opinion as to whether a particular child has suffered abuse.

Advantages

6.07 At present a child's competence is assessed by a judge questioning the child. Expert testimony could sometimes assist the court in this respect.

"It would surely be sensible if the criminal courts were willing to listen to child psychiatrists on this matter, both when deciding whether a young child is competent to give evidence at all, and in deciding what weight to put on its evidence if it does.¹⁹

... A psychologist could give general evidence on childhood development, "including memory, suggestibility, truthfulness, perception and narration, to assist the court in determining competence and reliability of the child".²⁰

6.08 Without expert testimony a child's reactions (for example delayed disclosure and recantation) can be misinterpreted by a jury. The expert witness by sharing information with the jury can give them an informed framework in which to judge the case.

"Thus a child which has suffered some traumatic assault will often keep it to itself like a guilty secret, and only reveal it when its odd behaviour has prompted questioning. Judges may know this if they are experienced; but juries almost certainly will not. Thus when they hear that a child began to behave very strangely and then, after questioning, accused some person of assaulting him sometime earlier, they will probably accept defence counsel's invitation to dismiss the case as the fabrication of a child which is obviously mentally disturbed. Any competent child psychologist or psychiatrist will know that this is turning the evidence on its head. They should surely be able to tell the jury so, at least in general terms, and perhaps even in the context of their report of an examination of the child in question".²¹

Thus, in *State v Myers*,²² for example, the Minnesota Supreme Court had no hesitation in accepting an expert's testimony on the general characteristics apparent in sexually abused children. It stated:

"The nature ... of the sexual abuse of children places lay jurors at a disadvantage. Incest is prohibited in all or almost all cultures, and the common experience of the jury may represent a less than adequate foundation for assessing the credibility of a young child who complains of sexual abuse. If the victim of a burglary failed to report the crime promptly, a jury would have good reason to doubt that person's credibility. A young child subjected to sexual abuse, however, may for some time be either unaware or uncertain of the criminality of the abuser's conduct. As [the expert] testified, uncertainty becomes confusion when an abuser who fulfills a caring-parenting role in the child's life tells the child that what seems wrong to the child is, in fact, all right. Because of the child's confusion, shame, guilt and fear, disclosure of the abuse is often long delayed. When the child does complain of sexual abuse, the mother's reaction frequently is disbelief, and she fails to report the allegations to the authorities. By explaining the emotional antecedents of the victim's conduct and the peculiar impact of the crime on other members of the family, an expert can assist a jury in evaluating the credibility of the complainant.^{25*24}

The court went on to observe that:

"background data providing a relevant insight into the puzzling aspects of the child's conduct and demeanor which the jury could not otherwise bring to its evaluation of her credibility is helpful and appropriate in cases of sexual abuse of children, and particularly of children as young as this complainant.^{25*26}

6.09 Expert testimony as to typical reactions to child sexual abuse may satisfy the corroboration requirements of a child hearsay statute.²⁷ For example, expert testimony could be used to explain why and how a child's unusual behaviour was consistent with behaviour one might see in an abused child. This evidence, together with any physical evidence of the abuse, could be used as corroboration, justifying admission of the child's out-of-court statement under a statutory hearsay exception.

Not all courts confer a *carte blanche* on evidence of this type. In *Bussey v Commonwealth*,²⁸ for example, the Supreme Court of Kentucky held that the trial court should not have admitted psychiatric evidence of the "child sexual abuse accommodation syndrome" in a prosecution of a father, since the syndrome as described could have been caused by the prior sexual abuse of the child by her uncles, in respect of whom there was accusatory testimony (of unstated weight). The court also noted that the prosecution had made no attempt to establish the credibility of this syndrome as a concept generally accepted in the medical community.

6.10 Specific expert testimony called "statement analysis" is widely used by the German courts. Expert witnesses who have a special expertise analyse children's statements using a set of specific criteria to establish the consistency

and credibility of the statements. The courts follow those expert opinions in more than 90% of cases of child sexual abuse. And where statements were judged as truthful by the expert, the perpetrator was convicted in 95% of cases. To date no convicted defendant was found to be innocent by the later discovery of conflicting evidence.²⁹

Disadvantages

6.11 It usurps the role of the judge and jury, whose function it is to assess the truthfulness of witnesses. In *Turner*³⁰ fears were expressed that if such evidence were admitted "trial by psychiatrists would be likely to take the place of trial by jury and magistrates".³¹

6.12 In the adversarial system, expert witnesses can be called by the defence and by the prosecution.

"If the prosecution were allowed to call a psychologist to say in effect that he believed the child had been sexually abused, the defence would have to be permitted to call another to say that he believed that it had not. In a criminal case, furthermore, defence is free to shop around until it eventually finds an expert who will tell the tale it wants the court to hear, and it is under no duty to tell the court of all the better qualified and more reliable experts whom it approached until at last it found what it was looking for. Furthermore, when it comes to deciding between two apparently well-qualified experts, a jury of butchers, bakers and candlestick makers is not well placed to tell the genuine expert from the mountebank. If at the end of the prize fight between rival experts truth eventually prevails, the trial will be greatly prolonged, its cost would be greatly increased, and (last but not least) the child might have the trauma and upset of a whole series of expert examinations. For these reasons judges would probably not admit this sort of evidence in criminal cases, even if they came to believe it was valuable."³²

6.13 Expert testimony on the child sexual abuse syndrome has met with a mixed reception in American courts. One of the difficulties arises from the fact that the child sexual abuse syndrome is very loosely defined. For example, the range of children's behavioural and emotional reactions to sexual abuse is very wide. A certain combination of reactions may be "typical" of child sexual abuse victims, it may even strongly suggest that sexual abuse has occurred, but it cannot be reliably diagnostic of sexual abuse. A child may show many of the behavioural and emotional reactions typical of a sexually abused child, e.g. sleep disturbance, enuresis, lowered school performance, fears and phobias, but these may be caused by other factors in the child's life and do not point to child sexual abuse without other evidence. In general, expert evidence that certain behaviours (for example delayed disclosure, recantation) are not inconsistent with abuse is admissible in most American courts. However, "syndrome testimony", i.e. expert opinion that a particular child has been sexually abused because his or her behaviour is

consistent with the child sexual abuse syndrome has generally been rejected.

6.14 Expert opinion vouching for the complainant's credibility has also generally been rejected by American courts. But expert testimony enhancing the complainant's credibility (for example by explaining the complainant's unusual behaviour) is generally admissible.

6.15 There is a growing body of empirical and clinical research on child development in general and on sexually abused children in particular. Expert witnesses have a valuable role in assisting the courts by bringing such knowledge before them. Some of the problems, e.g. the multiple interviews of children by experts called by the defence and the prosecution, could be avoided if expert witnesses were called by the court rather than by the defence and the prosecution. This already happens in civil proceedings. The judge in criminal proceedings has the same power, though this is rarely exercised, to call a witness who has not been called by either of the parties. If both the prosecution and the defence agree to a court-appointed assessor this would require no change in current law. But it would require a significant change in the law if the parties were to be forbidden to call their own experts when an expert witness was appointed by the court. Moreover, in civil cases, the judge sometimes has the option of appointing an assessor who is not a witness but sits with him on the bench to help him assess the expert evidence. This may also be possible in a criminal court.

Under existing law, expert evidence as to the child's competence is admissible. As for the other types of expert evidence, a fine line has to be drawn between evidence that will assist the jury to make its decision and evidence that will usurp or unduly prejudice the jury. The Scottish Law Reform Commission concluded:

"The broad lines of development in this important body of law have been laid out and it is expected that further judicial decisions will elaborate on the topic."³³

C Provisional Recommendation

6.16 *We provisionally recommend that expert evidence be admissible as to competence and as to children's typical behavioural and emotional reactions to sexual abuse.*

FOOTNOTES TO CHAPTER 6

- 1 Cf *Cross on Evidence*, 436-437 (6th ed. 1985), the Law Reform Commission of Australia Research Paper No 13, *Opinion Evidence* (1983), Basten, *The Court Expert in Civil Trials - A Comparative Appraisal*, 40 *Modern L Rev* 174 (1977). Guttmacher, *The Psychiatrist as an Expert Witness*, 22 *U Chi L Rev* 325 (1955), McCormick, *Some Observations upon the Opinion Rule and Expert Testimony*, 23 *Texas L Rev* 109 (1945). McDonald, *Opinion Evidence*, 16 *Osgoode Hall L J* 321 (1978).
- 2 IR 1 CL 211, at 217 (Exch, 1867).
- 3 1 *Starkie on Evidence*, p 69.
- 4 IR 1 CL, at 217-218.
- 5 [1975] 1 All ER 70 (CA Cr Div, 1974), critically analysed by Bates, *Comment*, 55 *Can Bar Rev* 178, at 185 (1977). See also Pattenden, *Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia*, [1986] *Crim L Rev* 92, at 92-94, 98-102, and Jackson, *The Ultimate Issue Rule: One Rule Too Many*, [1984] *Crim L Rev* 75.
- 6 [1975] 1 All ER, at 74.
- 7 [1973] 3 All ER 662 (PC).
- 8 *Id.* at 671.
- 9 [1967] 2 All ER 504.
- 10 [1975] 1 All ER, at 75.
- 11 *Supra*.
- 12 [1967] 2 All ER, at 505-506.
- 13 [1965] 1 All ER 506 (HL).
- 14 *Id.* at 509-510, 512.
- 15 NZCA, 19 May 1987 (CA 315/86).
- 16 P 12 of McMullin J's judgment.
- 17 Warner, *Child Witnesses in Sexual Assault*, Discussion Paper 1, pp 50-51 (Discussion Paper 1, Law Reform Commission of Tasmania 1987).
- 18 *Supra*.
- 19 Spencer, *Child Witnesses, Corroboration and Expert Evidence*, [1987] *Crim L Rev* 239, at 247.
- 20 Warner, *Child Witnesses in Sexual Assault*, at p 112 (Law Reform Commission of Tasmania, Discussion Paper 1, 1987).
- 21 Spencer, *op cit*, fn 19, *supra*, at 248.
- 22 359 NW 2d 604 (Minn Sup Ct, 1984).
- 23 Citing *State v Middleton*, 294 Or 427, 657 P 2d 1215 (1983).
- 24 359 NW 2d, at 610.
- 25 Citing *State v Middleton*, *supra*, and *State v Kim*, 64 Haw 598, 645 P 2d 1330 (1982).
- 26 359 NW 2d, at 610.
- 27 Murray, *Research Paper on Evidence from Children: Alternatives to In-Court Testimony in Criminal Proceedings in the United States*, pp 38-41 (1988).
- 28 697 SW 2d 139 (Ky Sup Ct, 1985).
- 29 Kohnken G and Steller M, *The Evaluation of the Credibility of Child Witness Statements in the German Procedural System*, see G Davis & J Drinkwater eds, *The Child Witness, Do the Courts Abuse Children?* (Issues in Criminological and Legal Psychology, vol 13, British Psychological Society for the Division of Criminological and Legal Psychology, 1988).
- 30 *Supra*.
- 31 At p 75.
- 32 Spencer, *op cit*, fn 19, *supra*, at 249-50.
- 33 Murray, *op cit*, *supra*, fn 27, at p 41.

CHAPTER 7: EVIDENCE: (3) *MAKING IT EASIER FOR CHILDREN
TO GIVE EVIDENCE*

A. General

7.001 Concern has frequently been expressed regarding the trauma or secondary victimization that sexually abused children are said to suffer by their involvement in the criminal justice system. There are occasional reports in the media of children breaking down in court and being unable to give or continue their evidence. There are claims by some experts in mental health that children may sustain serious psychological harm as a consequence of participating in the legal process.¹

These considerations may profoundly influence the number of cases of reported child sexual abuse which eventually reach the courts. Families of sexually abused children may be reluctant to submit their children to further stress and trauma. Prosecutors may also be concerned that particular children would be too intimidated by the court process and as a consequence may not continue the investigation and prosecution of those cases.

Some experts take a different view, believing that court involvement is not necessarily traumatic and may even be therapeutic for some children.²

7.002 The problem is that much of the evidence for both positions remains at an anecdotal and descriptive level. There is very little empirical evidence on the short-term and in particular the long-term psychological effects on children of giving evidence in court. What studies exist are often flawed by methodological weaknesses. For example, one study showed that children who gave evidence in court were more psychologically disturbed than those children who did not. But the researchers admitted that the cases that went to court were probably more serious than those that did not and that the families of the court group were more disturbed.³

One carefully controlled study found that sexually abused children who testified in court were more psychologically disturbed than sexually abused children in similar circumstances who did not give evidence. That study is not yet completed so there is no data on how long-term the psychological disturbance is. Neither is it clear if a certain sub-group of children may benefit from testifying. The authors from that study concluded:

"Finally, even if our findings do hold for larger numbers of children, the findings do not necessarily argue for limiting children's court appearances. In contrast, they may more justifiably argue for changes in court proceedings concerning children. A variety of innovations (e.g. use of closed-circuit television) are beginning to be proposed and to a lesser extent implemented in American courts in an attempt to decrease the presumed trauma experienced by child victims who must testify. Even if it does turn out that court involvement as it often occurs today is stressful for children, this finding does not imply that court involvement is inevitably stressful. Further studies aimed at investigating the effects of legal innovations on children's emotional reactions to courtroom testimony are needed to determine if stressful aspects of court involvement can be eliminated." ⁴

These considerations have led to a variety of changes in many jurisdictions in the practices and procedures that are designed to make it easier for children to give evidence. Some measures do not require legislation and raise no issues of principle. Other measures would require legislation or changes in rules of court. We will later examine various proposals aimed at making it easier for children to give evidence.⁵ Before we do, we will examine the Rule against Hearsay and the constitutional implications of some of these proposals, which together form the legal backdrop against which the proposals are made.

B. The Rule Against Hearsay

(i) The Present Law

(a) The general principles

7.003 Strictly speaking this section deals, however briefly, with the rules of evidence which exclude out-of-court statements, *including hearsay*. The above heading is convenient, familiar to lawyers and shorter. The Commission has published a Working Paper⁶ and a Report⁷ on the *Rule against Hearsay*. The Report was confined to civil cases (as were the recommendations in the Working Paper). The Commission, referring to the differing standards of proof in the criminal and civil regimes, were reluctant to make recommendations for criminal cases without first seeing how the abolition of the rule would operate in civil cases. Leaving aside the standard of proof and the danger inherent in admitting hearsay in a criminal trial, the considerations are much the same in civil and criminal proceedings. In fact the Commission has recommended a relaxation of the rule, albeit with

stringent safeguards, where it relates to business records in its Report on *Receiving Stolen Property*.⁸

In its Report on *Hearsay in Civil Cases* the Commission says:

"Under the law of evidence, the evidence adduced must be the best evidence available, i.e. to ascertain what John saw, you call John, not his mother. His mother's evidence of what John told her he saw is what lawyers call 'hearsay'.... Hearsay is excluded because the twin safeguards of an oath and cross-examination do not attend its introduction. The law takes the view that truth is best ascertained by the unrehearsed answers, on oath or affirmation, of witnesses who have actually perceived the relevant events and who are then subjected to cross-examination in the presence of the court. A hearsay statement is, by definition, not made before the court and, if the maker does not testify, he cannot be cross-examined nor can his demeanour be observed or his credibility tested. Where the hearsay statement narrated is oral, there is the possibility that it may be altered in the telling. Where it is made formally, there is the danger that it will be tailored to the requirement of the party making it. A further reason sometimes given for the rule is the possibility that a jury, where there is one, will be confused by a proliferation of evidence of little value. This would add to the cost of litigation. Hearsay evidence is also said to operate unfairly by catching the other party by surprise."⁹

The effect of the Rule against Hearsay in the present context is that, "in the case of child sexual abuse where a child tells a parent or other third person that he or she has been sexually interfered with in some way, the parent or other person cannot tell the court what the child said in order to help prove that the assault occurred. When the child is later interviewed by a police officer, [the police officer] can[not] give evidence of what the child said in that interview".¹⁰

(b) Exceptions at common law

7.004 There are, however, a number of exceptions to this rule. Evidence of what a person said may be adduced if part of the *res gestae*,¹¹ i.e. it becomes relevant and admissible because of its contemporaneity with the matters under investigation, e.g. remarks of a child who is being abused by her father overheard by her mother. In *Ratten v R*,¹² Lord Wilberforce, delivering the opinion of the Judicial Committee of the Privy Council, having reviewed all the authorities, stated:

"[T]he test should not be the uncertain one whether the making of the statement was in some sense part of the event or transaction. This may often be difficult to establish: such external matters as the time which elapses between the events and the speaking of the words (or *vice versa*), and differences in location, while being relevant factors are not, taken by themselves, decisive criteria. As regards statements made

after the event it must be for the judge, by preliminary rule, to satisfy himself that the statement was so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded. Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it.¹³

It may be that a generous application of the *Ratten* test could lead to a more indulgent application of the *res gestae* test in relation to complaints by young victims in the aftermath of a sexual assault. Before the decision in *Ratten*, the authorities insisted that the words should be strictly contemporaneous or spoken immediately after the event. Thus in *R v Bedingfield*,¹⁴ where the deceased came out of her room with her throat cut and said "See what Bedingfield has done to me", this evidence was not admitted as it was not contemporaneous. Whether our courts would be disposed to develop the concept of "excited utterances" as far as the courts in the United States¹⁵ is, however, far from certain.

7.005 Statements concerning the maker's contemporaneous physical sensations or emotion or state of mind may also be admitted.

Statements of this nature are admissible only as evidence of the existence of the declarant's state; they have no further evidential efficacy. Thus, if a child said to a doctor that he or she experienced pain at a certain location or was fearful, the doctor could give evidence that the child said this, but the doctor would not be permitted to include evidence of what the child said as to the cause of the pain or fear.

7.006 An important related rule of evidence should be noted here. This relates to complaints in sexual cases. Evidence of such a complaint is admissible in order to show the consistency of the conduct of the complainant with his or her evidence,¹⁶ and not merely to rebut the suggestion of consent. The exception applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself.¹⁷

The particulars of the complaint thus admitted in evidence are admissible "merely to show consistency with the complainant's account, i.e. to buttress the credit of the complainant"¹⁸ and they are not evidence of the facts related in the complaint. Thus, the recent complaint rule is not an exception to the hearsay rule but rather an exception to the rule making prior consistent statements of a witness inadmissible.

It should be noted that evidence of this type does not amount to corroboration "because corroboration must come from a source independent of the witness to be corroborated".¹⁹

*(c) Some Statutory Exceptions**Depositions under Sections 7 and 14 of the Criminal Procedure Act, 1967*

7.007 Under Section 7 of the *Criminal Procedure Act, 1967* either the prosecutor or the accused may call any witness on sworn deposition as part of the preliminary examination of a case in the District Court.

Section 14 provides in addition that, either on the application of the prosecution or the accused, if a justice is of the opinion that a prospective witness is unable to attend, or may be prevented from attending to give evidence at the trial, and that it is necessary, in the interests of justice, to take his evidence by way of sworn deposition, he may order accordingly.

Section 15 provides that a deposition, taken under section 14 or under section 7, may be read as evidence at the trial of the accused, if it is proved that the deponent (the person who made the deposition) is dead or otherwise unable to attend or prevented from attending, that the deposition was taken in the presence of the accused, and that an opportunity was given for cross-examination of the deponent. However, if a deposition was taken under section 7 on the prosecution's application, it cannot be read at the trial unless the accused consents (something he is unlikely to do). A deposition taken under section 14 may not be read unless the trial judge considers that not to do so would not be in the interests of justice.

Depositions under Section 28 and Section 29 of the Children Act 1908

7.008 These sections allow a justice to take a deposition of a child (aged 7-15) or young person (15-17) if their attendance at court would involve "serious danger to their life or health". This deposition would be admitted at the trial of the accused if the court were satisfied by the certificate of a doctor, provided that the accused or his counsel or solicitor had, or might have had, if he chose to be present, an opportunity of cross-examining the victim making the deposition.

*(ii) The Law in Other Jurisdictions**(a) U.S.A.*

7.009 Rule 801(c) of the *Federal Rules of Evidence* defines hearsay²⁰ as:

"a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

A "statement" in this context means "an oral or written assertion or non-verbal conduct of a person, if it is intended by him as an assertion".²¹ Thus, for example, pointing may amount to an assertion if it is so intended by the person pointing.

A non-assertive utterance is not hearsay, and thus generally is admissible if relevant. This type of utterance may be verbal, as, for example, an exclamation of joy, annoyance or fear. The issue is of some importance in relation to child sexual abuse. In *In re Penelope B.*,²³ in 1985, the Washington Supreme Court stated:

"[I]f in a child abuse case someone walks into a place where the child is, or that person's name is mentioned, and the child involuntarily reacts by trembling, running and hiding, screaming, crying, shouting 'I hate you' or the like, then such would be nonassertive utterances or non-verbal conduct and not hearsay

In the case before us, the child's utterances showing precocious knowledge of explicit sexual matters and certain private names for male and female genitalia, as testified to by witnesses, are examples of nonassertive utterances which are not hearsay and are admissible."

In this case the behaviour of the child, aged five, with anatomically correct dolls was held to be non-assertive conduct. This embraced the words that she had used at the time.²⁴

7.010 There are several cases in which out-of-court assertions are not excluded by the hearsay rule.²⁵ Thus, for example, Rule 801(d)(1)(A) of the *Federal Rules of Evidence* provides that an out-of-court statement is not hearsay if:

"[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and that statement is inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition."

Conversely, Rule 801(d)(1)(B) provides that prior consistent statements may be offered to rebut an express or implied charge against a witness of recent fabrication or improper influence or motive. This provision is of growing importance in child sexual abuse proceedings.²⁶

7.011 There are numerous exceptions to the Rule against Hearsay. The *Federal Rules of Evidence* list twenty-nine. In practice, however, only about a dozen of these arise with any frequency.²⁷ As regards child witnesses this list can be reduced to seven:²⁸

- (1) present sense impression;
- (2) excited utterance;
- (3) complaint of rape;

- (4) a statement as to a then existing mental, emotional or physical condition;
- (5) statements for purposes of medical diagnosis or treatment;
- (6) the residual exception; and
- (7) the child victim hearsay exception.

Each of these exceptions may be mentioned briefly.

1. PRESENT SENSE IMPRESSION

7.012 Rule 803(1) of the *Federal Rules of Evidence* provides that a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" falls outside the Rule against Hearsay. [This is equivalent to our notion of *res gestae*].

The requirements of this exception are worth noting.²⁹ First, the declarant must perceive an event or condition. Perception embraces not merely sight but also hearing³⁰ and the other senses.³¹ The event "need not be startling or shocking, and the declarant need not be a participant in the event. Statements by bystanders can qualify as present sense impressions".³²

Secondly, the requirement that the declaration be made while the declarant was actually perceiving the event or condition "or immediately thereafter" is a strict one.³³ Myers notes that:

"[a] few moments of delay between the event and the statement should not disqualify a statement as a present sense impression unless there is evidence of fabrication or other unreliability. When delay extends into minutes or hours, however, the statement is not a present sense impression."³⁴

Myers goes on to point out that:

"[i]n litigation involving abuse of children, th[is] exception does not play an important role. This is not surprising because abuse, particularly sexual abuse, almost always occurs in secrecy. There is little likelihood that a child victim's contemporaneous statements will be overheard by anyone but the perpetrator, and if the child later reveals what happened, the time interval is nearly always too long to satisfy the exception."³⁵

2. EXCITED UTTERANCE

7.013 The "excited utterance" exception is "the most frequently invoked hearsay exception in litigation involving children".³⁶ Rule 803(2) of the

Federal Rules of Evidence provides that statements relating to "a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition are not excluded by the hearsay rule".

Myers states that the rationale for the "excited utterance" exception is that:

"statements are trustworthy when made shortly after a startling event, while the declarant remains affected by the stress of excitement caused by the event....

Since statements made under the stress of a startling event are not likely to be the product of conscious reflection or fabrication, the risk of insincerity is reduced. Furthermore, the risk of memory lapse is appreciably reduced because the statement is made soon after the event."³⁷

The exception has not met with universal support. One commentator observed that:

"[t]he events are unexpected and episodic, and a person who witnesses them is presented with a vast number of stimuli that far transcend the space of appreciation Excitement is not a guarantee against lying, especially since the courts often hold that excitement may endure many minutes and even hours beyond the event. More important, excitement exaggerates, sometimes grossly, distortion in perception and memory especially when the observer is a witness to a non-routine, episodic event such as occurs in automobile collision cases and crimes. The likelihood of inaccurate perception, drawing of inferences to fill in memory gaps, and the reporting of nonfacts is high In fact, the theory is merely an artifice for the admission of highly unreliable evidence which is often the only type of evidence available. No justification exists for foregoing cross-examination and admitting such evidence if the declarant is available."³⁸

7.014 The "excited utterance" exception has three requirements. *Firstly*, "there must be an event which excited the declarant. It is not enough that the event would excite a reasonable person. The declarant himself must experience excitement".³⁹ Conversely, of course, this subjective test means that if the declarant was actually excited when a reasonable person would not have been, this requirement is fulfilled.

Secondly, the statement must "relate" to a startling event or condition.⁴⁰ This does not mean, however, that it should necessarily describe or explain the event.

Thirdly, the statement must be "made during the period of excitement caused by the event".⁴¹ Myers notes that:

"courts consider a host of factors to determine whether a statement is made under the stress of excitement. Ultimately however, the matter reduces to a determination of whether the utterance is a spontaneous response to a startling occurrence. It is the quality of the spontaneity which reduces the hearsay risks of insincerity and faulty memory."⁴²

The length of time between the startling event and the utterance is of course relevant, but it is not dispositive. It must be considered in conjunction with other factors indicating the presence or absence of spontaneity and excitement.⁴³ Where the declarant is a child of tender years, several decisions have held "that the requirements of the excited utterance exception, including lapse of time, are to be liberally construed in favour of receipt of the evidence".⁴⁴

Statements made by such children hours⁴⁵ or even days⁴⁶ after the events have been accepted by the courts, provided - and this is an important qualification - the utterance was an excited one.⁴⁷

The courts have accepted that "rekindled excitement" may render admissible an utterance made after a period of calm supervened subsequent to the event. The metaphor is an attractive one, but its analytic basis is less than fully clear. The question arises as to which event is the "exciting" event, for the purposes of the exception:

"It is the original event or is it the presentation of the stimulus which reawakens excitement? From an analytical point of view it is difficult to see how the original occurrence can be the exciting event since, in the rekindled excitement cases, there is an intervening period of calm. Yet it is quite plausible that in many cases the original shock and excitement has not disappeared, but is lying somewhere close to the psychological surface. Presentation of a stimulus connected to the original event brings the excitement back to the surface. Thus, the out-of-court statement is made under the stress of excitement caused by the original event. On the other hand, in some instances the presentation of the painful stimulus may be startling enough in itself to satisfy the requirement of the exception. In most cases, the out-of-court statement probably is a product of both sources of excitement. Regardless of the source of the excitement, the statement should qualify as an excited utterance if the judge is convinced that genuine excitement is present and the statement is not contaminated by conscious fabrication."⁴⁸

Of particular importance is the effect of questioning on the operation of this exception. Myers states that:

"[T]he way a child is questioned is vitally important in determining whether a statement fits the excited utterance exception. The courts are in agreement that questioning itself does not necessarily destroy the spontaneity required by the exception. When questioning is leading,

however, or when the adult 'drags' the statement out of the child, the requirement of spontaneity may be missing."⁴⁹

The fact that the child is incompetent to testify is not generally regarded as a reason for excluding evidence as to an excited utterance. In *Bishop v State*,⁵⁰ the Oklahoma Court of Appeal stated that:

"an excited utterance is admissible though hearsay, because it is thought to have independent indicia of reliability. That is, an excited utterance made contemporaneously with a specific event, which relates to or describes the event, is held to be reliable because its nearness to the stimulating event excludes the possibility of premeditation and fabrication We are of the opinion that the fact that a witness is ruled incompetent to testify because of age does not by itself negate the independent indicia of reliability which excited utterances possess and which are the key to their admissibility."

3. FRESH COMPLAINT OF RAPE

7.015 Where a complaint of sexual misconduct is made promptly, it may be admitted to rebut "the self-contradiction that inheres in silence"⁵¹ and to corroborate the complainant's testimony. On this rationale,⁵² the admission of the evidence is not truly an exception to the Rule against Hearsay.⁵³

The doctrine of fresh complaint was originally applied only to adult rape victims. This is no longer the case:

"There are numerous decisions in which fresh complaint evidence is received in other sex offence cases. Specifically, fresh complaint evidence is admissible in cases where consent is not in issue, and it is clear that the doctrine applies in sex offence litigation involving children."⁵⁴

Evidence of fresh complaint:

"is limited to the statement of complaint. No details may be admitted. Some decisions permit receipt of such 'particulars as are necessary' to identify the subject matter,⁵⁵ such as the time and place of the event. Most decisions hold that the statement may not identify the attacker or give details of the assault, although some opinions approve admission of the identity of the perpetrator. The reason for limiting fresh complaint evidence to the fact of complaint is that the purpose of the evidence is to establish that complaint was made so as to negate the supposed inconsistency of silence by showing that there was not silence.⁵⁶ Evidence of the details of the assault is immaterial to this limited evidentiary purpose and, therefore, such evidence is inadmissible. There is, however, an emerging minority position which permits admission of the details of the fresh complaint. In jurisdictions where

the details of the complaint are admissible, the trial judge retains discretion to limit the details to prevent undue prejudice to the defendant.⁵⁷

The requirement that the complaint be a "fresh" one may mislead: in truth, the freshness of the complaint is a relevant factor only to the extent that a lapse of time may be such as to fail to negate "the self-contradiction that inheres in silence". Thus in *Fitzgerald v United States*,⁵⁸ the court stated that:

"[u]nless the time lapse on reporting the incident is so long as to deprive the report of reliability, the length of time affects the weight of the evidence in the minds of the jury, but does not diminish the testimony's legal sufficiency as corroboration."⁵⁹

In practice a declaration that fails the requirements of "excited utterance" exception may well pass those of the "recent complaint" exception.⁶⁰

4. STATE OF MIND

7.016 Rule 803(3) of the *Federal Rules of Evidence* provides as follows:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the exception, revocation, or terms of declarant's will."

This exception does not appear to have a great deal of importance in relation to child witnesses, though one commentator points out that such evidence is:

"...helpful in child abuse proceedings in juvenile court, where a child's statements indicating fear of a physically abusive parent may be admissible. In litigation alleging psychological maltreatment, statements describing a child's state of mind may be crucial."⁶¹

5. STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT⁶²

7.017 Rule 803(4) of the *Federal Rules of Evidence* contains the following codification of the exception relating to medical diagnosis or treatment:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness: Statements made for purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

The principal justification for this exception is that there is a natural incentive to speak truthfully when seeking medical treatment.⁶³ But, as Myers point out,

"For youngsters below age five the logic of the exception may break down. Such children may not understand the need to be truthful with a physician or nurse, thus eliminating the primary indicator of reliability supporting the exception."⁶⁴

Prior to 1983 it was generally agreed that Rule 803(4) did not extend to statements identifying the abuser and attributing fault. The doctor's responsibility was perceived as being limited to diagnosis and treatment rather than to investigate illegal conduct.⁶⁵ Since the decisions of the Wyoming Supreme Court in *Goldade v State*,⁶⁶ however, the majority of cases have held that evidence of the identity of the perpetrator may be admitted.

Although most communications involve disclosures to a physician, courts have also endorsed statements to an ambulance driver,⁶⁷ nurse,⁶⁸ psychologist,⁶⁹ child psychiatrist,⁷⁰ and a relative,⁷¹ where what was said was pertinent to diagnosis or treatment.

6. THE RESIDUAL EXCEPTION

7.018 Rule 803(24) of the Federal Rules of Evidence prescribes a residual exception to the Rule against Hearsay, giving the courts discretion, to be exercised in only limited circumstances, to include hearsay evidence that does not fall within any of the specific exceptions. It provides as follows:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant."

In determining whether the statement has "equivalent" circumstantial guarantees of trustworthiness the courts have regard to the totality of circumstances.⁷²

7. THE CHILD SEXUAL ABUSE HEARSAY EXCEPTION

7.019 Before 1982, Michigan was the only State that had a common law exception to the Rule against Hearsay, designed to deal specially with child sexual abuse. This was a creature of the common law, deriving from a decision in 1886.⁷³

In 1982, Washington enacted a child victim hearsay exception which has provided a model for other States. The exception provides as follows:

"A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings in the courts of the State of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
 - (a) testifies at the proceedings; or
 - (b) is unavailable as a witness: Provided that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement."⁷⁴

It is worth noting that the Washington Supreme Court, when in 1979 it had adopted the rules modelled on the *Federal Rules of Evidence*, had not included any discretionary exceptions, even though it appears that before then there had been a discretionary exception based on the reliability of the evidence.⁷⁵ Thus, it could be said of the new statutory exception that:

"Although the new exception gives trial courts more discretion than they previously had under the rules of evidence, it does not give courts greater authority than they had prior to adoption of the rules. Rather, the exception merely restores the courts' pre-rule authority to make discretionary hearsay determinations in the limited area of child sexual abuse cases. Moreover, the discretion granted by the exception is no greater than that actually exercised by courts through their literal applications of the excited utterance exception even after adoption of the rules. The courts' analyses have typically involved a consideration of a number of factors: the time lapse between the alleged sexual assault and the child's statement; physical evidence consistent with the child's statement; the circumstances under which the statement was

made; and the age of the child. The 'time, content and circumstances' criteria of the new exception, together with the requirement that there be corroborative evidence if the child is unavailable, are the substantial equivalent of these factors."⁷⁶

In *State v Ryan*,⁷⁷ the Washington Supreme Court upheld the statute against constitutional attack.⁷⁸

7.020 Other States have followed Washington's lead.⁷⁹ Thus, for example, the Colorado legislation⁸⁰ provides that:

"Out-of-court statements made by a child describing any act of sexual conduct performed with, by, or on the child declarant, not otherwise admissible by statute or court rule which provides an exception to the objection of hearsay, may be admissible in any proceeding in which the child is a victim of an unlawful offence"

7.021 Legislation in Florida⁸¹ provides in part that:

"Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of eleven or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

1. the court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate, and
2. the child either:
 - (a) testifies;
 - (b) is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceedings would result in a substantial likelihood of severe emotional or mental harm in addition to findings pursuant to s.90.804(1)...."

The section goes on to provide that, in a criminal action, the defendant is to be notified no later than ten days before trial that a statement which qualifies as a hearsay exception pursuant to the section will be offered as evidence at trial. The notice must include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicates its reliability, and such other particulars as are necessary to provide full disclosure of the statement. The court is required to make specific findings of fact, on the record, as to the basis for its ruling under the section.

7.022 By early 1985, at least eight States had enacted legislation of this type.⁸² One commentator, writing that year, summarised the position as follows:

"All the statutes except one⁸³ require a showing of unavailability if the child is not to testify at trial. All but one⁸⁴ require corroboration of the abusive act in lieu of the child's testimony - apparently a response to the *Roberts* requirement of 'particularised guarantees of trustworthiness'.⁸⁵ Five of the statutes provide an additional safeguard not required by the confrontation clause.⁸⁶ They direct that even if the child is available to testify, the court should admit hearsay statements only if it finds - in a hearing conducted outside the presence of the jury - that the statement is supported by 'sufficient' indicia of reliability. The Indiana statute further requires the child's attendance at this hearing.⁸⁷ Such precautions demonstrate that legislators have aimed not only to facilitate the prosecution of sex offences against children, but also to avoid wrongful prosecution and discourage constitutional challenge to the new laws."⁸⁸

By the following year, twenty-two States had enacted statutory exceptions of this type.⁸⁹ Nine of them required that there be corroborative evidence either of the alleged act or of the statement itself.⁹⁰

This impetus continued unabated. By 1987, a further five States had accepted a special hearsay exception for child victims.⁹¹

(b) Scotland

7.023 The rules in Scotland relating to hearsay are broadly the same as under Irish law, save for an extra limited exception to the hearsay rule in relation to *de recenti* statements:

"A *de recenti* statement is a statement made by a witness shortly after an event. Typically it may take the form of a complaint or an account of events made to the first person seen by the witness after the events themselves. The use of *de recenti* statements is limited, however, in that they can be used only to support the credibility of the witness in question. They are not themselves evidence of the facts stated in them,

nor may such a statement be admitted in evidence where the witness in question does not himself give evidence." ⁹²

7.024 Since 1980 evidence may be taken on commission in criminal (as well as in civil) proceedings, where a witness by reason of being ill or infirm is unable to attend the trial.⁹³ An application to take evidence on commission will be granted only where the judge is satisfied, *inter alia*, that there would be no unfairness to the other party to have the evidence received in the form of a record of what took place.⁹⁴ The Scottish Law Commission have noted that:

"[t]he qualification about 'unfairness to the other party' is an important one, and we would doubt whether the present provisions for taking evidence on commission would be considered appropriate in the case of a key witness such as the alleged victim of physical or sexual abuse. Moreover, it seems unlikely that the provision which permits an application to be made where a witness is unable to attend court 'by reason of being ill or infirm' is capable of being construed so as to include a witness who is physically fit but who may suffer mental or psychological trauma by reason of giving evidence in court." ⁹⁵

In 1975, the Thomson Committee on Criminal Procedure⁹⁶ was satisfied that there was no reasonable alternative to existing practices in relation to children giving oral evidence in court. The Scottish Law Commission took the same view⁹⁷ in 1980. The Commission disposed of the matter in one sentence: "There is no satisfactory alternative procedure". In June 1988, however, the Commission published a wide-ranging Discussion Paper⁹⁸ in which it canvassed several possible avenues for legislative change.

(c) Australia

7.025 The South Australian Task Force recommended that there should be a hearsay exception but was divided as to whether hearsay evidence should be admitted if the child were unavailable as a witness. The majority view and the one enacted in legislation was that the child should either give evidence or be available to give evidence. The Law Reform Commission of Victoria recommended that the restrictions on admissibility of out-of-court statements made by a child complainant in sexual offence cases should be revised in the context of a general reform of the hearsay rules as recommended by the Australian Law Reform Commission and the New South Wales Law Reform Commission Reviews on Evidence. In those reviews it was recommended that hearsay evidence would be admissible whether or not the person who made the out-of-court statements was available to testify. When the person was unavailable "evidence about the statement would be admissible if it was made at or shortly after the time when the asserted fact occurred and in circumstances that made it unlikely that the representation [statement] is a fabrication".⁹⁹ The Law Reform Commission of Victoria further recommended that if the general reform of the hearsay rules did not happen, a special exception for offences against children should be established.¹⁰⁰

C: Constitutional Issues: *Confrontation and Cross-Examination*

7.026 Whether one is recommending reforms which would involve clear exceptions to the Rule against Hearsay, e.g. the use of child examiners or ameliorating measures which might not, strictly speaking, constitute exceptions to the rule, e.g. the use of a "live" video link, two constitutional rights or issues underlie all considerations.

Those are the right to cross-examine and to confront the accuser.

THE LAW IN IRELAND

7.027 While a right to cross-examine the prosecution witnesses is clearly required as a personal right for a fair trial, there is no specific provision for a right to confrontation in the Irish Constitution as there is in the 6th Amendment to the American Constitution.

Dr Michael Forde in his book *Constitutional Law of Ireland* says: "It can hardly be doubted that the rights of confrontation and compulsory process, which are recognised in the general rules of criminal procedure, feature among the components of 'due course of law' in Article 38.1 of the Constitution."¹⁰¹

Whatever about a right to cross-examine the opposing witnesses, it is not certain that an absolute right of physical confrontation is guaranteed by the Constitution. Having referred to *In re Haughey*¹⁰², Dr Forde goes on to qualify the initial bold proposition cited above when he says: "It may well be that certain kinds of evidence can only be given orally; that for certain matters documentary or other evidence is not sufficient."

7.028 *R v Beeston*¹⁰³ and *A.G. v Daly*¹⁰⁴ were cases concerning the admissibility in evidence of depositions from persons who subsequently died. In *Beeston*, Jervis CJ said:

"... if it be proved that the witness is dead or too ill to travel, the deposition may be given in evidence, if it also be proved that the accused had full opportunity of cross-examination; and we should do great injustice if we were to restrict the operation of that salutary provision. The presiding judge must determine in each case whether the prisoner has had full opportunity of cross-examination; and if the charges were entirely different, he would not decide that there had been that opportunity; but where it is the same case and only some technical difference in the charge, the accused generally has had full opportunity of cross-examining."¹⁰⁵

And in *Daly*, O'Byrne J, giving the judgment of the Supreme Court and having approved of the decision in *Beeston* said:

"It was contended that the accused had not a full opportunity of cross-

examining Mrs Gibbons by reason of the two matters already mentioned; viz. the illness of Mrs Gibbons and the shortness of the notice of the taking of the deposition. This appears to us to raise a question of fact, for determination by the trial judge, rather than a question of law. Although the question of the admissibility of the deposition was argued at great length at the trial we cannot find that this precise point was taken or relied upon. All the facts in connection with the taking of the deposition and the condition of Mrs Gibbons at the time were carefully investigated and the witnesses were examined and cross-examined with meticulous detail in this matter. The accused was represented by an eminent solicitor, who, in answer to the District Justice, stated that he had no questions to put to the witness by way of cross-examination. He did not suggest that he was unable to cross-examine for the aforesaid reasons or for any reasons; nor was any suggestion made with a view to an adjournment. In these circumstances we are of opinion that it was open to the trial judge to hold as a fact, as he obviously did, that the accused had a full opportunity of cross-examining Mrs Gibbons and, accordingly, we consider that this ground of objection wholly fails."¹⁰⁶

7.029 In his majority judgment in *In re Haughey*,¹⁰⁷ the Chief Justice said:

"The sixth and last of Mr Haughey's complaints was that his rights under s.3 of Article 40 of the Constitution were, and would be, disregarded. Article 40, s.3, provides as follows:-

- '1 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
- 2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.'

.... As to the disallowance of cross-examination, an accused person has a right to cross-examine every witness for the prosecution, subject, in respect of any question asked, to the court's power of disallowance on the ground of irrelevancy. An accused, in advance of cross-examination, cannot be required to state what his purpose in cross-examining is. Moreover, the right to cross-examine "to credit" narrows considerably the scope of the irrelevancy rule."¹⁰⁸

The Court, having agreed that the following were essential rights of a defendant:

"(a) that he should be furnished with a copy of the evidence which reflected on his good name; (b) that he should be allowed to cross-

examine, by counsel, his accuser or accusers; (c) that he should be allowed to give rebutting evidence; and (d) that he should be permitted to address, again by counsel, the Committee in his own defence. Protection (c) was allowed by the Committee and no real difficulty arose with regard to (a), so far as I can see; therefore (b) and (d) are the crux." ¹⁰⁹

went on to say:

"... No court is unaware that the right of an accused person to defend himself adds to the length of the proceedings. But the Constitution guarantees that the State 'so far as practicable' (sa mheid gur feidir e) will by its laws safeguard and vindicate the citizen's good name. Where, as here, it is considered necessary to grant immunity to witnesses appearing before a tribunal, then a person whose conduct is impugned as part of the subject matter of the inquiry must be afforded reasonable means of defending himself. What are these means? They have been already enumerated at (a) to (d) above. Without the two rights which the Committee's procedures have purported to exclude, no accused - I speak within the context of the terms of the inquiry - could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of *clocha ceangailte agus madraí scaoilte*.¹¹⁰

Article 40, s.3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40, s.3, are not political shibboleths but provide a positive protection for the citizen and his good name."¹¹¹

No mention is made of a right of physical confrontation.

7.30 Similarly in the Supreme Court judgment in *Healy v Donoghue*¹¹² no such right is mentioned. O'Higgins CJ stated:

"Article 38 deals specifically with a criminal trial and provides that no person should be tried on any criminal charge save in due course of law. This Article must be considered in conjunction with Article 34; with Article 40, s.3, sub-s.1, under which 'the State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen' and with sub-s.2 of the same section under which 'the State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.'

Being so considered, it is clear that the words 'due course of law' in Article 38 make it mandatory that every criminal trial shall be

conducted in accordance with the concept of justice, that the procedures applied shall be fair, and that the person accused will be afforded every opportunity to defend himself. If this were not so, the dignity of the individual would be ignored and the State would have failed to vindicate his personal rights. What then does justice require in relation to the trial of a person on a criminal charge? A person charged must be accorded certain rights. In referring to these in his judgment, Mr Justice Gannon J said -

'Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, or hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence.'

It seems to me that this puts very clearly what one would expect to be the features of any trial which is regarded as fair."¹¹³

There is, accordingly, no authority for the proposition that a constitutional right of physical confrontation, as distinct from a right to cross-examination, can be derived from the guarantee of fair procedures. A right to cross-examine, or indeed to be present when evidence is given during or before a trial, does not *ipso facto* include a right to physical confrontation.

7.031 In conclusion, while we are sure that the Irish courts would hold that the guarantee of fair procedures under the Constitution would entail the right to cross-examine State witnesses, we do not agree that the courts would refuse to contemplate any further exceptions to the rule against the admission of out of court statements.

Similarly, we think it unlikely that the courts would insist on a right to physical confrontation, provided a right to cross-examine was secured, where excusing circumstances existed, e.g. where a father is on trial for offences against his very young daughter. Procedures should be fair to all involved in the prosecution process, including witnesses. The confrontation of the child by the father who is suspected of abuse, is more likely to be unfair to the child than would the absence of physical confrontation be to the accused, particularly where the accused can see the witness, e.g. where a one-way screen or video link is used. What would have to be decided is whether there should be an absolute right for the prosecution to use the non-confrontation procedure or whether certain matters should first have to be

proved to the satisfaction of the court, e.g. a risk of serious psychological trauma to the child.

THE LAW IN THE U.S.A.

7.032 These matters all fell to be considered by the United States Supreme Court in June 1988 in the case of *Coy v Iowa*.¹¹⁴ The confrontation clause in the 6th Amendment to the United States Constitution gives a criminal defendant a right "to confront" face-to-face the witnesses giving evidence against him at trial.

The appellant was charged with sexually assaulting two 13-year-old girls. At the appellant's jury trial, the court granted the State's motion, pursuant to a 1985 state statute intended to protect child victims of sexual abuse, to place a screen between the appellant and the girls during their testimony, which blocked him from their sight but allowed him to see them dimly and to hear them. The court rejected the appellant's argument that this procedure violated the Confrontation Clause of the Sixth Amendment, which gives a defendant the right "to be confronted with the witnesses against him". The appellant was convicted on two counts of lascivious acts with a child, and the Iowa Supreme Court affirmed the conviction.

The majority opinion of the US Supreme Court (6 to 2) found that the appellant's right to face-to-face confrontation was violated by the Iowa statute, finding no merit in that State's assertion that its statute created a presumption of trauma to victims of sexual abuse that outweighed the appellant's right to confrontation. The majority opinion was that even if an exception to this "core right" could be made, it would have to be based on something more than the type of generalised finding asserted by the State.

The majority opinion was delivered by Justice Scalia in a judgment which quoted from the Acts of the Apostles, (Roman Law as applied to St Paul) and Shakespeare, (the reference to "frowning brow to brow" in *Richard II*, Act I, Scene 1) and referred to President Eisenhower's extolling the tradition of face to face solution of disagreements in his home town of Abilene. Justice Scalia took a strict literal view of the Amendment and disagreed with Wigmore¹¹⁵ that "[t]here was never at common law any recognized right to an indispensable thing called confrontation as distinguished from cross-examination. There was a right to cross-examination as indispensable, and that right was involved in and secured by confrontation; it was the same right under different names".¹¹⁶

Instead, Justice Scalia offered:

"The State can hardly gainsay the profound effect upon a witness of standing in the presence of the person the witness accuses, since that is the very phenomenon it relies upon to establish the potential trauma that allegedly justified the extraordinary procedure in the present case.

That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs."¹¹⁷

Justice Scalia refused to look beyond what he described as the "irreducible literal meaning of the clause". He said:

"The State suggests that the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse. It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the rights narrowly and explicitly set forth in the Clause, but rather rights that are, or were asserted to be, reasonably implicit - namely, the right to cross-examine,¹¹⁸; the right to exclude out-of-court statements¹¹⁹; and the asserted right to face-to-face confrontation at some point in the proceedings other than the trial itself....¹²⁰ To hold that our determination of what implications are reasonable must take into account other important interests is not the same as holding that we can identify exceptions, in light of other important interests, to the irreducible literal meaning of the clause: 'a right to *meet face-to-face* all those who appear and give evidence *at trial*."¹²¹ We leave for another day, however, the question whether any exceptions exist. Whatever they may be, they would surely be allowed only when necessary to further an important public policy.¹²² The State maintains that such necessity is established here by the statute, which creates a legislatively imposed presumption of trauma. Our cases suggest, however, that even as to exceptions from the normal implications of the Confrontation Clause, as opposed to its most literal application, something more than the type of generalized finding underlying such a statute is needed when the exception is not 'firmly rooted in our jurisprudence.'¹²³ The exception created by the Iowa statute, which was passed in 1985, could hardly be viewed as firmly rooted. Since there have been no individualized findings that these particular witnesses needed special protection, the judgment here could not be sustained by any conceivable exception."¹²⁴

7.033 Justice O'Connor (joined by Justice White), while agreeing with the majority opinion, did so only on the basis that the Iowa statute did not provide for "a case-specific finding of necessity"¹²⁵ to adopt other than a face-to-face procedure.

"Thus, I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy.... The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will

be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, see, e.g., Cal. Penal Code Ann. section 1347(d)(1) (West Supp. 1988); Fla.Stat. section 92.54(4) (1987); Mass. Gen. Laws section 278:16D(b)(1) (1986); N.J.Stat. Ann. section 2A:84A-32.4(b) (Supp. 1988), our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. Because nothing in the Court's opinion conflicts with this approach and this conclusion, I join it."¹²⁶

7.034 Justice Blackmun dissenting (joined by Chief Justice Rehnquist) said:

"The Sixth Amendment provides that a defendant in a criminal trial 'shall enjoy the right to be confronted with the witnesses against him.' In accordance with that language, this Court just recently has recognized once again that the essence of the right protected is the right to be shown that the accuser is real and the right to probe accuser and accusation in front of the trier of fact:

"The primary object of the [Confrontation Clause] was to prevent depositions or ex parte affidavits being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"^{127, 128}

The use of the screen:

"did not interfere with what this Court has recognized as the 'purposes of confrontation'.¹²⁹ Specifically, the girls' testimony was given under oath, was subject to unrestricted cross-examination, and 'the jury that [was] to decide the defendant's fate [could] observe the demeanor of the witness[es] in making [their] statements[s], thus aiding the jury in assessing [their] credibility"¹³⁰ In addition, the screen did not prevent appellant from seeing and hearing the girls and conferring with counsel during their testimony, did not prevent the girls from seeing and being seen by the judge and counsel, as well as by the jury, and did not prevent the jury from seeing the demeanor of the defendant while the girls testified. Finally, the girls were informed that appellant could see and hear them while they were on the stand. Thus, appellant's *sole* complaint is the very narrow objection that the girls could not see him while they testified about the sexual assault they endured."¹³¹

Evidence of visual identification did not arise in the case.¹³²

In a powerful criticism of the majority opinion, Justice Blackmun said:

"The weakness of the Court's support for its characterization of appellant's claim as involving 'the irreducible literal meaning of the clause' is reflected in its reliance on literature, anecdote, and dicta from opinions that a majority of this Court did not join. The majority cites only one opinion of the Court that, in my view, possibly could be understood as ascribing substantial weight to a defendant's right to ensure that witnesses against him are able to see him while they are testifying:

'Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause.' [*California v Green*¹³³].

Even that characterization, however, was immediately explained in *Green* by the quotation from *Mattox v United States*,¹³⁴ to the effect that the Confrontation Clause was designed to prevent the use of ex parte affidavits, to provide the opportunity for cross-examination, and to compel the defendant 'to stand face-to-face with the jury'^{135, 136}

Justice Blackmun found Dean Wigmore's statement "infinitely more persuasive than President Eisenhower's recollection of Kansas justice..."¹³⁷ and found the majority view at odds with the generally accepted exceptions to the Rule against Hearsay:

"While I therefore strongly disagree with the Court's insinuation that the Confrontation Clause difficulties presented by this case are more severe than others this Court has examined, I do find that the use of the screening device at issue here implicates 'a preference for face-to-face confrontation at trial,' embodied in the Confrontation Clause.¹³⁸ This 'preference,' however, like all Confrontation Clause rights, 'must occasionally give way to considerations of public policy and the necessities of the case'.¹³⁹ The limited departure in this case from the type of "confrontation" that would normally be afforded at a criminal trial therefore is proper if it is justified by a sufficiently significant state interest.

Indisputably, the state interests behind the Iowa statute are of considerable importance. Between 1976 and 1985, the number of reported incidents of child maltreatment in the United States rose from .67 million to over 1.9 million, with an estimated 11.7 percent of those cases in 1985 involving allegations of sexual abuse.¹⁴⁰ The prosecution of these child sex-abuse cases poses substantial difficulties because of the emotional trauma frequently suffered by child witnesses who must

testify about the sexual assaults they have suffered. "[T]o a child who does not understand the reason for confrontation, the anticipation and experience of being in close proximity to the defendant can be overwhelming."¹⁴¹ Although research in this area is still in its early stages, studies of children who have testified in court indicate that such testimony is "associated with increased behavioral disturbance in children".¹⁴²

Thus, the fear and trauma associated with a child's testimony in front of the defendant has two serious identifiable consequences: it may cause psychological injury to the child and it may so overwhelm the child as to prevent the possibility of effective testimony, thereby undermining the truth-finding function of the trial itself.¹⁴³ Because of these effects, I agree with the concurring opinion that a State properly may consider the protection of child witnesses to be an important public policy. In my view, this important public policy, embodied in the Iowa statute that authorized the use of the screening device, outweighs the narrow Confrontation Clause right at issue here - the 'preference' for having the defendant within the witness' sight while the witness testifies.

Appellant argues, and the Court concludes, that even if a societal interest can justify a restriction on a child witness' ability to see the defendant while the child testifies, the State must show in each case that such a procedure is essential to protect the child's welfare. I disagree. As the many rules allowing the admission of out-of-court statements demonstrate, legislative exceptions to the Confrontation Clause of general applicability are commonplace.¹⁴⁴ I would not impose a different rule here by requiring the State to make a predicate showing in each case.

In concluding that the legislature may not allow a court to authorize the procedure used in this case when a 13-year-old victim of sexual abuse testifies, without first making a specific finding of necessity, the Court relies on the fact that the Iowa procedure is not 'firmly rooted in our jurisprudence.'¹⁴⁵ Reliance on the cases employing that rationale is misplaced. The requirement that an exception to the Confrontation Clause be firmly rooted in our jurisprudence has been imposed only when the prosecution seeks to introduce an out-of-court statement, and there is a question as to the statement's reliability. In these circumstances, we have held: 'Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.'¹⁴⁶ Clearly, no such case-by-case inquiry into reliability is needed here. Because the girls testified under oath, in full view of the jury, and were subjected to unrestricted cross-examination, there can be no argument that their testimony lacked sufficient indicia of reliability.

For these reasons, I do not believe that the procedures used in this case violated appellant's rights under the Confrontation Clause."¹⁴⁷

We have quoted at some length from this judgement as it is a recent judgment and contains useful material relevant to the discussion that follows.

Conclusion

7.035 Having thus examined the constitutional law in Ireland and the United States *we are of opinion that the Irish courts in a criminal case, would insist, with few exceptions, on a right to cross-examine but not on a right physically to confront State witnesses.*

D: Options for Reform

General

7.036 The reasons usually advanced for making an exception to the Rule against Hearsay are:-

- (a) That reliable second-hand evidence might be excluded by the Rule.
- (b) That the child would be relieved of trauma.
- (c) That the child is usually the only witness and corroborative evidence is usually inconclusive.
- (d) To guard against the child retracting his or her evidence when a prosecution has commenced or is about to commence.

Reasons (c) and (d) can be dismissed at once on the familiar basis that hard cases make bad law. Changes must be justified in their own right.

Reason (b), the relief of trauma to the child, is the Commission's paramount objective in making provisional recommendations for reform in this Paper. In making our recommendations, however, we must ensure that the defendant is not asked to pay too high a price for the attainment of that objective. If, for example, the defendant is to lose his right to cross-examine, it is vital that there be great confidence in the reliability of the evidence in question.

7.037 One of the main reasons for excluding an out-of-court statement is that it might be fabricated by the complainant to support an untrue allegation. In addition, if the person who made the statement is unavailable to testify, then there is a danger that the person testifying about the statement might have misunderstood what was said or deliberately falsified it.

In the case of children, some commentators fear that the dangers of hearsay evidence are further compounded by children's (perceived) inherent unreliability as witnesses. Furthermore, if a child's hearsay evidence is

introduced without the child's participation at the trial, no cross examination can take place. As a consequence, the accused could be convicted on the basis of highly prejudicial evidence, of questionable reliability, which he or she could not test in cross-examination.

In its Report on *The Rule against Hearsay in Civil Cases*¹⁴⁸ the Commission departed from a recommendation in its earlier Working Paper¹⁴⁹ on the topic that a judge should have discretion to admit depositions, evidence taken on commission or statements on affidavit, even where the relative unimportance of the evidence did not justify the expense of bringing a witness to court. The Commission was concerned about the constitutional difficulties which might arise if a right to cross-examine a witness were denied.

7.038 While in this Paper we are not treating child witnesses as *inherently* unreliable, we nevertheless place great store firstly on the court's assessing their competence before they can give evidence and secondly on the defendant's right to cross-examine.

Confrontation and cross-examination are indelible characteristics of the adversarial system as normally operated. The quest is for immediacy tempered with accuracy. The law leans against the second-hand as stale and potentially unreliable. But the use of modern technology asks searching questions of the traditional system and *can* be accommodated to the advantage of the system. The law must provide for the keeping of records on computer chip or micro-film. In turn, these records should prove much more accurate and reliable than records compiled by hand, which compilation has subsequently to be recalled in evidence.

Modern T.V. and video technology raise serious questions as to the desirability of the Rule against Hearsay. A video recording not only preserves the *ipsissima* of the questions and answers, the pauses and the vocal inflexions, but also the facial expressions and "body language" of the witness being recorded. The availability of closed circuit television can take a witness out of an oppressive atmosphere while preserving the immediacy of a trial and can even provide for the "live" participation in a trial of a witness in another jurisdiction or continent. In fact the use of a live video-link cannot truly be regarded as tendering an out-of-court statement except to the extent that the witness is not physically present.

7.039 Having examined the relevant law of hearsay, confrontation and cross-examination and bearing in mind what can be achieved by modern technology, we now must consider whether the law should be changed in relation to the ways in which the child's account of what happened can be received into the legal process. Several options are worthy of analysis. They are by no means mutually inconsistent. The range of permutations and combinations of techniques in this area is vast. We examine seven options in turn and some other suggested improvements, and then set out our conclusions as to how best the law can be reformed.

These options are as follows:

1. A child sexual abuse exception to the Rule against Hearsay.
2. A residual exception to the Rule against Hearsay.
3. Presenting evidence through a surrogate witness.
4. Using a screen to protect the child when giving evidence.
5. Enabling the child to give evidence by means of closed-circuit television.
6. Video recording of out-of-court statements.
7. Video recording of the child's depositions.

1. A Child Sexual Abuse Exception to the Rule Against Hearsay

7.040 As we have seen in our study of the relevant law in the United States, certain States, for example Washington and Florida, have created a specific exception to the Rule against Hearsay for child abuse cases.¹⁵⁰ Broadly speaking, the child's out-of-court statement may be admitted in these States if the court finds that the time, content and circumstances of the statement provide sufficient indicia of reliability and the child either testifies or is unavailable, provided in the latter case there is corroboration of the act complained of. Unavailability may include a finding by the court that participation in the trial could cause trauma.

2. A Residual Exception to the Rule Against Hearsay

7.041 The next option worthy of consideration is a residual exception such as is contained in Rule 803(24) of the Federal Rules of Evidence in the United States.¹⁵¹ It provides for the admission of evidence not already covered by one of the hearsay exceptions already established in the U.S.A., where the evidence is relevant, probative and its admission is calculated to serve the interests of justice. To be admissible, the court must be satisfied that the evidence must have circumstantial guarantees of trustworthiness equivalent to those obtaining in the case of existing exceptions. The phrase "circumstantial guarantees of trustworthiness" is sufficiently broad and all-embracing to capture, *inter alia*, video-recorded evidence, evidence on sworn deposition or corroborated evidence. Perhaps it is unfair to impose such a burden on a court with so little guidance as to how to discharge it.

It is to be noted that the Law Reform Commission of Victoria recommended that reform of the law relating to the admissibility of out-of-court statements in child abuse cases should be done in the context of a general reform of the hearsay rules.¹⁵²

3. Presenting Evidence Through a Surrogate Witness

7.042 If this proposal were adopted, the child would not be required to attend the trial but instead another person, a "surrogate witness", would present the child's evidence on the child's behalf.

The best known example of the "surrogate witness" is the youth interrogator system introduced in Israel in 1955. Its main features are:

- (a) A child victim is interviewed at an early stage by a youth interrogator. This is somebody who is trained in human behaviour and interview techniques.
- (b) The child is not required to give evidence in court unless the interrogator gives permission. If the child does testify, the interrogator can request the court to excuse the child if the interrogator feels that continuation may cause the child emotional harm.
- (c) If the child does not testify, the youth interrogator presents the child's evidence and may be cross-examined. The accused cannot be convicted on the evidence unless there is corroboration that the crime was committed and that the accused was guilty of it.

7.043 The advantages of this approach are as follows:

- (i) The child is spared the stress of participating in court proceedings. As soon as the interrogator has interviewed the child, the child need participate no further and can begin the process of recovery. In Israel in about 85% of the cases the youth interrogator has not allowed the child to be called as a witness.¹⁵³
- (ii) If the child participates, the youth interrogator can effectively intervene if the child is considered to be suffering psychological harm as a result of the cross-examination or participation in the court proceedings.
- (iii) In Harnan's view, the youth interrogator system has achieved its purpose of preventing further psychological harm to children who are victims of child sexual abuse. In addition, youth interrogators have managed to provide a "first aid" care to the victims and their families and this is beyond what was expected of them under the provisions of the statutes.
- (iv) Harnan also concludes that the youth interrogator system has contributed to the ascertainment of the truth, since many of the children concerned could not be interrogated in court in the ordinary way and, moreover, without the youth interrogator system fewer parents would have made a complaint in the first place.

7.044 The disadvantages of the surrogate witness system are as follows:

- (i) The courts do not directly supervise the examination of the child and have to rely on the interrogator to interpret and assess the evidence. The quality of the evidence will depend on the quality of the examiner.
- (ii) Some commentators believe that the protection of the accused's interest requires a more direct link between the child's evidence and the courts decision than the youth interrogator system allows.¹⁵⁴
- (iii) There are no empirical studies upon which to evaluate the overall advantages and disadvantages in the system. According to Harnan's overview, few children are called as witnesses. Yet Harnan believes that courts have scrupulously observed the corroboration requirement, so innocent persons have not been convicted. However, this also means that some sexual offenders, some of whom may be dangerous, have also been acquitted or have not been put on trial at all. Some Israeli judges have also expressed reservations about the youth interrogator system, commenting particularly on the difficulty of considering the reliability of a witness without having the opportunity of seeing him, hearing him or gaining an impression of his behaviour, and without the defence having had the possibility of cross-examining him.
- (iv) There would be no cross-examination. The Scottish Law Commission recently considered the Israeli system in their Discussion Paper No.75, *The Evidence of Children and Other Potentially Vulnerable Witnesses* (June 1988). They stated that "[a]s presently advised,"¹⁵⁵ they were not attracted by this approach. The lack of opportunity to cross-examine the child or even to put an alternative version of the facts to him or her might, in their view, be thought to contravene Article 6.3(d) of the European Convention on Human Rights.

The Law Reform Commission of Victoria rejected the proposal of a "youth interrogator" giving evidence about the interview with the child:

"The major disadvantage is that the Court has not directly supervised the examination of the child, and has to rely upon the interrogator for the interpretation and assessment of the evidence. The Commission believes that the protection of the interest of the accused demands a more direct link between the court which decides the fate of the accused, and the evidence of the child upon which the decision is based, than is permitted by reliance on a surrogate witness."¹⁵⁶

4. Using a Screen to Protect the Child When Giving Evidence

7.045 The proposal to reduce stress for child witnesses by the use of screens falls midway between proposals to alter traditional courtroom lay-out and the

use of closed-circuit or video-taped testimony. As we have seen, the United States Supreme Court has recently examined the constitutional issues involved in the case of *Coy v Iowa*.¹⁵⁷ The *Canadian Evidence Act 1987* also provided that a judge may order the complainant to testify behind a screen or other device or allow the complainant not to see the accused. Recently in England at the Old Bailey Court child victims were permitted to testify behind a wooden screen.

The advantages of this approach are as follows:

- (i) The screen provides a relatively cheap and easy way of protecting children from some of the traumas of testifying in open court.
- (ii) Testifying in the presence of the defendant has been identified as one of the most anxiety-provoking aspects of the trial from the child's point of view. Children feel distressed at the prospect of facing the defendant in court.¹⁵⁸ Kee MacFarlane, an experienced professional in the area of child sexual abuse, has said that children have told her that they are scared of testifying in court in case the defendant will leap across the desk and kill them.¹⁵⁹

Magistrates in England reported a case where a little girl seeing the defendant in court dived screaming under the clerk's desk where she remained for the rest of the proceedings.¹⁶⁰

The disadvantages of the procedure are as follows:

- (i) The practicality of the screen may be off-set by the fact that courts vary considerably in their physical layouts. This would require the construction of many screens of different shapes and sizes, that could be erected and removed with relative ease when necessary. In addition, if the screens had to be constructed so that the accused could see the child but the child could not see the accused, and yet that everybody else - judge, jury and lawyers - could continue to see the accused, this would further complicate their use.
- (ii) The use of screens might prejudice the jury against the accused. The jury might conclude that the screen was necessary because the child had good reason to be afraid of the accused and needed protection from him or her.

7.046 The Scottish Law Commission were not impressed by the argument in favour of screens. They were:

"not persuaded that a screen is likely to be very effective in terms of reducing a child's fear or anxiety about giving evidence in the presence of the accused. The child is bound to be aware that the accused is behind the screen and in those circumstances we would have thought

that a frightened child might remain as frightened as he would be if no screen were used."¹⁶¹

They were also concerned with the problem of prejudice for the accused. They considered that the erection of a screen between a witness and an accused was:

"probably more likely than any other technique to cause prejudice to an accused. By its very nature, the erection and use of a screen is an obviously *ad hoc* arrangement, and we suspect that, despite warnings to the contrary, a jury might well conclude in those circumstances that the screen had been erected simply because the child was, with good reason, afraid of the accused."¹⁶²

They came to the conclusion, on balance, that screens would not constitute a useful change. They pointed to the practical difficulties:

"We would regard it as desirable, if screens were to be used, that they should be so constructed that the accused could see the child although the child could not see him. This would probably involve the use of one-way glass in the screen's construction. Moreover, although the screen should prevent the accused from being seen by the child, we consider that everybody else - judge, jury, and lawyers - should continue to be able to see the accused. Given the wide variety of court layouts in Scotland this requirement might necessitate the construction of many screens of different shapes and sizes. Such considerations might, we suspect, make screens less simple and inexpensive than they might at first sight appear."¹⁶³

There is very little empirical evidence about the presumed advantages and disadvantages attaching to this proposal. However, what evidence exists does suggest that children do find testifying in the presence of the defendant intimidating and stressful. Despite the practical difficulties, the use of one-way screens is still a relatively inexpensive procedure and may make it possible for some young children to give evidence who could not do so otherwise. With regard to its presumed prejudicial effect on the jury, this could be minimized by a requirement that the judge instruct the jury that the procedure is designed as a way of reducing the stress for child witnesses and cannot be taken as evidence of the guilt of the accused. The use of screens and the use of closed circuit television are options which give rise to similar considerations.

5. Enabling the Child to Give Evidence by means of Closed Circuit Television¹⁶⁴

7.047 One of the principal proposals for law reform in relation to the criminal prosecution of child sexual abuse cases is for the child to be allowed to give evidence via closed circuit television, i.e. the child gives evidence in

a separate room but can be seen and heard by everyone in the courtroom. One of the main advantages claimed for closed circuit television is that it allows the child to give evidence without directly confronting the accused person. Another advantage is that it allows children to give evidence in a comfortable, non-threatening environment. Thus the child will not be disturbed by the size of the courtroom or the witness chair, the raised bench and the presence of many strangers.

Twenty-four American States have enacted legislation to permit child victims to testify via closed circuit television. England, New South Wales and other countries have also enacted legislation to permit the use of closed circuit television. The Victorian Law Reform Commission and the Scottish Law Reform Commission have also recommended its use.

Statutes relating to the use of closed circuit television treat the closed circuit testimony as the functional equivalent of live in-court testimony. The procedures adopted by various jurisdictions differ in certain key respects.

Presence of Lawyers

In some States, lawyers for both sides are in the room with the child; in California they remain in the court.

The Age of the Child

7.048 In New South Wales and California the procedure is available to children under ten, in Florida to children under sixteen. The Law Reform Commission of Victoria recommended that it be available to all complainants under sixteen.

The Availability of the Procedure

In Florida the procedure is available where the court is satisfied that there is "substantial likelihood that the child will suffer at least moderate emotional or mental harm if required to testify in open court".¹⁶⁵

In New South Wales it is to be used in all cases of personal assault on children under ten. The Law Reform Commission of Victoria recommended that the procedure should be available to all complainants under sixteen but should be available only if required. In other words children who are willing and able should continue to testify in the courtroom. The decision should be a matter for the prosecution. Moreover, the judge should be required to inform the jury when closed circuit television is used that the procedure has been adopted to assist child witnesses, and that no inferences should be drawn about the guilt of the accused. We have seen how this approach did not find favour with the United States Supreme Court which favoured "a case-specific finding of necessity".¹⁶⁶

Statutes also differ regarding the defendant's right to be present or to participate in the proceedings.¹⁶⁷

Defendant Present in the Room While the Child Testifies

One-Way Approach:

7.049 The defendant can observe and hear the child's testimony but the child can neither see nor hear the defendant.

Two-Way Approach

The defendant can observe and hear the child's testimony and a TV monitor projects the defendant's image into the room in which the child is testifying so that the child can see the defendant's face while he or she testifies.

The decision as to which procedure to use depends on the judge's view of the likely trauma to the child.

7.050 There are a number of objections to the use of closed circuit television:

- (i) It may suggest that the child has good reason not to confront the accused and may therefore suggest to the jury that the accused is guilty. New South Wales has attempted to minimize this difficulty by having the procedure applied to all cases involving children under ten and requires the judge to inform the jury that the use of these facilities is standard procedure and to warn them not to draw any inferences or give the evidence any greater or lesser weight because of its use.
- (ii) It may prevent the jury from observing the demeanour of the complainant when he or she is repeating the accusation in the immediate presence of the accused.

"There are serious questions about the effects on the jury of using closed circuit television to present the testimony of an absent witness since the camera becomes the juror's eyes, selecting and commentating on what is seen. There may be significant differences between testimony by closed circuit television and testimony face-to-face with the jury because of distortion and exclusion of evidence ... for example, 'the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanour in a number of ways ... variations in lens or angle, may result in failure to convey subtle nuances, including changes in witness demeanour ... and off-camera evidence is necessarily excluded while the focus is on another part of the body ... thus, such use of closed circuit television may affect the juror's impressions of

the witness' demeanour and credibility ... also it is quite conceivable that the credibility of a witness whose testimony is presented via closed circuit television may be enhanced by the phenomenon called status-conferral; it is recognised that the media bestows prestige and enhances the authority of an individual by legitimising his status ... such considerations are of particular importance when, as here, the demeanour and credibility of the witness are crucial to the state's case."¹⁶⁸

- (iii) Some critics feel that closed circuit television may also not greatly help children. The child is removed from the room where everything is going on, may be intimidated by the presence of the camera and other equipment and may have difficulty in concentrating on a face and voice coming from a TV monitor over a prolonged period of time.

"Two-way closed circuit testimony may be stranger and more anxiety-provoking than conventional testimony, and it may diminish the child's understanding of expectations for testimony".¹⁶⁹

- (iv) Another objection is based on the belief that a complainant is more likely to tell the truth when compelled to face the accused.
- (v) A common fear expressed by prosecutors is that closed circuit television would weaken the impact of children's evidence and would therefore be detrimental to the prosecution.

"An experienced trial attorney would know that in any kind of an assault case it is imperative that the trier of fact be able to see and relate to the victim. Keep in mind that the jury sits for a period of time in the same room with the defendant who looks like anyone else. Molesters do not have a large 'M' tattooed on their foreheads - they look like members of the jury, the jury members' mothers, father, little brothers. Further, they do not molest children in the presence of the jury. Consequently, over the period of time that it takes to try a case, the jury gets to 'know' a defendant. In this case familiarity does not breed contempt. Familiarity breeds pity and concern. If this pity and concern are not tempered in the jury's collective mind by the victim and the victim's pain, then human nature will favour the person [defendant] who has become real to them."¹⁷⁰

This appears to be supported by the American experience where there is a "discernible trend amongst lawyers working almost exclusively in this field in the U.S.A. to reserve the use of closed circuit television for the extraordinary cases".¹⁷¹

- (vi) Finally, there may or may not be constitutional concerns revolving around the defendant's right to confront and cross-examine witnesses.

The Arguments in Favour of Using Closed Circuit Television

7.051(i) It is less stressful for children. One study¹⁷² of children who were interviewed at the court-house while they were waiting to see if their required, found that a majority of them were anxious and unhappy about the prospect of testifying and virtually all of the children were negative about having to face the defendant in court. Many professionals who work with sexually abused children stress the need to let children testify outside the presence of the accused.

"When the setting involves a relative accused of sexual abuse, the child becomes guilty, anxious and traumatised. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony."¹⁷³

The Commission accepts the stress suffered by child complainants confronting their abusers as a very real fact of life.

- (ii) The stress of testifying in an open court may adversely affect a child's ability to testify competently. Some research shows that intimidation and stress can decrease a person's willingness and ability to release information from memory.¹⁷⁴ Thus, closed circuit television may make it possible for a child to be a better witness. One perceived disadvantage of closed circuit television, i.e. that the televised image of the child testifying is less powerful than live testimony, may be therefore cancelled out by the increased accuracy and details of the child's evidence which are made possible by the use of closed circuit television.
- (iii) The objection that closed circuit television would deprive a defendant of his right to confront his accuser has been trenchantly rejected by John Spencer, a leading British lawyer. Referring to the case of Colin James Evans, who was convicted of abducting and sexually assaulting and murdering a child of four in 1984 and who had been twice tried and acquitted for indecently assaulting children, Spencer had this to say:

"If the basic traditions of British justice really require the Colin James Evans of the paedophile world to confront their four year old accusers face-to-face, even if this makes it impossible to get a word of evidence out of them, it is the traditions of British justice which need re-examining, not the video-link proposal. When the terrorist Nezar Hindawi was tried at the Old Bailey for attempting to blow-up the El Al jumbo jet, two El Al security officers were allowed to give evidence against him from behind a thick oak screen. If the traditions of British justice permit that sort of thing to protect a witness who is an Israeli security man, than they should permit it to be done for a terrified little child."¹⁷⁵

- (iv) Many of the procedural problems arising from the use of closed circuit television, e.g. the child's lack of readiness for cross-examination, could be dealt with by familiarizing the child with court procedures as part of his or her preparation for court. In addition, appropriate interview techniques, e.g. spending time establishing rapport with the child, asking age appropriate questions, and encouraging the recall sequence to begin prior to the critical incident, are probably more important in eliciting good evidence than whether the child is physically present and "settled in court".

The use of screens and of closed circuit television would ameliorate the trauma caused by confrontation and do not really constitute an exception to the Rule against Hearsay as the child witness can be heard and seen at the trial by everyone involved.

7.052 In the case of a summary trial, this would seem to be all that is required. Where, however, the accused is sent forward for trial, a further problem arises. Because a Book of Evidence has to be prepared and served and a preliminary examination of that evidence held in the District Court, it takes longer to hold a trial by jury than a summary trial. When the District Justice decides the accused has a case to meet, the case is returned for trial in the Circuit Court and must take its place in the queue with all other cases awaiting trial. Only in Dublin is the Circuit Court in constant session to deal with jury trials in criminal cases. Thus, trial by jury is necessarily delayed and this can give rise to lapses of memory on the child's part. This makes it all too easy for the defendant's lawyer to discredit the evidence for no better reason than lapse of memory and makes it necessary for us to consider other options, i.e. the video-recording of the child's evidence.

6. Video-Recording Out-Of-Court Statements

7.053 A number of American states have legislated to permit video-recorded evidence to be used at trials instead of the witness having to give evidence in person. The majority of statutes authorising the admission of such evidence refer to child victims. These statutes in effect create a new exception to the

hearsay rule. They differ in a number of respects. In some States, Florida for example, the video-taped evidence may only be used if the trial court finds that there is a substantial likelihood that the child would suffer at least moderate psychological harm if required to testify in open court. Statutes also differ in where they specify the defendant should be while this testimony is being taken. The majority of these statutes state that the defendant must be able to hear and see the child and communicate with defence counsel while the child testifies, but that the child should neither see nor hear the defendant. Some statutes prevent the child from seeing or hearing the defendant while testifying on a video tape only in those cases where it is considered likely to cause psychological harm. In Iowa, the statute examined by the U.S. Supreme Court in *Coy v Iowa*¹⁷⁶ required that the child be informed that he or she could be seen by the defendant. In Ohio, the child victim and defendant can view each other on monitors while the testimony is given.¹⁷⁷

A more fundamental distinction between the different models for laws relating to video-taped evidence is whether the child is required to be available for cross-examination at the trial or not. The first model permits a video-taped recording to *replace or supplement the child's testimony but requires the child to be available for cross-examination*. The second model allows the recording as *a substitute for the child's participation at the trial*.

A With the child available for cross-examination

7.054 The video-taped recording becomes "the means of presenting the child's evidence in chief, in the same way as a complainant's statement is presented in a hand-up brief at a preliminary examination".¹⁷⁸

Evidence-in-chief here means the initial testimony of the complainant at the trial in which he or she gives evidence about the alleged complaint in response to questions asked by the prosecutor. The defence then has the opportunity to cross-examine on this evidence.

Some Scandinavian countries have provision for a procedure like this. In Sweden, specially trained policewomen are used to interrogate child victims:

"Except for medical or therapeutic purposes no other interrogation of the child is permitted. The policewoman's interview, or interviews, with the child are tape-recorded and these tapes may be used as evidence at a trial. The investigating policewoman normally supervises any identification parade or other out-of-court identification proceeding that may be required."¹⁷⁹

The child normally gives evidence in court. His or her tape-recorded statement is available to both the prosecution and the defence (as well as any other person with a legitimate interest). The policewoman attends the trial and may give evidence.¹⁸⁰

However, if offered as substantive evidence that the abuse occurred, the video tape would be inadmissible hearsay in pre-trial and trial proceedings, except in specific circumstances. These circumstances have been summarised by Toth and Whalen as follows:

"No attorney for either party is present when the statement is made. The recording is both visual and aural and made on video tape, film or other electronic means. The equipment is capable of making accurate recording, the operator of the equipment is competent, and the recording is accurate and has not been altered. The statement is not made in response to questions designed to lead the child to make a specific statement. Every voice on the recording is identified. The interviewer is present at the proceeding and available to testify or be cross-examined by either party. The defendant or his attorney is given the opportunity to view the recording before it is offered in evidence. The child is available to testify."¹⁸¹

Even if a statement meets all these statutory criteria, it must satisfy the requirements of the Sixth Amendment to the Federal Constitution and state constitutional confrontation clauses which afford an accused the right to be confronted with the witness against him. As we note above in our study of *Coy v Iowa*,¹⁸² there are doubts in the U.S. about whether these statutes violate the accused's right to confrontation with the complainant.

7.055 The major advantages of the use of video-taped evidence with the child available for cross-examination are as follows:

- (i) Less trauma for the child. The testimony can be taken in a relatively informal setting in a comfortable room, outside the courtroom and away from the jury and the press. Many of the American statutes allow a support person to be present in the room with the child while the child is testifying. Where the defendant is excluded and the child can testify without seeing or hearing the defendant, the child is spared the trauma of testifying in close physical proximity to the defendant.
- (ii) The freshest possible evidence is obtained and presented to the court. The child gives the evidence when the details are still fresh in his or her mind. In addition, the interview may be conducted by a skilled person in a setting that is less intimidating than a courtroom.
- (iii) The video tape can be used to refresh the victim's memory, as evidence of a prior consistent statement, or as substantive evidence of abuse where the victim is recanting at trial.
- (iv) The video tape presenting the child as a credible witness may persuade some guilty defendants to plead guilty, thus avoiding the necessity for a trial and cross-examination of the child.

- (v) The methods of interview are apparent in the video tape. The court and counsel for the accused can see and evaluate the form of questions used to elicit the information.
- (vi) The child's responses are apparent. The child's demeanour and facial expressions and gestures are preserved. Thus the court can evaluate the way the child gave testimony and how he or she reacted to questions.
- (vii) The video tape can be used by others and thereby spare the child from repeating accounts of the alleged abuse.
- (viii) The video tape can be availed of to assess whether or not to allow other special procedures such as closed circuit television.

The disadvantages of this approach are as follows:

- (i) Children are often ill-at-ease with recording equipment and may be apprehensive about disclosing abuse in these circumstances. Young children may find the equipment distracting and their ability to concentrate may be impaired as a consequence.
- (ii) A child's disclosure of abuse is generally progressive. The report is rarely complete at the initial interview, even if skilled professionals are involved. Difficulties can arise as to when the disclosure process is completed. An interview obtained later in the disclosure process may be challenged when it is realised how long it took to elicit the information from the child.
- (iii) Video-taping every interview would present practical difficulties. It may also give the impression that the child is giving an inconsistent story where the child's story is disclosed slowly and details seem to change.
- (iv) Showing all of the victim's video-recorded statement at the trial would be time-consuming.
- (v) Effective interviewing of the child may require the use of leading questions. These questions would be attacked by the defence as improper and used to discredit the reliability of the statement and thereby render it inadmissible. Some critics of the procedure believe that a verbatim visual record of an interview, especially one that is poorly conducted or otherwise ineffective, may provide the defence with strategies or opportunities that otherwise would not be available to them.
- (vi) Some parts of the video tape recording may be inadmissible. There would have to be a procedure to enable an authorised independent person to excise inadmissible parts of the recording.

- (vii) The process of giving oral evidence in court may actually help the child. The prosecutor can bring the child through his or her evidence thereby giving the child time to settle down, and to get used to the courtroom atmosphere and to answering questions put by a lawyer. "Otherwise the child is immediately confronted by the defence counsel's cross-examination and may find it difficult to testify effectively".¹⁸³
- (viii) The videotaping may not prevent multiple interviewing of the child as different agencies such as the police, the prosecutors, social workers and medical personnel will have to agree to have confidence in the person who does the first interview, agree with the interview method and accept the quality of the videotaped evidence.

"Few places actually get their act together well enough. For videotaping to reduce interviewing there has to be a willingness to give up some of their turf or prerogative."¹⁸⁴

- (ix) If a video-taped statement contains a denial, a recantation or is incomplete, it can be used to attack the child's credibility by showing alleged prior inconsistencies in the child's evidence. If a number of different professionals record the interviews with the child, the chances of recorded statements appearing inconsistent will increase.

7.057 Australian enquiries have reached different conclusions regarding admitting a videotaped record of the child's evidence with the child available for cross-examination. The Sturgess Enquiry recommended that the videotaped evidence-in-chief of a child under twelve years should be admissible provided the child was available for cross-examination and that evidence be given of the history of the interviews of the child leading up to the recorded interviews. The South Australian Task Force were in disagreement about it. The New South Wales Violence Against Women and Children Law Reform Task Force stated that the issue needed further study before the use of video-recorded evidence could be recommended.

Section 3 of the New South Wales *Children (Care and Protection) (Personal and Family Violence) Amendment Act 1987* provides that regulations made under the *Children (Care and Protection) Act 1987* may regulate the recording by videotape or audiotape of any interview with a child concerning the commission of a personal assault offence on the child.

These regulations may in particular make provision for:

- (a) the making of any such recording (including the circumstances in which it may be made, any consent required and the persons who may interview the child);
- (b) the joint making or use of any such recording by law enforcement, child welfare health care and other agencies; and

- (c) the use, possession, storage and destruction of any such recording.

If any such recording was made for therapeutic purposes in connection with the treatment or counselling of the child, the recording (or any transcript) is not admissible in evidence in any criminal or civil proceedings unless the court considers it is in the interests of justice to admit the recording. These rules apply to recordings made by the State or any authority of the State as well as to recordings made by any other person or agency.

7.058 The Law Reform Commission of Victoria recommended that the court should have discretion to admit as evidence an audio or video-recording of an interview of a child complainant if the child is available for cross-examination at the trial. The Commission was of the view that the availability of the video-recording need not be used to supplant completely the child's oral evidence and that it may be beneficial for the child to be questioned by the prosecution before being subjected to cross-examination. They considered that two steps were necessary before the procedure should be adopted. First, rules need to be established about key aspects of the procedure. For example, they recommended that the use of video-taped evidence should be at the discretion of the prosecutor. Whether a recording is admissible should be determined by the court, perhaps as part of the pre-trial procedure and not in the jury's presence. A copy of the recording should be provided to the accused before the preliminary examination. Secondly, police and other interviewers need to be trained to ensure that the techniques are effective, comply with the rules of evidence and are appropriate for children. The Commission suggested that it would be desirable to establish a pilot scheme before the procedure was formally introduced.¹⁸⁵

B In substitution for the child's participation at the trial

The second approach to the use of video-recorded evidence is more radical. The video-recording is used as a substitute for the child's evidence, with cross-examination of the child only allowed at trial in special circumstances.

7.060 One suggested approach has been outlined by Glanville Williams and JR Spencer.¹⁸⁶ The key features of their proposal are as follows:

The child is interviewed by a specially-trained examiner such as a child psychiatrist, psychologist, police, surgeon or social worker. If the suspect has been identified at the time of the interview, the interview is witnessed by the accused and his or her legal adviser through a one-way mirror. If the accused is not identified until after the interview there must be a supplementary examination, under the same conditions, when the accused's lawyer can put questions to the child. The accused and his lawyer are allowed a supplementary interview where necessary to clarify any points that have arisen. When all interviews have concluded, both lawyers are given a copy of the video.

- The child examiner wears a miniature ear-phone so that the accused's lawyer can ask the examiner to ask the child specific questions.
- The conduct of the interview would be controlled by statutory order or ordinary rules of court and the child examiner would be available to give evidence as to conformity with these rules.
- Anything that happens in the interview room is recorded and the recording is admissible as the child's evidence.
- The child would not be required to give evidence at the trial or be cross-examined unless the court believed that there were special reasons which made this necessary.
- If a point arises at trial that has not been covered by the video-recording, the child could, at the judge's discretion, be allowed to give evidence by the live-link procedure.
- The defendant should be required to be legally represented for the purposes of cross-examining the child at the trial. The defendant's questions put to the child via the child's examiner should be phrased by the child examiner in a way that is appropriate for children.
- The prosecution could call witnesses who interviewed the child and should be required to call any of these witnesses at the request of the defence.

7.061 The Scottish Law Commission have suggested that no specific criteria should be prescribed for use of such a procedure; they

"would not envisage that this procedure would be utilised in every case where a child was likely to be a witness. In many instances it would be unnecessary and inappropriate. On the other hand, we would imagine that a prosecutor would seriously consider using the procedure in cases where the child was very young, in cases where the child was the alleged victim, or possibly a witness, of acts of sexual abuse or assault, and in any case where, for whatever reason, more formal procedures for taking evidence seems likely to cause the child undue fear or distress."¹⁸⁷

7.062 The question of when the video-recorded interview should take place raises a number of difficulties. If it is early in the investigation, no one will have been charged, or even perhaps invited to come to the Garda Station. It will not normally be possible therefore for a prospective defendant to participate in the process through his lawyer. On the other hand, if the video-recorded interview is deferred until a defendant has been charged, this creates difficulties: either the child will not be interviewed at all by any person before the video-recorded interview, in which case there will be no chance to

assess properly the strength of the case, or the child will be interviewed beforehand, in which case the video-recorded interview will lose some of its spontaneity. It is generally agreed that children should be interviewed as few times as possible. This option thus interpreted would not be consistent with such a policy: if there is to be cross-examination, there has to be an accused and any option preferred should accommodate that fact.

7.063 The advantages of this procedure are as follows:

- (i) Less trauma for the child. The child's evidence is recorded at a very early stage, i.e. as soon as possible after the complaint is made. The child's participation could then end at that point and the child can begin the process of recovery. The cross-examination is conducted by a neutral, specially-trained examiner and the child is not subjected to hostile cross-examination except in very special circumstances.
- (ii) Guilty defendants are more likely to plead guilty. If the defendant sees the child's evidence in advance, he or she may be encouraged to plead guilty. Alternatively, if the defendant strongly protests his or her innocence he or she can request the police to investigate further details in the child's interview which are in dispute.
- (iii) An additional advantage is that defence counsel could pursue a more thorough cross-examination via the child examiner. Glanville Williams points out that at present defence counsel may feel inhibited from pursuing uncertain lines of enquiry with the child because of the danger of antagonizing the jury.

"Counsel generally dares not ask a question to which he does not know the answer and under the present procedure he often will not know the answer, because he has been hindered from contact with the child."¹⁸⁸

The source of the child's sexual knowledge, his or her knowledge of the seriousness of the accusation or the likely consequences for the accused, the possibility of pressure or persuasion from another family member to make the accusation, the possibility that the abuse occurred with somebody other than the accused whom the child wants to protect - all such possibilities can be pursued in an appropriate way by a specially-trained child examiner.

- (iv) If the questions turn out to be unhelpful to the investigation, they could be excised from the video-tape by mutual consent of the prosecuting and defence lawyers, one copy being kept intact in case of dispute. In the case of a dispute between prosecution and defence lawyers, the judge could be requested by either side, in the absence of the jury, to order the "blind alley" questions to be deleted.

7.064 The disadvantages of this model are as follows:

- (i) The procedure constitutes a radical departure from the present system and introduces the inquisitorial system of justice by the back door. Not everyone would consider this a disadvantage. In the inquisitorial system, the court conducts an official enquiry, the court asks the questions and the court uses its own initiative to collect the evidence it needs to establish the truth.
- (ii) Such a procedure deprives the accused of the right to cross-examine the child in open court.
- (iii) The notion of adversarial justice includes the idea of "the day in court", where the prosecution case, the defence's challenge to it and the defence case are all presented continuously so that the court can compare the two sides and can come to a judgment. The idea of part of the evidence being collected in advance does not fit in with the adversarial idea of justice.¹⁸⁹
- (iv) It is feared that the video-taped evidence will usurp the function of the jury. The impact of video-taped evidence may be so strong as to unduly influence them. Juries may also be unable to judge witness credibility in some cases where video-taped evidence only is presented. Melton, an American researcher, has summarised research in this area:

"For example, if a child responds to facial expressions of others in the courtroom, this information probably would be unavailable. Also, the camera operator might affect jurors' perceptions of the event inadvertently, by choice of camera angle and shot [eg zooms and pans]. More generally the few studies available of the effects of video-taping suggest that both the televised presentation itself and variations in such presentation [eg black and white versus colour] affect jurors' attention and their perceptions of witness credibility and attractiveness. In the face of such evidence, plausible objections may be made to televised testimony on grounds of violation of the rights to trial by jury, due process and a fair trial."¹⁹⁰

- (v) The objections to cross-examination are mainly based on the number and form of questions and the language used by lawyers. If the child examiner were to put the lawyer's questions to the child using exactly the language of the lawyers, the interview may be as stressful for the child, thus lessening one of the arguments in favour of this procedure. If the child examiner were to paraphrase the lawyer's questions, as suggested by Glanville Williams, this could lead to many disputes as to the appropriateness of the paraphrasing.

- (vi) If one of the legal representatives wishes to ask questions through the child examiner which the other legal representative challenges as being impermissible under the laws of evidence, the position could involve injustice (unless there is also to be a judge in session ready to adjudicate on such a challenge).

It is useful in this context to note the observations of one commentator in relation to the video-taping of trials in the absence of a judge:

"If opposing counsel objects to a question, the questioner must first assume the objection was sustained and restate his question. If the objection was made on the grounds of relevancy, materiality or competence, counsel must ask a series of questions to cure the objection. Then the lawyer must go back and assume the objection was overruled and ask the witness questions based on that assumption.

This procedure might cause more confusion and expense than it is worth. Can a lawyer effectively conduct a logical and meaningful cross-examination in the absence of an umpire (the judge) when he has to backtrack continually and rephrase his questions every time an objection is raised? All of these rephrasings and multiple questions and answers will appear on the tape that the court must review, probably in the absence of counsel. Whatever rulings the trial judge makes, the appellate court could be called upon to review them after watching the entire tape. The whole process may take far more time than a judge now takes to sustain proper objections and overrule those which are frivolous.

Editing the tapes will also create some new and interesting problems. Would each side set the order of witnesses after they have seen the videotapes of their testimony? Would that contribute to the artificiality of the videotaped trial? And since the camera naturally limits the focus of the naked eye, who will decide camera angles, close-ups and long shots?¹⁹⁷

- (vii) Since the child could be called as a witness to the trial under special circumstances, he or she will not know until the trial is actually in progress if he or she will be required to attend for further examination. Thus the child cannot truly forget this anxiety.

7.055 There continues to be a great deal of debate and controversy surrounding the proposal that a video-taped recording of a child complainant should be admitted at the trial in place of the child giving evidence. The Law Reform Commission of Victoria has recommended that this proposal should not be adopted, at least not without further detailed consideration of the issues of practicality and principle which might be involved. Similarly, the

United Kingdom Government refused to support the proposal although most responses to their Home Office supported it.

(i) Authorising Video Testimony

7.066 Many American statutes require the prosecution to show that the child victim would suffer psychological harm if he or she had to testify in open court and that video-tape procedures are therefore necessary. The factors which the court has to take into account in making this decision include the child's age, level of development, fear of the defendant, threats made by the defendant, the number of previous interviews the child has been subjected to and his or her reaction to them, the child's emotional reaction to the abuse, the nature of the abuse, the nature of the defendant's relationship with the child and the attitudes of other family members. Relatives, friends, teachers and others close to the child may give evidence as to the child's psychological state. Some statutes require testimony from experts who have examined the child for this purpose. Some commentators have differentiated between the subjective standard and objective standard of expert psychological testimony. The subjective standard takes the form of expert opinion by psychiatrists, psychologists and other mental health professionals. The objective standard refers to "those things that everyone can agree upon as being a reason for having the procedure".¹⁹²

Examples of the objective standard include a child breaking down while giving evidence and being unable to continue, threats of bodily harm to the child by the defendant, and the use of a weapon by the defendant. The Scottish Law Reform Commission concluded that:

"It is believed to be unlikely that most courts will require expert testimony to establish a child's unavailability or inability to testify under normal conditions, but that such testimony would be persuasive in protecting the procedure in any ensuing appeal."¹⁹³

(ii) Timing of Video-Taped Interviews

7.067 Procedural guidelines are necessary to assist in deciding when to start video-taping a child's statement. Disclosure may occur over a lengthy period and over several interviews. It is difficult to know when to start video-taping. Video-taping at too early a juncture when the child is not ready to disclose all the details may result in a statement that constitutes poor evidence and may weaken the case. However, repeated interviews may produce a comprehensive final statement in video-tape but may be attacked by the defence on the grounds that the child was badgered, persuaded or led into making the disclosures or that the video-taping was too selective. Repeated interviews are also very stressful for the child. There is also the difficulty of integrating the video-taped evidence with other unrecorded statements, for example reconciling inconsistent details. It would be impractical as well as expensive to video-tape every meeting with the child and also difficult to

establish the quality, cataloguing, preservation and storage of the video-tape. Should there be an editing process and if so, should the defence lawyer have a role in it?

(iii) Selecting the Interviewer

7.068 If the child is to be spared the stress of multiple interviewing and prolonged participation in the investigation process there has to be a high degree of inter-professional trust, co-operation and agreed working practices. But account has to be taken of laws relating to confidentiality, privilege and non-disclosure. In some circumstances, the permission of the child or the child's parents or guardian has to be obtained in order for one professional or agency to pass information on video-taped statements to another professional or agency.

(iv) Ownership and Availability

7.069 It would be necessary to limit the distribution of or access to video-taped statements in order to protect the child's right to privacy. Issues of ownership and availability are governed by statute in some American States.

(v) Evaluation

7.070 At the present time there is no empirical evidence for many of the assertions, both favourable and unfavourable, made about video-taping evidence and no consensus about their usefulness. It is important that evaluation procedures are put in place, for example to monitor the number of guilty pleas or eventual convictions that result from the use of video-taped evidence.

(vi) Guidelines for the Use of Video-Tapes

7.071 Video-taped interviews should be conducted in a systematic way and under accepted guidelines. Kee MacFarlane, an American social worker who is very experienced in the use of video-taped evidence, highlights some of these issues:

"A decision to video-tape an alleged victim of child sexual abuse should not be made on the grounds that the equipment is waiting in the closet and someone is available to operate it. Issues associated with its use, such as: who can or must consent to the taping and to the viewing of the tapes, how should the consent form be designed, who owns the tapes and who may have copies, and how the tapes will be protected and used should be carefully researched. Decisions should be made with full knowledge of the potential consequences that relate to each situation."¹⁹⁴

(vii) *Planning and Preparation for Video-Taped and Live Closed Circuit Testimony*

7.072 First the prosecutor has to decide which of the various alternatives is best suited to the child and to the prosecution of the case. "If, for example, the child is fearful of testifying in front of strangers in open court but is not particularly anxious about the defendant's presence, a court order excluding all spectators from the courtroom might suffice rather than resorting to either video-tape or closed circuit television. When the courtroom environment is the cause of the child's anxiety, video-taped or closed circuit testimony might be more suitable".¹⁹⁵ Different agencies involved in the assessment and video-taping of child sexual abuse, and the police, will have to ensure that video-taping procedures are incorporated into their interviewing and statement-taking policy. A central or regional facility for video-taping interviews could be shared by key agencies. This would ensure continuity and standardisation of the process, reduce costs and provide vital resources to regions which do not have adequately skilled professionals or video-taping technologies. In the U.S. the statutory schemes vary widely but, in general, prescribe procedures for using video-tapes to record pre-trial interviews or statements of child victims, to record full-scale depositions or other testimony of child victims. They also prescribe procedures for using closed circuit television simultaneously to broadcast live testimony of child victims from one room to another during trial. Arrangements for the storage and ultimate disposition of video-tapes are necessary. Some American statutes provide that the video-tape is part of the court record and is therefore subject to any court protective order to safeguard the victim's privacy.

7.073 The acceptance and usefulness of video-taped procedures will largely rest on finding satisfactory answers to the issues raised above. As Spencer pointed out:

"There is nothing in the video-tape proposal which removes trial by jury, or which alters the principle that the prosecution have the burden of proving guilt, or which changes the rule that in criminal cases the standard of proof is proof beyond reasonable doubt: the proposal is merely to change the rules governing what evidence can be used to prove the defendant's guilt to the requisite criminal standard."¹⁹⁶

The impact of the video-taped evidence both true and false, on the jury, does not deprive the jury of the power of critical reasoning.

"Criminal justice is possible only on the assumption that a court can distinguish between true and false evidence, or at any rate can decide what part of the prosecution's evidence is true beyond reasonable doubt. If the vivid presentation of the prosecution's evidence (or of the defendant's evidence for that matter) deprives the jury of the power of critical reasoning, that is an argument for abolishing juries in these cases."¹⁹⁷

7. Video-Recording Depositions

7.074 The primary disadvantage of the usual deposition procedure is that where a deposition is read in evidence, the jury are deprived of an opportunity to assess the child's evidence as to its credibility and weight, based on the child's demeanour. The obvious way of neutralising this objection would be to take a video-recording of the deposition proceedings. This would not exactly replicate proceedings in front of the jury, but it would go some way towards doing so. A second disadvantage is that the procedure would not work satisfactorily in cases where the accused was not legally represented.¹⁹⁸

If this option were to be adopted, the question would arise as to the circumstances in which the deposition procedure would be permitted. One solution would be to require proof, or at least evidence, that the child would be likely to suffer serious psychological damage by testifying in the normal way, or that the child is incapable of testifying at all. The Scottish Law Commission rejected this solution, being of the view that this test:

"would be too demanding and could, in any event, simply lead to an unhelpful clash between 'expert' witnesses adduced respectively by the prosecution and the defence."¹⁹⁹

The Scottish Law Commission's preference was for a much more discretionary test: the court should be entitled to authorise the taking of a pre-trial deposition on cause shown, taking into account matters such as the age and maturity of the child, the nature of the offence, the nature of the evidence which the child was likely to be called on to give, and the possible effect on the child if required to give evidence in court.²⁰⁰ The evidence as to the possible traumatic effects for children of giving evidence in court is less than convincing for many commentators;²⁰¹ if this is so, the court should perhaps be very slow to exercise its discretion against the normal trial process.

Nonetheless, in *McGuire v State*,²⁰² in 1986, the Arkansas Supreme Court held that the use of a video-taped deposition of a child who was alleged to have been raped by her stepfather was not unconstitutional. The child was 11 years old. At the hearing of a motion by the State to use a video-taped deposition, the child's grandparents testified that she was under a psychologist's care; that she no longer wanted to go anywhere; that she was easily upset; and that she had changed schools. The grandparents believed it would be best to use the video-taped deposition "because the child would feel ridiculed if she appeared before the jury".²⁰³

The relevant Arkansas legislation²⁰⁴ provided as follows:

"In any prosecution for a sexual offence or criminal attempt to commit a sexual offense against a minor, upon motion of the prosecuting attorney and after notice to the opposing counsel, the court may, for good cause shown, order the taking of a videotaped deposition of any

alleged victim under the age of seventeen years. The videotaped deposition shall be taken before the judge in chambers in the presence of the prosecuting attorney, the defendant and his attorneys. Examination and cross-examination of the alleged victim shall proceed at the taking of the videotaped deposition in the same manner permitted at trial under the provisions of the Arkansas Uniform Rules of Evidence. Any videotaped deposition taken under the provisions of this Act shall be admissible at trial and received into evidence in lieu of the direct testimony of the victim. However, neither the presentation nor the preparation of such videotaped deposition shall preclude the prosecutor's calling the minor victim to testify at trial if that is necessary to serve the interests of justice."

The defendant was convicted and had appealed to the Supreme Court of Arkansas, which gave very short shrift to his constitutional arguments.

As regards the statute's alleged violation of due process, the Court said:

"This statute provides the least restrictive means of carrying out the State's interest in protecting children who are victims of sexual abuse. The statute protects the children from testifying in court about a personal, traumatic, and often devastating experience. The statute protects the defendant's basic constitutional rights by requiring, after good cause is shown, that the videotaped deposition be taken before the judge, the prosecuting attorney, the defendant and his attorney, and that examination and cross-examination be permitted in accordance with the Uniform Rules of Evidence."²⁰⁵

As regards the defendant's argument that the use of the deposition deprived the jury of the right to judge the victim's credibility, the court said:

"Although generally it may be the better practice for a witness to testify at trial, in many cases a videotape is the best substitute.²⁰⁶ The use of depositions in criminal cases is more carefully scrutinized than in civil cases, but such use is not *per se* unconstitutional. Videotaped depositions are permissible only when authorized by statute.²⁰⁷ Ark. Stat. Ann. s43-2036 authorizes the use of videotaped depositions in cases of sexual offences against children, undoubtedly in recognition of the further stress testimony at trial might cause the child. In this situation, videotaped testimony is useful and does not deprive the jury of the opportunity of determining the victim's credibility."²⁰⁸

The Court rejected the right to confrontation argument in a manner suggesting that it accepted that the argument could have some merit had not the Arkansas legislation been drafted as tightly as it was:

"Our statute does not violate the confrontation clause which is generally interpreted as the right to cross-examine a witness.²⁰⁹ Some states have

had problems with statutes or situations where the defendant was not present at the deposition for a face-to-face confrontation.²¹⁰ Our statute requires face-to-face confrontation between the victim, the defendant and his attorney at the time the deposition is taken, and provides the opportunity for cross-examination of the victim by the defendant. The trial court followed the requirements exactly. The deposition was taken before the judge in chambers in the presence of the defendant, his attorney and the prosecuting attorney. (The defendant) had the opportunity to cross-examine the victim at that time."²¹¹

The Court also rejected an attack based on the "vagueness" doctrine, taking the view that many facts could and should be considered in determining what was "good cause", including the circumstances surrounding the offence, the child's age and the potential harm to the child.²¹² In the instant case, the grandparents' testimony "indicated that the child could be seriously harmed if forced to appear before a jury".²¹³

7.076 The Commission is sympathetic to this approach. It is also sympathetic to the view of the judges of the United States' Supreme Court in the minority in *Coy v Iowa*²¹⁴ where they deemed it unnecessary to prove in every individual case of child sexual abuse that giving evidence in such a case will be traumatic. If such proof were necessary, we agree with the Scottish Law Commission that resolution of the matter would lead to even more interviews and would degenerate into an unhelpful clash between medical witnesses. We consider it a proper expression of public policy to legislate in order to secure that the giving of evidence by children in court in these cases would be the exception rather than the norm.

Provisional Conclusions

7.077 The Commission is satisfied at this stage of its deliberations-

- (a) that the child in the normal course of events should be spared the trauma of giving evidence in court in these cases
- (b) that the number of interviews with the child on video or otherwise be kept to a minimum
- (c) that video-recorded evidence, consisting of both examination-in-chief and cross-examination, is *prima facie* reliable and should be admissible
- (d) that the defendant should not be allowed to cross-examine the child at the trial without the leave of the court, which would only be given in the interests of justice and fair procedures. The defendant would not be able, as of right, to conduct a "memory test" hoping to catch the child out if his or her account varies from a previous account

(e) while a preliminary video might be taken by the doctor or child examiner, preferably with a member of the Gardai present at the earliest stage of the investigation for use in assessing the case, no "evidential" video would be made until the suspect had been charged

(f) the decision to make an evidential video recording and whether or not to use it at the trial should rest with the DPP. The DPP has directed the Gardai not to prefer charges in these cases without his directions.

7.078 Of the various models studied under the previous heading dealing with video-recorded evidence in general, the Commission is particularly attracted by the Glanville Williams/Spencer approach, the principal features of which are outlined above.²¹⁵ We share the wish to curtail the right to cross-examine at the trial. An aspect which caused us concern in considering other evidence-recording models was that of making provision for the unrepresented defendant. There could well be constitutional difficulty in denying a person the right to represent himself.

At the very least, the Commission, four out of five of whose members are lawyers, would feel uncomfortable about recommending that legal representation should be compulsory. Even if the child could at all stages be protected from face-to-face confrontation with, say, an abusing father, he or she would have to listen to his voice and answer his questions in cross-examination. For this reason, the use of specially-trained child examiners, through whom all questions would be put, recommended in the Glanville Williams/Spencer model, readily commends itself to us and will be recommended by us. We note that Article 6.3(d) of the European Convention on Human Rights provides that everyone charged with a criminal offence has the minimum right "to examine *or have examined* witnesses against him" (emphasis added).

The other matter which concerns us about the standard American video-recording model and indeed, the Glanville Williams/Spencer model, is the absence of a judge or referee. Our concern arises for two reasons. First, there is no independent person present to assess the competence of the child to give reliable evidence. Secondly and, obviously, while all questions, whether from lawyers or from an accused representing himself would be channelled through a child examiner, there is no figure present to keep order and adjudicate on the fairness of the questioning. We consider it utterly unrealistic to envisage that where lawyers are working the adversarial system fully and properly, or an accused is representing himself, a judicial figure would not be needed to maintain order. Were such a person not present, we feel that inevitably the examiner would be expected to act as referee or become cast, however unwillingly, in that mould. This would be totally undesirable as the examiner's sole function should be to maintain undistracted and uncontroversial contact with the child. Who should be the referee? It might be suggested that any experienced barrister or solicitor could fill this

role. County Registrars, Land Commissioners, Appeals Commissioners, lawyers and non-lawyers, and many others have exercised limited functions of a judicial nature. The most junior barristers have presided over the taking of evidence on commission. However, to avoid constitutional problems arising, it would be preferable for the referee to be a District Justice. This has implications in regard to the staffing of the District Court to which we shall return.

7.79 As we have seen in our study of the constitutional implications of these proposals in the context of confrontation and cross-examination, we are navigating in waters which are virtually uncharted with legal precedent. Our best guess from such navigation points as are afforded by Irish decisions and by the somewhat equivocal judgments in *Coy v Iowa*²¹⁶ on the American situation, is that face-to-face confrontation of witness with accused is not an absolute constitutional requirement. However, as we have seen, the use of a screen or of closed circuit television still does not prevent the child witness giving evidence *at the trial* and being seen, while she gives evidence, by judge, jury and accused.

Articles 34 and 38 of the Constitution, read together, require that persons be tried in courts, in public, by judges, in due course of law and that where offences are not minor offences, persons should be tried by jury. The question is whether the giving of evidence by a witness and the cross-examination of such witness have to take place in every case in a court. As we have seen, there are already well settled instances in which out-of-court statements may be admitted in criminal proceedings, e.g. admissions, dying declarations, utterances admissible under the *Res Gestae* Rule, certificates of the Medical Bureau of Road Safety as to blood alcohol level under the *Road Traffic Acts, 1968-78* and of forensic scientists under Section 10 of the *Misuse of Drugs Act, 1984*.

Undoubtedly, the constitutional thrust is directed towards the giving of all evidence in court where possible. It is instructive to examine again the most relevant precedent in existing law, i.e. the law governing the taking of depositions found in the *Criminal Procedure Act, 1967*. Unlike the similar provisions in sections 28 and 29 of the *Children Act, 1908*, the 1967 provisions are presumed to be constitutional,²¹⁷ and are comparatively recent.

7.080 Before the *Criminal Procedure Act, 1967* was passed, when an accused person was going forward for trial by jury, he became aware for the first time of the State's case against him when depositions were taken in the District Court. The procedure followed was that the prosecution witnesses were all called to give their evidence on oath before a District Justice. The accused or his lawyers could cross-examine the witnesses if desired, and the prosecution could then re-examine. Usually the defence "held their fire", and postponed cross-examining until the trial itself. All the evidence given by each witness whether on direct examination, cross-examination or re-examination was taken down in longhand, read over to the witness and signed

by him as an accurate record of his evidence. The record of evidence so signed was the witness' deposition. The accused therefore knew clearly the case he had to meet. The justice could discontinue the prosecution if he decided no jury could be asked to convict on the evidence called before him. The procedure, which had to be followed in every case, took time.

7.081 The *Criminal Procedure Act, 1967* substituted a new procedure of serving on the accused what is known as a Book of Evidence, containing statements of the evidence of the witnesses proposed to be called at his trial. Under section 7, any witness may be required by either the prosecution or the accused to give evidence on deposition. Where the witness is required by the prosecution, however, the deposition cannot be read at the trial without the consent of the accused, unless the witness is dead. Under section 14, where the District Justice is of opinion that a prospective witness may be unable to attend or may be prevented from attending to give evidence at the trial, his evidence may be taken on deposition on the application of either the prosecutor or the accused person. But the deposition may not be read at the trial, unless the witness is dead or the trial judge considers it in the interest of justice that it should be read.

Section 7 of the Act is normally operated where it is assumed that the witness whose deposition is being taken will also be giving evidence at the trial. Section 14 is operated where it appears possible that he or she will not be able to give evidence at the trial. As noted above, however, whichever section is operated, it is only in limited circumstances that a deposition taken on the application of the prosecution in the District Court may be read at the subsequent trial. In other respects, the procedure is somewhat similar to what we have stated to be our favoured approach for the admission of video-recorded evidence. The differences are that under other models the video-recording is envisaged as taking place outside the trial process itself and there is no referee.

7.082 As we said above, the use of screens and of closed circuit television for the evidence of children at trials in these cases would be the only recommendations necessary were it not for the delay in obtaining trial by jury in indictable cases. If the child were not to give evidence until trial in a case on indictment, the delay could seriously affect the child's memory and ability to give an accurate account of events. For this reason, provision needs to be made for the video-recording of depositions prior to trial on indictment. The same problem does not exist in the case of summary trial. Where the offence is tried summarily, the justice in the case would simply hear the evidence on closed circuit television. Having agreed that it is pointless to make any evidential video before charge, since the accused would not be present or represented, we are prepared to proceed on the basis that the date for the taking of a deposition on video, or the date for summary trial would be fixed without delay.

It should also be borne in mind that were we to recommend that the evidential video-recorded statement be taken out-of-court after charge, rather than on deposition, it would still be open to the *accused* to call the child on deposition under section 7 of the Act and thereby to cause delay and probably confusion. Provision would have to be made for that eventuality.

7.083 If a recommendation for the use of closed circuit television at both summary and jury trials were brought into effect, courthouses throughout the country would have to be appropriately equipped and adapted or provision would have to be made for transfer of cases to a few venues, which were appropriately equipped and adapted. Ideally one would provide the facility in courthouses where both the Circuit and District Courts sit. The camera and microphones could be discretely located in an appropriately decorated and furnished room in the courthouse where the child could be questioned by the examiner in a relaxed environment. One assumes that the closed circuit T.V. camera records its pictures, and that the same room, familiar to the child, could therefore be used any time the child is to give evidence in a case. Were provision to be made for evidential video recording outside the judicial process, it might be necessary to provide separate, independent recording facilities. However, we have no doubt the Minister for Justice and the DPP could reach a sharing arrangement.

If there were an insufficient number of District Justices to cope with this additional work, more District Justices could be appointed. If such new Justices were well versed in child psychology or related disciplines, so much the better. Alternatively, new Justices appointed or, indeed, all District Justices and Judges who would have to operate the new procedures, could receive special training.

7.084 To summarise:

Advantages of video-recording court depositions rather than out-of-court statements:

- (a) The process becomes a Court proceeding within the existing framework for the preliminary examination of indictable offences.
- (b) Reform entails amendment and extension of laws (and rules of court) that already exist and are presumed to be constitutional.
- (c) The District Justice can act as an adjudicator on competence.
- (d) The District Justice can act as referee between the parties.
- (e) The presence of the District Justice relieves the child examiner of any umpiring role.
- (f) Provision can be made, if necessary, to enable the examiner ask questions for the District Justice.

- (g) The taking of "tactical" depositions by the accused is forestalled.
- (h) Facilities already provided for closed circuit television at trials can be used.

Disadvantages of video-recording court depositions rather than statements

- (a) More District Justices may need to be appointed.
- (b) Any delay arising in compiling and serving the Book of Evidence would obviously also delay the video-recording of the deposition. This should be eliminated by efficient procedures.

E: Other Suggested Improvements

(i) Providing a Support Person

7.085 Some American States permit the child to have a support person present with him or her throughout the court proceedings. The role of the support person, who may be a relative or a friend, is to guide the child through the criminal justice process, including familiarising the child with courtroom practice and courtroom personnel. The child may sit close to or even on the support person's lap if the child is very young. The judge when necessary may direct the support person to refrain from any coaching and instruct the jury not to accord special significance to the presence of the support person. If the support person is also a witness, his or her evidence is taken before the child's evidence and while the child is not present in the court.

(ii) The Guardian Ad Litem

7.086 The guardian *ad litem* has broader responsibilities than a support person, though he or she may also act in that capacity. The guardian *ad litem* is responsible for advising the court and safeguarding the child's interests throughout the whole process of bringing the case to trial, not just during the court proceedings. In the U.S., it is common practice to assign a guardian *ad litem* in civil cases involving children, but recently they have been appointed in criminal cases too. Their role is to protect the child from the stress of courtroom proceedings and to ensure greater co-ordination between the civil and criminal proceedings involving the same child. The exact dimensions of the guardian *ad litem's* role are still at an experimental stage in the U.S. and are generally determined by the presiding judge, who can in some cases refuse to allow the guardian *ad litem* to be party to the proceedings. The role of a guardian *ad litem* is particularly important for children who are isolated, for example in cases where the child has been sexually abused by a family member and has been removed from the family.

(iii) Reducing Procedural Delays

7.087 Prolonged delay between the occurrence of the abuse and the time for testimony can result in memory loss and undue stress for victims and families. Delay in bringing the case to trial has been identified as one of the most significant factors affecting the child's emotional well being. Other jurisdictions, in the U.S. and elsewhere, have enacted laws that ensure the early timetabling of cases. The Scottish Law Commission has also recommended reforming the law to ensure that trials are speedy in all cases where children appear as witnesses.

Delays in the trial must also be considered. Young children may need frequent breaks. The court already has broad powers to recess proceedings. However delays may be very stressful for children. Research evidence suggests that postponement or continuations may exacerbate the child's anxiety and memory loss.²¹⁸

Another study observed:

"Most of the children who are subpoenaed wait around the courtroom for days, bored and frightened, and then go home without testifying that day. It is typical either for the hearing or trial to be 'continued' (i.e. set for another later date) or for a defendant to waive his or her right to a preliminary hearing; or for a plea bargain to be arranged at the last minute. Each of them means that the child will not be required to testify on that occasion."²¹⁹

It has been pointed out that it is essential that the courts carefully assess the child witnesses' needs and capabilities and that the adverse effects of postponement and delays be always kept in mind.²²⁰

(iv) The Use of Anatomical Dolls and Other Demonstrative Aids to Testimony

7.088 As the law stands, the trial judge would be entitled to allow the use of dolls, provided the general requirements of the law of evidence, particularly the prohibition on leading questions, are observed. Inviting the child to identify a particular portion of the anatomy by reference to a doll, in cases where he or she might be too shy or inarticulate to find the correct expression, appears to be as much in conformity with existing procedures as, for example, inviting adult witnesses, who may not be good judges of measurements in terms of metres or yards, to offer estimates by reference to objects in the courtroom, a commonplace procedure in all trials today. In *DPP v T*²²¹ the Court of Criminal Appeal accepted that the use of such dolls in that case was unobjectionable.

F: Provisional Recommendations

1. A CHILD SEXUAL ABUSE EXCEPTION TO THE RULE AGAINST HEARSAY

7.089 The Commission would rather address this and the next option in the context of a general Report on the admissibility of out-of-court statements in criminal cases. It would have no objection to the creation of the exception on grounds of reliability where the child is available to give evidence and testifies. Where the child is not available, corroboration is required and the quality of corroboration may vary enormously. Having said that, where the law requires corroboration at the moment, it is silent as to the quality of such corroboration. If the law required corroboration to be such as the Court deemed sufficient, the Commission would not rule out this option.

2. A RESIDUAL EXCEPTION TO THE RULE AGAINST HEARSAY

7.090 While again we would rather deal with this in the context of a general Report, we would not rule out such an exception, carefully expressed, as an option.

3. PRESENTING EVIDENCE THROUGH A SURROGATE WITNESS

7.091 Whatever the merits of such a proposal, it represents so radical a departure from the norms of our system of criminal justice that we do not think it either practical or desirable to recommend it even on a tentative basis.

4. USE OF A CHILD EXAMINER

7.092 While we would have difficulty in recommending the use of a surrogate witness we provisionally recommend that the child should be questioned during the investigation and prosecution of these offences by disinterested but skilled child examiners, experienced in child language and psychology and appointed by the court. The examiner would act as the *conduit* for all questions from the lawyers in the case, from the court or from the accused if he is representing himself. The examiner's role would be to establish and maintain rapport and ease of communication with the child witness while remaining detached from the issues.

5. USING A SCREEN TO PROTECT THE CHILD WHEN GIVING EVIDENCE

7.093 There is very little empirical evidence as to the presumed advantages and disadvantages attaching to this proposal. However, what evidence exists does suggest that children do find testifying in the presence of the defendant intimidating and stressful. We are not impressed by the claim that there are practical difficulties, still less by the suggestion that it might prove expensive. Both the alleged practical difficulties and the expense are of small significance compared with the importance of what the screens are designed to achieve. The possible prejudicial effect on the jury could be minimised by a requirement that the judge instruct the jury that the procedure is designed as a way of reducing the stress for child witnesses and should not under any circumstances be taken as evidence of the guilt of the accused. As to the

possible constitutional invalidity of such a proposal, we are satisfied that once the right to cross-examine State witnesses is preserved, the guarantee of fair procedures is not necessarily violated by the absence of any physical confrontation with the witnesses. *Accordingly, we recommend that at the election of the prosecution, the child complainant could give his or her evidence in these cases from behind a screen.*

6. ENABLING THE CHILD TO GIVE EVIDENCE BY MEANS OF CLOSED CIRCUIT TELEVISION

7.094 *We would also provisionally recommend that this option should be available to the prosecution.* For the reasons already given, we do not think that the use of closed circuit television should be excluded on constitutional grounds or on the grounds of impracticality or expense. Were it not for the delay which can arise from time to time in holding trials on indictment, this and the previous option would suffice to protect the child witness from trauma.

7. VIDEO-RECORDING OUT-OF-COURT STATEMENTS

7.095 As we have seen, this can take two forms, one in which the child must be available for cross-examination and another in which the video-taped recording is admissible in total substitution for the child's participation at the trial. *We would prefer the first version, since the right to cross-examine which it preserves is, prima facie, a more reliable safeguard for the accused than the corroboration requirement, corroboration being notoriously variable in quality. However, we think that the second alternative could also be adopted, provided a general reliability or trustworthiness requirement such as is built into the child abuse or residual hearsay exceptions were also built into this exception, or a requirement of "sufficient" corroboration.*

8. VIDEO-RECORDING DEPOSITIONS

7.096 While we do not rule out the video-recording of out-of-court statements provided appropriate safeguards are provided, *our preferred option is that the Criminal Procedure Act, 1967 should be amended to provide for the video-recording of depositions in cases going forward for trial by jury, at the election of the D.P.P.* The procedure preserves the child's evidence in a reliable form in case delay leads to loss of memory. *The video-recording would be presented as the child's evidence at all trials on indictment as the normal procedure, unless the court decided after application by the accused that in the interests of justice and fair procedures, the child had to give evidence at the trial. In the latter event, the evidence could be given behind a screen or on closed circuit television.*

The advantages of this proposal easily outweigh the disadvantages. The law would take notice of (a) the fact that confrontation with the accused is traumatic for the child and (b) the fact that a child's memory takes time to develop. What would be recorded is part of the preliminary examination

itself, a proceeding in a court conducted in due course of law under the supervision of a District Justice. A law which already exists and is presumed to be constitutional would be extended and varied. *Accordingly, we provisionally recommend that the Criminal Procedure Act, 1967 be amended to provide for the video-recording of depositions, at the election of the D.P.P., of persons under the age of fifteen in prosecutions for offences of child sexual abuse and for the admission in evidence of such recorded depositions.*

9. THE USE OF ANATOMICAL DOLLS AND OTHER DEMONSTRATIVE AIDS TO TESTIMONY
7.097 We think that in the case of very young children these can be of assistance. It would not appear to us to be necessary to effect any change in the law of evidence so as to render legitimate their use in trials where appropriate.

10. PROVIDING A "SUPPORT PERSON"
7.098 Again, this is a procedure which could be of assistance, but would not appear to require any change in the law in order to accommodate it. It is entirely within the discretion of the trial judge to allow witnesses, whose age or physical condition may so require, to give evidence in a particular location in the court and to permit a so-called "support person" to sit in close proximity or, in the case of very young children, to take the child on his or her lap. This is a perfectly legitimate procedure, provided there is no communication of any sort between the witnesses and the "support person".

11. THE USE OF A GUARDIAN *AD LITEM*
7.099 The concept of a guardian *ad litem* being appointed to protect the interests of a child who is not a party to the proceedings is novel. However, it may clearly have distinct advantages although it might be going too far to permit the guardian *ad litem* to become a party to the proceedings for the reasons given in our *Report on Rape* in which we advised against the availability of separate legal representation for the complainant in rape cases. Such a proposal would be of dubious constitutionality as tilting the balance of the trial unfairly against the accused and might also introduce serious and unjustifiable complications in the trial procedure.

12. DELAYS IN PROCEDURE
7.100 We think that the desirability of ensuring that trials are speedy in all cases, and not merely where children appear as witnesses, is obvious.

FOOTNOTES TO CHAPTER 7

- 1 See Goodman et al, *The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims: A Preliminary Report*, in G Davis & J Drinkwater eds, *The Child Witness, Do the Courts Abuse Children?* (Issues in Criminological and Legal Psychology, vol 13, British Psychological Society for the Division of Criminological and Legal Psychology 1988).
- 2 Berliner & Barbieri, *The Testimony of the Child Victim of Sexual Assault*, 40 J of Soc Issues, 125 (1984).
- 3 TCN Gibbens & J Prince, *Child Victims of Sex Offences*. London Institute for the Study and Treatment of Delinquency, 1963 cited in Murray. *op cit*, at p 1.
- 4 V DeFrancis, *Protecting the Child Victim of Sex Crimes Committed by Adults*. Denver, American Humane Association (1969).
- 5 *Infra*, para.
- 6 No 9 of 1980.
- 7 LRC 25 - 1988.
- 8 LRC 23 - 1987.
- 9 *Op cit*, para 4.
- 10 Warner, *Child Witnesses in Sexual Assault*, 42 (Law Reform Commission of Tasmania, Discussion Paper 1, 1987).
- 11 See our *Working Paper on the Rule Against Hearsay*, 144-152 (WP No 9-1980).
- 12 [1972] AC 378. See WP No 9-1980, 148-149.
- 13 [1972] AC, at 389.
- 14 [1914] AC 544. See also *Sparks v R*, [1964] AC 964. *Cross on Evidence*, 589, fn 7 (6th ed, 1985) observes of the latter case:
- "Were the facts to recur in criminal proceedings, it is just possible that the statement could be held admissible as part of the *res gestae* in view of the new approach in *Ratten*"
- 15 *Infra*, pp 133-136.
- 16 *R v Camelleri*, [1922] 2 KB 122; cf *Cross*, *op cit*, at 260, and PB Carter, *Cases and Statutes on Evidence*, 190 (1981).
- 17 *R v Osborne*, [1905] 1 KB 551 (Cr Cas Res, per Ridley J, delivering the judgment of the Court).
- 18 Warner, *op cit*, *supra*, fn 10, at 39.
- 19 *Cross*, *op cit*, *supra*, fn 14, at 263.
- 20 See generally Myers, *Hearsay Statements by the Child Abuse Victim*, 38 Baylor L Rev 775 (1986), Bacigal, *Implied Hearsay: Defusing the Battle Line Between Pragmatism and Theory*, 11 S Ill ULJ 1127 (1987), Yun, *Note: A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, Peterson, *Note: Sexual Abuse of Children - Washington's New Hearsay Exception*, 58 Wash L Rev 813 (1983), Anon., *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legal Innovations*, 98 Harv L Rev 806 (1985), National Legal Resource Center for Child Advocacy and Protection, American Bar Association, *Recommendations for Improving Legal Intervention in Intrafamily Child Sexual Abuse Cases*, 34-36 (1982), R Eatman & J Bulkley, *Protecting Child Victim/Witnesses: Sample Laws and Materials*, 5-9, 51-56 (National Legal Resource Centre for Child Advocacy and Protection, American Bar Association, 1986) (1987 reprint), Skoler, *New Hearsay Exceptions for a Child's Statement of Sexual Abuse*, 18 John Marshall L Rev 1 (1984), Rickert, *Child Abuse and Hearsay: Doing Away with the Unavailability Rule*, [1987] Army L (Nov ed), p 41.
- 21 *Federal Rules of Evidence*, Rule 801(a).
- 22 Myers, *op cit*, *supra*, fn 1, at 786.
- 23 709 P 2d 1185, at 1192 (Wash Sup Ct 1985).
- 24 See also *United States v Short*, 790 F 2d 464 (US Ct Apps, 6th Cir, 1986), and Moore, *The Medical Diagnosis and Treatment Exception to Hearsay - the Use of the Child Protection Team in Child Sexual Abuse Prosecutions*, 13 N Ky L Rev 51, at 58-63 (1986).
- 25 See Myers, *op cit*, *supra*, fn 20, at 794-814.

- 26 Rule 801(d)(1)(b) has been adopted verbatim by nineteen states: Alaska, Arizona, Colorado, Delaware, Florida, Iowa, Minnesota, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, Vermont, Washington, Wisconsin and Wyoming. Arkansas has adopted the identical 1974 Uniform Rule 801(d)(1)(B), and Hawaii, Maine, Montana, Nevada and Oregon have enacted substantially similar rules: Cohen, *Comment, Nitz v State: Skewing the Evidence Rules to Prosecute Child Molesters*, 4 Alaska L Rev 333, at 340 (1987).
- 27 Myers, *op cit, supra*, fn 20, at 855.
- 28 *Id.*
- 29 *Id.*, at 856-858.
- 30 *Cf United States v Portsmouth Paving Corporation*, 694 F 2d 312, at 323 (4th Cir. 1982).
- 31 Myers, *op cit, supra*, fn 20, at 857.
- 32 *Id.* (Footnote references omitted).
- 33 *Id.*
- 34 *Id.*, at 857-858.
- 35 *Id.*, at 858.
- 36 *Id.*, at 859. See further Andrews, *The Child Sexual Abuse Case: Part II*, [1987] Practical Lawyer (December ed), p 33, at 34-36, Fote, *Comment, Child Witness in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform*, 13 Pepperdine L Rev 157, at 167-168 (1985).
- 37 Myers, *op cit, supra*, fn 20, at 859.
- 38 Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, [1970] Utah L Rev 1, at 27-29.
- 39 Myers, *op cit, supra*, fn 20, at 860.
- 40 *Id.*, at 862.
- 41 *Id.*, at 863.
- 42 *Id.*
- 43 *Id.*, at 863-864.
- 44 *Id.*, at 864.
- 45 *Cf, eg People v Roart*, 643 P 2d 756 (Colo 1982), *People v Robinson*, 94 111 App 3d 304, 418 NE 2d 899 (1981), *State v Paulsen*, 265 NW 2d 581 (Iowa, 1978), *State v Stafford*, 237 Iowa 780, 23 NW 2d 832 (1946).
- 46 *Cf, eg State v Noble*, 342 So 2d 170 (La 1977), *People v Lovett*, 85 Mich App 534, 272 NW 2d 126 (1976), *State v Posten*, 302 NW 2d 638 (Minn 1981).
- 47 *Cf, eg Alston v United States*, 462 A 2d 1122 (DC 1983), *Lyster v State*, 412 So 2d 458 (Fla Dist Ct App 1982), *State v Pullins*, 145 Mich App 414, 378 NW 2d 502 (1985).
- 48 Myers, *op cit, supra*, fn 20, at 867-868 (footnote reference omitted).
- 49 *Id.*, at 873-874.
- 49 *Id.*, at 873-874.
- 50 581 P 2d 45, at 48 (1978).
- 51 Myers, *op cit, supra*, fn 20, at 877.
- 52 Other rationales, which involve important procedural differences, justify receipt of the evidence as a rebuttal of impeachment or as excited utterances: *cf Myers, op cit, supra*, fn 20, at 878-879.
- 53 *Id.*, at 880.
- 54 *Id.*, at 881.
- 55 Citing *Elmer v State*, 463 P 2d 14, at 19 (Wyo 1969), cert denied 400 US 845 (1970).
- 56 *Wignore on Evidence*, 307 (Chadbourn Rev ed, 1974).
- 57 Myers, *op cit, supra*, fn 20, at 883-884 (certain footnote references omitted).
- 58 443 A 2d 1295 (DC 1982) (*en banc*).
- 59 The word "corroboration" is used in a loose sense, as a complaint is not strictly corroboration for legal purposes.
- 60 Myers, *op cit, supra*, fn 20, at 885.
- 61 *Id.*, at 888.
- 62 See Graham, *Hearsay Exceptions - Medical Diagnosis or Treatment*, 24 Crim L Bulletin 167 (1988), Moore, *The Medical Diagnosis and Treatment Exception to Hearsay - The Use of the Child Protection Team in Child Sexual Abuse Prosecutions*, 13 N Ky L Rev 51 (1986).
- 63 *United States v Iron Shell*, 633 F 2d 77, at 84 (8th Cir 1980), cert denied 450 US 1001.

- 64 Myers, *op cit, supra*, fn 20, at 891 (footnote reference omitted) also Graham, *op cit, supra*,
fn 62, at 170:
- "Although the motives of such courts are clearly praiseworthy, this expansion
is nevertheless a distortion of the rationale underlying the hearsay exception.
Since children who make such statements are not usually seeking treatment or
prevention from the health care professional, the basic guarantee of
trustworthiness that buttresses the exception is often missing."
- 65 Myers, *op cit, supra*, fn 20, at 892.
66 674 P 2d 721 (Wyo 1983) cert denied 104 Sup Ct, 3539 (1984), analysed by Jubin, 20
Land & Water L Rev 735 (1985).
67 *State v Smith*, 315 NC 76, 331 SE 2d 833, at 839 (1985).
68 *Goldade v State, supra*.
69 *Shields v State*, 281 Ark 420, 664 SW 2d 866 (1984), *State v Mueller*, 344 NW 2d 262
(Iowa Ct Apps, 1983).
70 *United States v Deland*, 22 MJ 70 (AMCR 1986), cited by Andrews, *op cit*, at 36.
71 *State v Smith, supra*.
72 Myers, *op cit, supra*, fn 20, at 895-896.
73 *People v Gage*, 62 Mich 271, 28 NW 835 (1886). When Michigan adopted its version of
the *Federal Rules of Evidence*, it did not include this "tender years" exception; in *People*
v Kreiner, 415 Mich 372, 329 NW 2d 716 (1982), the Michigan Supreme Court later held
that it was no longer part of the law: see Myers, *op cit, supra*, fn 20, at 906, fn 517.
74 Act of 1 April, 1982, ch 129, s 2, 1982 Wash Laws 481. See Peterson, *Comment: Sexual*
Abuse of Children - Washington's New Hearsay Exception, 58 Wash L Rev 813 (1983), Fote,
Comment, Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special
Problems, and Proposals for Reform, 13 Pepperdine L Rev 157, at 169 - 172 (1985).
75 See Peterson, *op cit, supra*, fn 74, at 816.
76 *Id.* at 819.
77 691 P 2d 197 (Wash Sup Ct, 1984). Cf Morey, *Comment. The Competency Requirement*
for the Child Victim of Sexual Abuse: Must We Abandon It? 40 U Miami L Rev 245, at
260-262 (1985).
78 See Myers, *op cit, supra*, fn 20, at 908.
79 *Id.* at 906-907.
80 Colo Rev Stat s18-3-411(3) (1985).
81 Fla Stat s 90.
82 *Anon, Note, The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative*
Innovations, 98 Harv L Rev 806, at 811 (1985). As well as Washington, Colorado and
Florida, statutes had been enacted in Indiana, Kansas, South Dakota, Utah and California:
see Broderick, *Comment, California Evidence Code 1228: A Constitutional Analysis*, 17
Pacific LJ 917 (1986).
83 Utah Code Ann §76-5-411 (Supp 1983).
84 Kan Stat Ann §60-460(dd) (1983).
85 See *Ohio v Roberts*, 448 US 56, 66 (1980).
86 See Colo Rev Stat §13-25-129 (1)(a) (Supp 1983); Ind Code Ann §35-37-4-6(c)(1) (Burns
Supp 1984); Act of Apr 26, 1984, ch 588, §4, 1984 Minn Sess Law Serv 415-16 (West)
(to be codified at Minn Stat §19-16-38(1) (Supp 1984); Wash Rev Code Ann
§9A.44.120(1) (Supp 1984).
87 See Ind Code Ann §35-37-4-6(c)(1)(B) (Burns Supp 1984).
88 *Anon, op cit*, 98 Harv L Rev, at 812.
89 See Eatman & Bulkley, *Protecting Child Victims/Witnesses: Sample Laws and Materials*, 9
(National Legal Resource Center for Child Advocacy and Protection, American Bar
Association, 1986) (1987 reprint).
90 *Id.*
91 *Id.* at 51 (*Updated Analysis of Legal Reforms in Child Sexual Abuse Cases*, by J Bulkley,
May 1987).
92 Scottish Law Commission Discussion Paper No 75, *The Evidence of Children and Other*
Potentially Vulnerable Witnesses, para 2.15.
93 *Criminal Justice (Scotland) Act 1980*, section 32.
94 *Id.* section 32(2).

- 95 *Op cit*, para 2.23 (citation omitted).
- 96 *Criminal Procedure in Scotland (Second Report)*, 1975, Cmnd 6218, paras 43.31-43.32.
- 97 *Consultative Memorandum on Evidence* (No 46, 1980).
- 98 Discussion Paper No 75. *The Evidence of Children and Other Potentially Vulnerable Witnesses* (June 1988).
- 99 Law Reform Commission of Australia, Report No 38, p 164.
- 100 Law Reform Commission of Victoria, Report No 18, paras 245-251 (1988).
- 101 At p 366.
- 102 [1971] IR 217
- 103 6 Cox 425 (1854).
- 104 83 ILTR 87 (1949).
- 105 6 Cox, at 430.
- 106 83 ILTR, at 94.
- 107 [1971] IR 217.
- 108 *Id.*, at 260-261.
- 109 *Id.*, at 263.
- 110 Binding stones and unleashing dogs.
- 111 *Id.*, at 263-264.
- 112 [1976] IR 325.
- 113 *Id.*, at 349.
- 114 43 Crim L R 3226 (US Sup Ct 1988).
- 115 Wigmore, *Evidence*, (J Chadbourn rev 1974).
- 116 *Id.*, §1397, p 158 (emphasis in original).
- 117 43 Crim L R, at 3228.
- 118 Citing *Chambers v Mississippi*, 410 US 284, at 295 (1973).
- 119 Citing *Ohio v Roberts*, 448 US 56, at 63-65.
- 120 Citing *Kentucky v Stincer*, US Sup Ct 1987.
- 121 Citing *California v Green*, 399 US 149, at 175 (Harlan, J, concurring) (emphasis added).
- 122 Citing *Ohio v Roberts*, *supra*, at 64; *Chambers v Mississippi*, *supra*, at 295.
- 123 Citing *Bourjaily v United States*, US Sup Ct, 1987 (citing *Dutton v Evans*, 400 US 74 (1970)).
- 124 43 Crim L R, at 3228.
- 125 *Id.* at 3229.
- 126 *Id.*
- 127 Citing *Kentucky v Stincer*, *supra* quoting *Mattox v United States*, 156 US 237, at 242-243 (1895).
- 128 43 Crim L R, at 3229-30.
- 129 Citing *California v Green*, *supra*, at 158.
- 130 *Id.* Justice Blackmun also cited *Lee v Illinois*, 476 US 530, at 540 (1986) in this context.
- 131 43 Crim L R at 3230.
- 132 *Id.*, at 3230, fn 1.
- 133 399 US, at 157.
- 134 156 U.S., at 242-243, quoted p 155, *supra*.
- 135 Citing *California v Green*, 399 US, at 158 (emphasis added by Justice Blackmun).
- 136 43 Crim L R, at 3230.
- 137 *Id.*
- 138 Citing *Ohio v Roberts*, *supra*, at 63.
- 139 Citing *id.*, at 64, quoting *Mattox v United States*, 156 US, at 243. Justice Blackmun referred also to *Chambers v Mississippi*, 410 US 284, at 295 (1973) in this context.
- 140 Citing the American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985*, pp 3, 18 (1987).
- 141 Citing D Whitcomb, E Shapiro, & L Stellwage, *When the Victim is a Child: Issues for Judges and Prosecutors* 17-18 (1985).
- 142 Citing Goodman, et al, *The Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims*, Proceedings for the International Conference on Child Witnesses: *Do the Courts Abuse Children?* p 46 (British Psychological Association, 1988), and referring also to Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim Just J 1, 3-4 (1983); S Sgroi, *Handbook of Clinical Intervention in Child Sexual Abuse* 133-134 (1982).

143 In a supporting footnote Justice Blackmun stated:

"Indeed, some experts and commentators have concluded that the reliability of the testimony of child sex-abuse victims actually is enhanced by the use of protective procedures. [Citing *State v Sheppard*, 197 NJ Super 411, 416, 484 A2d 1330, 1332 (1984); Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U Mich J of L Reform 131 (1981)]."

144 In a supporting footnote Justice Blackmun stated:

"For example, statements of a co-conspirator, excited utterances, and business records are all generally admissible under the Federal Rules of Evidence without case-specific inquiry into the applicability of the rationale supporting the rule that allows their admission. See Fed. Rule Evid. 801(d)(2), 803(2), 803(6). [Citing *United States v Inadi*, 475 US 387 (1986), and *Bourjaily v United States*, 483 US (slip op 9-12) (1987).]"

145 Citing the Court's reference to *Bourjaily v United States*, *supra* (slip op II).

146 Citing *Ohio v Roberts*, 448 US, at 66, and referring also to *Bourjaily v United States*, *supra*.

147 43 Crim L R, at 3231-2.

148 LRC 25-1988.

149 Working Paper No 9 (1980).

150 *Supra*.

151 *Supra*.

152 Law Reform Commission of Victoria, Report No.18, *Sexual Offences Against Children*, para 251 (1988).

153 Harman, *Examination of Children in Sexual Offences - The Israeli Law and Practice*, [1988] Crim L Rev 263.

154 See Law Reform Commission of Victoria, Report No 18, *Sexual Offences Against Children*, para 268 (1988).

155 Para 5.33 of the Discussion Paper.

156 Law Reform Commission of Victoria's Discussion Paper No.12, *Sexual Offences Against Children*, para 183 (1988).

157 *Supra*.

158 Goodman, et al, *op cit*, p 50.

159 Murray *op cit*, p 27, citing Howard Davidson, Director, National Legal Resource Center for Child Advocacy and Protection, Washington DC: interview on 27 August, 1987.

160 Glanville Williams, *op cit*, p 110.

161 Discussion Paper No 75, *op cit*, para 5.62.

162 *Id*, para 5.64.

163 *Id*, para 5.63.

164 See Law Reform Commission of Victoria, Report No 18, *Sexual Offences Against Children* (Nov 1988) and P Toth & M Whalen eds, *Investigation and Prosecution of Child Abuse*, American Prosecutors Research Institute, ch 4 (1987).

165 Fla Statutes, Art 92.52 [Supp 1985], p 102.

166 *Coy v Iowa*, 43 Crim L R 3226 (US Sup Ct, per Justice O'Connor 1988).

167 P Toth & M Whalen eds, *op cit*, *supra*, fn 164.

168 *Hochheiser v Supreme Court*, 161 Cal App 3d, at 786, 208 Cal Rptr, at 278-279, cited in Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U of Miami L Rev, at 74-75 (1985).

169 Melton & Thompson, *Getting Out of a Rut: Day Tours to Less Travelled Paths in Child Witness Research*, in S Ceci, M Toglia and D Ross eds, *Children's Eyewitness Memory*, 222 (1987).

170 Smith, *The Child Witness*, in *Representing Children: Current Issues in Law, Medicine and Mental Health*, p 3 (National Association of Counsel for Children, 1987).

171 Latham, *Evidentiary and Procedural Trends in Child Sexual Assault Litigation in USA*, report to NSW Law Foundation following a travelling fellowship, p 30 (1981) cited in Law Reform Commission of Victoria, Report No 18 *op cit*, para 265, fn 41.

172 Goodman & Helgeson, *Child Sex Assault: Children's Memory and the Law*, 40 Univ of Miami L Rev (1985).

173 *Id*, at 70.

- 174 J Myers. *Child Witness, Law and Practice*, p 386 (1987).
- 175 Spencer. *Child Witnesses: A Case for Legal Reform*, in G Davies and J Drinkwater eds. *The Child Witness -Do the Courts Abuse Children?*, at p 12 (British Psychological Society for the Division of Criminological and Legal Psychology, 1988).
- 176 43 Crim L R 3226 (US Sup Ct 1988).
- 177 Murray, *op cit*, pp 20-1.
- 178 Law Reform Commission of Victoria, Report No 18. *Sexual Offences Against Children*, para 273 (1988).
- 179 Scottish Law Commission, Discussion Paper No 75. *The Evidence of Children and Other Potentially Vulnerable Witnesses*, para 4.5 (1988).
- 180 Scottish Law Commission, *op cit*, para 4.6.
- 181 Toth P and Whalen M eds, *Investigation and Prosecution of Child Abuse*, at pp 10-11 (American Prosecutors Research Institute, VI-2, 1987).
- 182 43 Crim L R 3226 (US Sup Ct, 1988) *supra*.
- 183 Law Reform Commission of Victoria, Report No 18, *Sexual Offences Against Children*, para 275 (1988).
- 184 Kee MacFarlane, Director, Child Sexual Abuse Diagnostic Centre, Children's Institute International, Los Angeles: Interview on 13 August 1987, cited in the Scottish Law Commission Research Paper, p 14.
- 185 Law Reform Commission of Victoria, Report No 18, *Sexual Offences Against Children*, para 279 (1988).
- 186 Williams, *Videotaping Children's Evidence*, 137 New L J 108 (1987) and Spencer, *Child Witnesses, Video Technology and the Law of Evidence*, [1987] Crim L Rev 76.
- 187 The Scottish Law Commission's Discussion Paper No 75, *The Evidence of Children and Other Potentially Vulnerable Witnesses*, para 5.41 (1988).
- 188 Williams, *Video-taping Children's Evidence*, 137 New L J 109 (1987).
- 189 See Spencer, *Child Witnesses, Video Technology and the Law of Evidence*, [1987] Crim L Rev 78.
- 190 Melton, *Day Tours to Less Travelled Paths in Child Witness Research*, in Ceci, Toglia and Ross eds, *Children's Eyewitness Memory*, p 212 (1987).
- 191 Hartman, *Second Thoughts on Videotaped Trials*, 61 *Judicature* 256, at 257 (1978).
- 192 Kenneth Freeman, Research Fellow, US Department of Justice, National Institute of Justice, Washington DC, Interview on 28th August 1987, cited in Murray *op cit*, p 28.
- 193 *Id.*
- 194 MacFarlane, *Diagnostic Evaluations and the Use of Video-tapes in Child Sexual Abuse Cases*, 40 *Miami L R* 135, cited in Murray, *op cit*, p 19.
- 195 Murray, *op cit*, p 32.
- 196 Spencer, *Child Witnesses and the Criminal Justice Bill*, 137 New L J 1032 (1987).
- 197 Williams, *Videotaping Children's Evidence*, 137 New L J 108 (1987).
- 198 Scottish Law Reform Commission, Discussion Paper No 75, *The Evidence of Children and other Potentially Vulnerable Witnesses*, para 5.58 (1988).
- 199 *Id.* para 5.55.
- 200 *Id.*
- 201 Justice Leon Thompson of the California Court of Appeal, having criticised the methodology of some earlier studies which purported to show that attesting during a trial was traumatic to the child, went on to observe that "[g]iven the lack of solid empirical evidence supporting the thesis that open, confrontational testimony is traumatic to a child victim of sex abuse, courts should exercise caution in both the construction and use of the current video-taping and closed circuit television statutes": *The Use of Modern Technology to Present Evidence in Child Sex Abuse Prosecutions: A Sixth Amendment Analysis and Perspective*, 18 *U W L A Rev* 1, at 43 (1986).
- 202 706 SW 2d 360 (1986).
- 203 *Id.* at 361.
- 204 Ark Stat Ann s.43-2036 (Supp 1985).
- 205 706 SW 2d, at 362.
- 206 Citing *King v Westlake*, 264 Ark 555, 572 SW 2d 841 (1978).
- 207 Citing *Russell v State*, 269 Ark 44, 598 SW 2d 96 (1980).
- 208 706 SW 2d, at 362.
- 209 Citing *Ohio v Roberts*, 448 US 56 (1980) and *Douglas v Alabama*, 380 US 415 (1965).

- 210 Citing *Long v State*. 694 SW 2d 185 (Tex App 5 Dist 1985). *Powell v State*. 694 SW 2d
 211 416 (Tex App 5 Dist 1985) and *United States v Benfield*. 593 F 2d 815 (8th Cir 1979).
 212 706 SW 2d, at 362.
 213 *Id.* at 363.
 214 *Id.*
 215 43 Crim LR 3226 (US Sup Ct, 1988).
 216 Pp 152ff, *supra*.
 217 *Supra*.
 218 *McDonald v Bord na gCon*, [1965] IR 217, at p 239, *East Donegal Co-Operative Livestock*
Mart Ltd v Auomey General, [1970] IR 317.
 219 L Berliner. *Interviewing Children*, Paper presented at the Special Assault Seminar,
 220 American Prosecutor's Research Institute, Seattle, 23 August 1987. Cited in Murray, *op*
cit. p 48.
 221 Goodman et al, *op cit*, p 48.
 J Myers, *Child Witness Law and Practice*, p 424 (1987).
 Para 3.10 above. More recently, the Supreme Court discussed the use of anatomical dolls
 in civil care proceedings. The use itself of the dolls was not at issue, but the Court said
 that it should not be restricted merely to hearing the evidence of an expert witness based
 on an earlier recorded interview involving anatomical dolls. Finlay CJ thought that the
 video-recording should have been shown to the court, along with a demonstration as to
 the precise use of the dolls. In addition, it was felt that counsel for the parents should
 have been given reports of the evidence in advance of the trial, so as to be fully prepared
 to cross-examine the expert witness. The Irish Times, 28 July 1989 (full judgment not
 yet given).

Part III Other Legal Aspects of Child Sexual Abuse

*CHAPTER 8: INVESTIGATION TECHNIQUES***A: LEADING QUESTIONS**

8.01 The reliability and status of testimony elucidated by professionals from children suspected of being sexually abused has been the subject of much controversy and debate. In Britain, the interview techniques pioneered by the Great Ormond Street Hospital have been criticised by judges when presented in civil proceedings for wardship and custody. In particular, the use of hypothetical and leading questions and the use of anatomically correct dolls has been criticised.¹ The debate is also current in the U.S.A.

8.02 Professionals who work with sexually abused children are faced with a major dilemma as to whether they are therapists or evidence gatherers. From a therapeutic point of view, clinicians see it as vital that a child discloses the abuse so that appropriate family interventions can be initiated and the child protected. However, young children are often under severe pressure not to disclose, through fear or guilt or anxiety as to what will happen to them, the accused or their family. Professionals came to the conclusion that standard open-ended questions, which involved asking children what had happened to them, did not help them to disclose abuse. Techniques originally developed in the field of family therapy were modified and used in the area of child sexual abuse. These involved using hypothetical and circular questions.

"Thus, instead of asking a child 'what has happened to you', or 'has anything rude happened to you', we used the form of questioning: 'if something rude has happened to you, for instance being touched on the vagina [demonstrating on dolls with explicit sexual features], who would you speak about it to? Would you say if you had such a touch it would hurt more if the touch was just on the outside or inside, a little way inside your vagina or a long way?' Then we might proceed to questions such as: 'If you were touched in this way, did it hurt a little

or a lot? What did you do? or What did you say? Show me with the dolls".²

Such techniques were found to by-pass children's resistance and at a later point children were able to spontaneously disclose the abuse.

When videos of such interviews were presented in court, they were criticised for their use of suggestion, the unconscious reinforcement of a child's response to confirm the expectations of the interviewer, and the interviewer's expectations or conviction that disclosure had indeed occurred.

"What was basically developed as a clinical technique to help make a diagnosis and ensure the protection of a child, was, therefore, being scrutinized in the court context as a forensic technique and inevitably the value of such interviews was being questioned."³

8.03 We fully understand the frustration of some investigators about what they regard as the technical and unfair requirements of the judicial system in relation to interviewing techniques. A child whom the interviewer may have very good independent reason to believe has been sexually abused may deny that this has taken place. The investigator may also realise that a few (or perhaps a lot) of pertinently placed leading questions, supplemented by questions framed on assumptions in direct opposition to what the child has said, will be likely in many cases to induce the reluctant child to reveal the truth. The problem is that these techniques, while they may have this effect in some cases, may in other cases have the undesigned and unintended effect of inducing a false accusation against a particular person. The investigator cannot tell which cases are which. The result must be that innocent defendants are likely to be convicted in the cause of catching other guilty persons in other cases. This principle of judicial sacrifice is rightly unacceptable to our law. It should not form part of any investigative process, however well-intentioned the inquisitor.

8.04 Many workers in the area of child sexual abuse have now modified their clinical techniques using the assistance and advice of the courts and legal experts so that the interviewing is more acceptable to the courts. The modified interviewing techniques attempt to balance the need for good specificity, which is achieved by the use of open-ended questions, and good sensitivity, which is achieved by the use of hypothetical questions. The interviewer begins with open-ended questions and progresses to the more hypothetical form of question. A summary of the stages of interviewing in the modified structured interview now in use in Great Ormond Street Hospital, London, will be found in Appendix II.

B: The Use of Anatomical Dolls and other Demonstrative Aids⁴

8.05 As we have seen, permitting the child to use drawings, diagrams of the human body or other props is a matter within the normal discretion of the

trial judge. More recently, the investigation of child sexual abuse has also involved the use of anatomically correct dolls by medical and police personnel. Allowing a witness to give evidence in court regarding the child's use of anatomically correct dolls during the preliminary assessment and validation procedures is a different point and has been controversial. It developed as a means of helping young children tell of their experiences who otherwise might be too embarrassed, shy or inarticulate to communicate what had happened to them. Criticisms of the technique include the following:

1. The technique has not been generally accepted as reliable in the scientific community in which it was developed.⁵
2. The possible suggestive effects on children. It is argued that the dolls "will stimulate fantasy and not recall, and plant a falsified memory of fantasy to be recalled later as truth".⁶
3. The interviewer may reinforce the child's "desired" responses by playing with the dolls in a way that suggests abuse has occurred.
4. The difficulty of cross-examination on evidence derived from this technique may be difficult to engage at a verbal level.

The arguments in favour of the use of anatomically correct dolls are as follows:

1. There is some empirical evidence that children who have not been sexually abused do not play with dolls in a sexual way. In other studies, 90% of sexually abused children played with the dolls in a sexual way. Of those children who were not sexually abused, 80% did not play with the dolls in a sexual way.⁷ What these studies show is that sexualized playing with dolls may be suggestive of sexual abuse but clearly on its own, sexualized playing with anatomically correct dolls cannot be taken as diagnostic evidence of sexual abuse.
2. In the context of a thorough professional assessment of suspected child sexual abuse, anatomically correct dolls can be used to help the child recount his or her experiences.

"They should certainly not be used as the first stage method of evaluation. They may be a useful adjunct to the facilitative second stage, but in our view there are too many questions concerning the validity and reliability of anatomically correct dolls to recommend their use as a first stage diagnostic aid. They might be useful when a child has indicated sexual abuse at some level, but has then become stuck or wishes to describe a particular detail about sexual abuse and simply does not have the words and concepts, but might be able to show the evaluator. They can be useful with young, barely verbal

children when other signs point to a strong likelihood of sexual abuse, for example, physical findings.⁸

3. A professional code of practice issued by the appropriate Department could ensure the proper conduct of interviews including the correct use of anatomically correct dolls and other innovative techniques in the assessment of child sexual abuse. The interviewer could be required to be available to give evidence as to the conformity with that code of practice.
4. Evidence derived from the child's play with anatomically correct dolls or with any other evidence can only be admitted when the judge grants leave. If the judge is of the opinion that the interviewer used leading questions or subtle reinforcement that led the child, the judge can reject that evidence.
5. Cases of child sexual abuse where the evidence rests solely on the child's non-verbal play with anatomically correct dolls, unsupported by other corroborative evidence, are unlikely to reach the courts. If they do, they are subjected to the same rules as other cases, i.e. that the prosecution must prove the case against the accused beyond reasonable doubt, that the judge and jury can discriminate between true and false evidence and that the jury will form their judgment on the evidence as a whole.

C: Provisional Recommendations

8.06 As we mentioned at the outset of our analysis of this subject, the range of possible permutations of the several procedures mentioned above is very wide. Perhaps the best way of deriving tentative proposals is to explain our guiding principles. We proceed on the basis that the procedure for investigating a child in relation to possible sexual abuse must at all stages be just to any potential or actual suspect or defendant, as well as avoiding techniques that risk false conclusions being reached. We could not accept that a "balance may have to be struck"⁹ between forensic and therapeutic needs if that phrase is to imply any curtailment of the principles of justice towards suspects and accused persons. To suggest that regard for the interests of actual victims of abuse in some cases can justify the adoption of a procedure with built-in risks of conviction of innocent persons in other cases, impresses us as a perversion of the principle of justice on which our law and culture are founded.

We see considerable merit in a system of investigation which protects the child as much as possible from emotional damage, and which also protects the rights of suspects and defendants.

Two matters about the investigative procedures adopted internationally trouble us. These are (i) the fact that many investigators are determined to resort

to leading and pressurising questions, and (ii) the use of anatomical dolls. We will briefly consider these in turn.

- 8.07 (i) *We recommend that at no stage in the investigative process in relation to child sexual abuse prosecutions should the child be subjected to leading questions.*

Although the question is somewhat less stark in non-criminal cases, we recommend that this exclusion of leading questions should apply also in such cases where an issue of child sexual abuse arises. In child care, barring order and custody cases, where the position of a parent is usually at stake, the Constitution would seem clearly to protect the parent against losing his or her child or right to live in his or her dwelling on the basis of leading questions.

- (ii) *As to the use of anatomical dolls, we would be reluctant to recommend that this practice should be discontinued, since clearly many of those professionally concerned with the investigation of possible child sexual abuse find it a useful technique. Our provisional view is that, since under the existing law the courts will exclude statements which are obtained in circumstances unfair to the accused and convictions will in any event be unlikely without corroboration, the use of such techniques should not be outlawed.*

FOOTNOTES TO CHAPTER 8

- 1 See special issue of Family Law Reports, 1987.
- 2 A Bentovim & M Tranter, *The Sexual Abuse of Children and the Courts*, in G Davies & J Drinkwater eds, *The Child Witness - Do the Courts Abuse Children?*, p 55, at pp 55-56 (British Psychological Society for the Division of Criminological and Legal Psychology, 1988).
- 3 *Id.*, at p 56.
- 4 Demonstrative evidence refers to physical things such as pictures, diagrams and objects whose admissibility depends upon their being authenticated by a live witness.
- 5 Cf *People v McDonald*, 37 Cal 3d 351, at 372-373, 208 Cal Rptr 236, 690 P 2d 709 (1984).
- 6 Christiansen, *The Testimony of Child Witnesses: Fact, Fantasy and the Influence of Pre-Trial Interviews*, 62 Wash L R 705 (1987).
- 7 Gampolel & Weber, *An Assessment of the Behaviour of Sexually and Non-sexually Abused Children With Anatomically Correct Dolls*, Child Abuse & Neglect, 187 (1987).
- 8 Special Report, *Child Sexual Abuse: Principles of Good Practice*, prepared by the Independent Second Opinion Panel, Northern Regional Health Authority, October 1987, and submitted to the Cleveland Child Abuse Judicial Enquiry.
- 9 Cf *Re M (a minor) (Child Abuse: Evidence)*, [1987] 1 F L R 293, at 296 (Latey, J).

CHAPTER 9: THE PERSONNEL OF THE LAW

9.01 If it were possible to draft an ideal set of laws and procedures and to establish the finest administrative structure for dealing with cases of child sexual abuse, these alone could not guarantee perfection. Essential to the proper operation of a system whose purpose is the protection of children is that the persons working within it should be well trained in their own professional spheres, sensitive to the objectives of the system and capable of working effectively within an interdisciplinary framework. Although this is not strictly a matter of law reform we think it important to make some observations on it.

9.02 As a law reform body, the Commission is not in a position to comment generally on the training of health and social welfare officials. It is right to observe that our own research has convinced us what an extraordinarily difficult area of work child sexual abuse is, how demanding it is in terms of the professional skills that are required, how difficult are the judgments that need to be made, and how stressful the work can be, particularly in view of the scarce resources available in the child care services. The one specific comment we can make relates to the need for social work and health professionals to have some understanding of the legal environment in which they operate. We have encountered on several occasions negative attitudes to the law, ranging from lack of knowledge or scepticism about what the law can achieve to uncertainty and even anxiety about the legal parameters of permissible action. This points to a need for more understanding of the law and more provision for its teaching within the training of health and social work professionals working with children.

9.03 It is appropriate for the Commission to comment at greater length on the selection and training of professional lawyers who become involved in cases of child sexual abuse. A lawyer involved in such a case requires skills

and faces demands which go beyond purely legal ones. This is true whether the lawyer is representing a child or parents, or prosecuting or defending an alleged abuser. In order to do his or her job effectively, the lawyer needs to know something about the capacity of children at different stages in their development, about the effects on children of child sexual abuse, and about the typical ways in which children react to it. The lawyer needs to understand the language of children and to be able to communicate with children, not in the esoteric language of the law, but in the language appropriate to the particular stage of the child's development. The lawyer needs to know something about family dynamics, and the impact on, and likely reactions of, family members when an allegation of abuse is made. The lawyer also needs to know something about the work practices and perspectives of other professional groups working in child sexual abuse. We are not suggesting that the lawyer should become an expert in social work, in psychology or medicine. What we are suggesting is that, in order to do his or her job properly, the lawyer needs to know the context in which he or she is operating, so that the issues in particular cases are seen clearly, the right kinds of question are asked, and experts can be called upon when necessary.

We have elsewhere in this Paper suggested the setting up of a special panel of lawyers from which independent representatives for children might be drawn in appropriate cases. We also think that special care should be exercised by the Director of Public Prosecutions in selecting prosecuting counsel in child sexual abuse cases. Again a panel system might be considered. We also think that the legal professions should give serious consideration to adopting special codes of practice relating to representation in, and the conduct of, cases involving children. The professions should also consider ways, including the possibility of a certification system, of ensuring that lawyers involved in such cases have appropriate training or experience.

9.04 Child sexual abuse cases also make special demands on judges and justices. Most judges and justices will not, prior to their appointment, have had the opportunity to acquire skills or experience in cases involving children, and may have little knowledge of the special problems posed by child sexual abuse. Lord Justice Butler-Sloss, who chaired the Cleveland enquiry, stated at a recent conference that it was particularly important to offer training to judges at the present time and that there was a need to have help in this from other disciplines.¹ Judges and justices are likely to function more effectively in child sexual abuse cases if they know something about their context, and have some appreciation of the roles of the different professions working in the area. We think it important, therefore, that opportunities be provided for justices and judges to acquire this information in an interdisciplinary setting.

THE ROLE OF THE DPP

9.05 Disquiet was voiced to Commissioners by doctors working in the field of child abuse concerning prosecution delay and the use of discretion by the

DPP. Indeed, the remark was made by one doctor that it was perceived that the DPP only prosecuted when the suspect admitted the offence, there were unequivocal physical indicators and the child was a good witness.

Given a limited appreciation of all the factors involved in prosecutorial decision-making, it is not unreasonable for this view to be held. When a typical case finally reaches the DPP's office, the complaint has, to an extent, been filtered through the child's family, frequently a social worker, a doctor, members of the Gardai and a State Solicitor. Where a doctor believes that a child has been abused and would make an adequate witness, it is understandable that such doctor would be dismayed when the DPP "denies" the child the right to be assessed by the judge with a view to his giving sworn evidence against the abuser. In many cases, however, where a doctor would favour a prosecution and believes his view of the case is generally held, the doctor may not be aware that the Gardai and State Solicitors may be opposed to a prosecution.

9.06 Our research has revealed a rather alarming misunderstanding of the law among some Gardai, i.e. that there *cannot* be a prosecution on the uncorroborated evidence of a young child. There appears to be misunderstanding of section 30 of the *Children Act, 1908* leading to confusion between the status of sworn and unsworn evidence. The Commission hopes that this misapprehension as to the state of the law has not taken root to any great extent in the Gardai or discouraged in any way the investigation of alleged child abuse. If this misunderstanding can be attributed in any way to a misunderstanding of directions received from the DPP, we have no doubt the situation can readily be clarified.

9.07 The Commission was interested to ascertain whether there was any basis in fact for the medical perception of delay in the DPP's office or the use of discretion in relation to the bringing of prosecutions. Mr Simon O'Leary, a member of the Commission on secondment from the DPP's office, studied all the files registered in that office in the calendar year 1986, relating to all sexual offences, consensual and non-consensual committed against or with persons aged under 16 at the time of the alleged abuse. In one case the complaint was made by a 19-year-old of abuse which commenced when she was seven.

No particular guidelines had been laid down by the Director for dealing with to child abuse cases. Each case was dealt with in accordance with the basic guidelines which attend every decision to prosecute, i.e. is a *prima facie* case made out in law, does one believe in the guilt of the accused and is there an absence of an overwhelming humanitarian or public policy reason not to prosecute from the point of view of the child or, very occasionally, the potential accused?

9.08 The time taken to obtain a direction from the DPP's office is determined by the number of legal assistants, the overall number of files

reaching the office and the quality, length and complexity of files. Files on child sexual abuse get no special priority. No files do, unless, for example, a court is insisting on the earliest possible service of a Book of Evidence, in which case the trials of other citizens are necessarily delayed.

The average length of time a child sexual abuse file was in the DPP's office in 1986 between registration and the issuing of directions was 18 days. This figure *includes* cases where further information had to be sought from the Gardai or other witnesses and this delayed decisions by months in some cases. For the first seven months of 1986 there were only four legal assistants in the office, as a result of career breaks. This increased to five in August and six in September of that year.

The survey covered 154 files. These files involved 48 boys and 155 girls. Each child allegedly abused constitutes one case. There were 113 prosecutions and 90 non-prosecutions. There were admissions in 81 of the 113 prosecutions. Interestingly, there were admissions in 23 of the 90 cases which were *not* prosecuted. In 27 cases complaints were made against fathers in respect of alleged assaults on their daughters, and in one, against a father in respect of an assault on his son. Twelve prosecutions were directed in these cases. A refusal or failure by the suspect to make a statement was counted as a denial of the commission of the offence.

REASONS FOR NOT PROSECUTING

(i) EVIDENCE UNAVAILABLE

9.09 Under this heading are grouped cases where, although there had been an initial complaint and investigation, the evidence of the complainant was ultimately unavailable for prosecution purposes. In two cases, the complainant had left the country. In 11 cases, the suspect was not a parent and the parents of the complainant would not permit the complainant make a statement to the Gardai. In the other three cases the mother would not co-operate with the Gardai and the daughter made no statement to them in respect of alleged abuse by her father. In all of these cases there was no other evidence against the suspect.

(ii) SUSPECT MENTALLY ILL

9.10 There was a group of cases where the suspect was clearly mentally ill and was already undergoing treatment.

(iii) BEST CASE ON FILE SELECTED

9.11 It is a traumatic experience for any child or complainant, however potentially good a witness he or she may be, to give evidence in a case of child abuse, particularly against a parent. In certain cases where more than one child was abused and there was a clear case against the suspect on the evidence of one child, usually the eldest, the younger and weaker witnesses

were spared the ordeal of giving evidence.

(iv) **DIVERSION**

9.12 The Juvenile Liaison Scheme is the only formal type of diversion we have. An offender under 17, admitting the offence, may be dealt with under the Scheme if the child (or child's parent) consents and he or she has no previous convictions. Otherwise diversion is entirely at the Director's discretion. In two cases, the Director recommended caution or supervision. The offenders in the cases were young and had extremely vindictive fathers.

(v) **PROSECUTION HARMFUL TO VICTIM**

9.13 In certain cases it was perceived that a child, although available to give evidence, should not do so because it would be unduly harmful to him or her, e.g. where he or she was suffering from epilepsy, or from a speech defect.

(vi) **NO STATEMENT IN WRITING**

9.14 An inability to take a witness statement from the child was categorised as an inability to give evidence. However, the absence of a written statement may simply have reflected the opinion of individual Ban Gardai of the efficacy of a prosecution in the particular cases. The average age of the children in these cases was 5.3 years.

(vii) **STATEMENT VAGUE OR UNRELIABLE**

9.15 Under this heading are included statements which were vague or unreliable by normal prosecution standards, not simply because of the age of the child. The average age of children in these cases was 12.3 years.

(viii) **DELAY IN COMPLAINING**

9.16 Although there is frequently a delay in complaining, usually after a threat has been made, in certain cases delay was found to be excessive.

(ix) **AGE/NO CORROBORATION**

9.17 Cases under this heading were not prosecuted because it was deemed unsafe to prosecute on the uncorroborated evidence of the complainant although it was not specifically stated that the complainant's evidence was considered unreliable or untrue. The average age of the children in these cases was 8.5 years.

9.18 The final table reads:-

<i>Reason</i>	<i>Number</i>
Victim Unavailable	16
Suspect Mentally Ill	6
Better Case Selected	12
Diversion	6
Prosecution Harmful to Victim	10
No Statement in Writing Taken	9
Statement Vague or Unreliable	19
Delay	5
Age/No Corroboration	<u>7</u>
	90

9.19 Breakdown of cases out of the above where there was an admission but no prosecution:

<i>Reason</i>	<i>Number</i>
Victim Unavailable	10
Suspect Mentally Ill	3
Better Case Selected	0
Diversion	2
Prosecution Harmful to Victim	3
No Statement in Writing Taken	3
Statement Vague or Unreliable	1
Delay	0
Age/No Corroboration	<u>0</u>
	23

Figures furnished by the DPP for subsequent years are as follows:

	TOTAL NO OF SUSPECTS	NO OF PROSECUTIONS	TOTAL NO OF CASES (COMPLAINANTS)
1987	219	72	289
1988	239	80 (22 decisions pending)	288

9.20 The Commission is satisfied that in dealing with the problem of child sexual abuse, the medical and legal professions and, indeed, all disciplines involved, have much to learn from each other.

FOOTNOTE TO CHAPTER 9

- 1 Ronald Davie & Peter Smith eds, *Child Sexual Abuse: The Way Forward After Cleveland*, at pp 77-78 (National Children's Bureau 1988).

CHAPTER 10: SUMMARY OF PROVISIONAL RECOMMENDATIONS

A. THE CIVIL LAW

1. The definition of child sexual abuse proposed by the Western Australia Task Force in its 1987 Report should be adopted for child care proceedings.
2. Doctors, health workers, social workers and teachers should be under a legal obligation to report to the Director of Community Care and Medical Officer of Health within each health board, or to the Gardai, instances of child sexual abuse in circumstances where they are aware such abuse has taken place or a reasonable person would be so aware.
3. There should be legal immunity for *bona fide* reports made with due care by mandated reporters. The development of the law of negligence or breach of duty in the context of a mandatory reporting obligation should be left to the courts.
4. Failure to report should constitute a summary offence punishable by a maximum penalty of six months' imprisonment and/or a fine of £1,000. Prosecutions for failure to report should be instituted only with the consent of the Director of Public Prosecutions.
5. A statutory duty should be placed on health boards to take at least certain minimal steps in response to a report of alleged child sexual abuse. The obligation to investigate such abuse should not be absolute, but where a decision is made not to investigate following a report of alleged abuse, the onus should be on the health board to give reasons for its failure to investigate. The law should also specify, in broad terms, the matters to be investigated.

6. The DCC/MOH should be under a general legal duty to hold a case conference in cases of suspected child sexual abuse which have not been rejected as "unfounded". When he or she decides not to hold a case conference, he or she should record the reasons for the decision.
7. Case conferences should have an advisory role in relation to the appropriateness of criminal proceedings.
8. Parents should, as a general rule, be invited to attend for at least part of the case conference.
9. Certain changes in practice by health boards are recommended in relation to the maintenance of child abuse lists.

Proposals in the Child Care Bill 1988

10. Section 11 provides that the maximum period for which a child may be kept in a place of safety is eight days. The DCC/MOH or a senior officer of the health board nominated by him should be enabled to apply to a District Justice for an order extending that period for a further eight days. In order to succeed in such an application, the Health Board should be required to satisfy the justice that preparations for care proceedings are advancing with all due speed, that an extension of the emergency care period is necessitated by the circumstances of the particular case and that no adequate alternative means for protecting the child are available.
11. While it is implicit in section 11(1) of the Child Care Bill 1988 that an emergency care order should only be made where the risk to the child "necessitates his detention in a place of safety", a more explicit rule would be preferable. The justice should be placed under a positive obligation to consider whether other adequate means of protecting the child exist.
12. Where the level of suspicion of abuse is sufficiently high, the District Court should be given a power to authorise a health board to arrange for the medical examination and other assessment of a child. Where such an authorisation is granted, the parent should be under an obligation to present the child for examination at a given place and at a certain time or times. It should be open to the health board to apply for the order on an *ex parte* basis.
13. Where a place of safety order or an emergency care order is granted by the court the law should make it clear what are the minimum rights of medical examination and assessment implicit in such order and, where the health board proposes to go beyond those limits, specific authorisation from the District Court should be necessary.

14. Before making an emergency care order, the District Justice should be satisfied that the risk to the child is such as to make *ex parte* proceedings necessary. The health board should have to convince the justice not only that the relevant degree of risk exists, but also that the emergency nature of the situation justifies a hearing in the absence of the parents.
15. If denial of access by his or her parents to the child allegedly abused is to be the rule when a place of safety or emergency care order is made, this should be made explicit in the legislation. Consideration should be given to empowering a justice, when granting an emergency care order, having taken all the circumstances into account, to allow access by the non-abusing parent where this would not jeopardize the child's safety.
16. When dealing with an emergency situation, the District Court should have at its disposal the option of removing the alleged abuser on an *ex parte* basis, as an alternative to an emergency care order. The grounds for such exclusion should be the same as the grounds for an emergency care order. The right to apply for such an order should be restricted to a health board or a parent of the child. The order should be available against any member of the child's household, including siblings and perhaps against any other persons, such as babysitters, who are likely to be regularly in contact with the child.
17. A health board should be entitled to seek a protection order on an *ex parte* basis on the same grounds as those which at present apply where a spouse makes the application. Any person who is a member of the household of the child against whom abuse is alleged, and any other person who is likely to have regular contact with the child, should be capable of being made subject to a protection order.
18. A positive obligation should be placed on a District Justice making the supervision order proposed in section 15(5) of the Bill in lieu of a care order to be satisfied that such order will adequately protect the child.
19. Provision should be made for the appointment by the District Justice of an independent representative for the child where, in the opinion of the justice, this appears to be necessary in the interests of the child.
20. Where under section 17 of the Bill, the court is making or varying an order relating to access to a child who is the subject of a care order, there should be a presumption that the parents enjoy access rights unless the court otherwise decides. If a health board believes that it may be damaging to a child to see either parent while in care, or that access rights should be denied or limited in some way in the interests of the child, the onus should be on the board to convince the court of its case.

21. Where a court has determined that a child is at risk from a parent, the health board should not be permitted to return the child to his parents without a positive ruling from the court that it would not involve risk for the child.
22. Health boards should be given power to seek a barring order as an alternative to a care order in non-emergency situations. The court should be given power to grant a barring order as an alternative to a care order where the justice is satisfied that this is the most appropriate method of securing the protection of the child. Before making a barring order, the justice should be satisfied that the conditions have been met both (a) for the making of a care order, and (b) for the making of a barring order.
23. The recommendation in the Commission's *Report on Illegitimacy* that the right to seek a barring order should be extended to the child should be revived in the context of child sexual abuse.
24. Barring and protection orders should be available in respect of any person who is or has been a member of the abused child's household or who, while not a member of the child's household, comes into regular contact with the child.
25. A court should have power to make a barring or protection order, as appropriate, against a person found guilty of an offence involving child sexual abuse.

B. THE CRIMINAL LAW

26. Sections 61 and 62 of the *Offences Against the Person Act, 1861* and section 11 of the *Criminal Law Amendment Act, 1885*, which render criminal acts of buggery and gross indecency between male persons, whether committed consensually or otherwise, should be repealed.
27. The expression "carnal knowledge" used in the *Criminal Law Amendment Act, 1935* should be replaced by the expression "sexual intercourse" as defined in Section 1(2) of the *Criminal Law (Rape) Act, 1981*.
28. It should continue to be an offence to have sexual intercourse with a girl under the age of 17. The maximum penalty available for the offence should continue to depend on the age of the girl involved. However, consideration should be given to altering the age bands in respect of which certain maximum penalties are fixed and the penalties themselves should be re-examined.
29. The girl herself should not be made liable for the offence at (28) at any age.

30. In relation to the offence at (28), consideration should be given to the provision of a defence of reasonable mistake as to age, where the accused genuinely believed at the time of the act, on reasonable grounds, that the girl had attained the age of consent or an age attracting a less serious penalty.
31. It should be an offence to engage in anal penile penetration where one of the parties is under the age of 17 years. As with the offence at (28), the maximum penalty available should vary with the age of the person under 17. Consideration should be given to the provision of a defence to this offence similar to that suggested for consideration at (30). Consent would not be a defence.
32. Section 14 of the *Criminal Law Amendment Act, 1935*, which provides that consent is no defence to a charge of indecent assault on a young person, should be repealed.
33. An offence of sexual exploitation should be created which would encompass the doing, procuring or inciting of an act, other than sexual intercourse or anal penile penetration, with a person below a specified age for the purpose of sexual gratification. Without prejudice to the generality of the offence as defined, specific acts could be set out as included in the definition. Consent would not be a defence.
34. It should be an offence for a person in a position of authority as defined in (35) below to engage in acts of sexual exploitation with a person who has reached the age specified for the offence at (33) but is under 17. Consent would not be a defence.
35. A person in authority should be defined as a parent, step-parent, grandparent, uncle or aunt, any guardian or person in loco parentis or any person responsible, even temporarily, for the education, supervision or welfare of a person below the age of 17.
36. Except where provision is already made for a maximum sentence of life imprisonment, there should be a greater penalty where the offences at (28), (31) and (33) above are committed by a person in authority.

C. THE LAW OF EVIDENCE

37. The court should continue to make the ultimate decision as to the competence of witnesses.
38. The oath should be replaced by a form of affirmation made after an adjudication on competence on lines similar to those suggested by the Australian Law Reform Commission, i.e. an approach which ascertains the potential witness' cognitive ability.

39. The present requirement to warn a jury before they can convict on the sworn evidence of a child and the requirement of corroboration of the unsworn evidence of a child would lapse. Were the oath to be retained as the test of competence, the warning and corroboration requirements should be abolished.
40. Expert evidence should be admissible as to competence and as to children's typical behavioural and emotional reactions to sexual abuse.
41. An exception to the Rule against Hearsay on the lines of the Washington or Florida child sexual abuse exceptions could be made on grounds of reliability where the child is available to give evidence and testifies. Where the child is not available to give evidence, it would be necessary to provide for corroboration such as the court would deem sufficient.
42. A residual exception to the hearsay rule such as is found in the Federal Rules of Evidence could be provided.
43. The presentation of evidence through a surrogate witness would represent so radical a departure from the norms of our system of criminal justice that the Commission does not think it either practical or desirable to recommend it.
44. During the prosecution and, if possible, the investigation of these offences, the child should be questioned by disinterested but skilled child examiners who are experienced in child language and psychology, and are appointed by the court. The examiner would act as the conduit for all questions from the lawyers in the case, from the court or from the accused if he or she is representing himself or herself. The examiner's role would be to establish and maintain rapport and ease of communication with the child witness while remaining detached from the issues in the case.
45. The child complainant should be able to give her evidence behind from a screen at the trial.
46. The child complainant should be able to give evidence by means of closed circuit television at the trial.
47. Provision could be made for admitting a video-recording of the child's evidence provided the child was made available for cross-examination at the trial. A video-recording could be admissible in total substitution for the child's participation at the trial, provided a general reliability or trustworthiness requirement such as is built into the child abuse or residual hearsay exceptions in the United States was also built into this exception, or a requirement of sufficient corroboration.

48. The Commission provisionally recommends, as its preferred option for trials on indictment, that the *Criminal Procedure Act, 1967* should be amended to provide for the video-recording of District Court depositions in cases going forward for trial by jury, at the election of the DPP. The video-recording would be presented as the child's evidence at all trials on indictment, as the normal procedure, unless the Court decided after application by the accused that, in the interests of justice and fair procedures, the child should give evidence at the trial. In that event, the evidence could be given from behind a screen or on closed circuit television.
49. No special reform is necessary to enable anatomical dolls and other demonstrative aids to testimony to be used in court.
50. Similarly no special law reform would be necessary to enable the trial judge at his or her discretion to allow witnesses whose age or physical condition may so require to give evidence in a particular location in the court and to permit a so-called "support person" to sit in close proximity or, in the case of very young children, to take the child on his or her lap, provided there was no communication of any sort between the witnesses and the "support person".
51. The Commission would not recommend the appointment of a guardian *ad litem* in civil or criminal proceedings to protect the interests of a child who is not a party to such proceedings. Such a proposal would be of dubious constitutionality, as it might tilt the balance of the trial unfairly against the accused and might also introduce serious and unjustifiable complications in the trial procedure.
52. Apart from provisionally recommending the video-recording of evidence as above as a means of guarding against lapses of memory on the part of the child, the Commission makes no particular recommendation relating to delay in procedure. The desirability of ensuring that trials are speedy in all cases, and not merely where children appear as witnesses, is obvious.

APPENDIX I

*THE FINDINGS OF RESEARCH INTO CHILD SEXUAL ABUSE**Extent of Problem*

A characteristic common to most of the research on sexual offences is that it has been collected by a single discipline. This separation has led to distinctive and often unrelated bodies of research from police and crime statistics, child protection and health services statistics, survey data and data collected by self-help and other community agencies. Most information on the unreported and hidden aspects of child sexual abuse comes from victimization surveys, i.e. random surveys of adults regarding their experience of sexual abuse as children; reports from agencies to whom child and adult victims turned for help, published personal accounts and other community surveys.

However, these studies can themselves only estimate the true problems of child sexual abuse in the community. The estimates vary depending on the population surveyed, the definition used and the type and sensitivity of the questions used. For example, the rate for females has been variously estimated as 8%, 9%, 12%, 15%, 19%, 22%, 28% and 38%, and for males as 3%, 5%, 6%, 9%. See Finkelhor¹, Kempe and Kempe² and Mrazek and Kempe³ for reviews. Rates commonly cited by the media and at special conferences are that one in five girls and one in ten boys are sexually assaulted before they become adults.

One of the most comprehensive and authoritative accounts of child sexual abuse is contained in the Badgley Report on the Committee on Sexual Offences Against Children and Youths. To obtain information on the incidence of sexual offences against children and youths in Canada, the Committee undertook a National Population Survey to obtain information from a representative sample of people concerning their experience as victims of sexual offences as children or as adults. They also instituted a National

Police Force Survey to obtain information on cases of sexual offences reported to the police and also a National Survey of cases reported to child protection agencies and health services.

Occurrences in the Badgley Population Report

The main findings of the National Population Survey were that, at some time during their lives, about one in two females and one in three males have been victims of unwanted sexual acts. About four in five of these incidents first happened to these people when they were children or youths. The size of the sample used in the Canadian Survey was much larger in that usually drawn in National Surveys. The results indicated that sexual offences are endemic, that a significant number of both females and males have been victims of these unwanted acts and that children and youths are at greatest risk. The Badgley Committee concluded that because the survey was carried out on adults recalling their experiences of child sexual abuse, the results were likely to be an underestimate of instances of this kind.

The type of unwanted sexual acts range from acts of exposure and threats, to actual or attempted assaults. The ratio of female to male victims in relation to all kinds of unwanted sexual acts was consistently 2:1. Overall, about one in seven people reported acts of exposure and one in thirteen people reported that another person had threatened to have sex with them. One in six people reported unwanted sexual touching and another one in six people reported attempted or actual sexual assault. The majority of the victims were children and youths when these incidents first occurred.

In the more serious category of attempted or actual sexual assault, which included attempted or actual masturbation and vaginal or anal penetration, 6.3% of the girls and 2.4% of the boys were under seven when these acts occurred; 16.5% of the girls and 12.2% of the boys were aged seven to eleven; 9.4% of the girls and 9.8% of the boys were aged twelve to thirteen; 15.8% of the girls and 21.9% of the boys were aged fourteen to fifteen and 21.2% of the girls and 29.3% of the boys were aged sixteen to seventeen.

In relation to the occurrence of more serious sexual assaults, the findings of the survey show that four in one hundred, that is 3.8% of females have at least once been raped, i.e. been subjected to unwanted vaginal penetration by a penis. The survey's findings indicate that about two in one hundred persons, i.e. 2.1% of both sexes have either experienced at least once an unwanted anal penetration with a penis, an attempt to commit these acts or anal penetration by means of objects or fingers.

The best evidence available to the Badgley Committee suggested that the volume of sexual offences has remained at a relatively constant level for some time. The major change that seems to have occurred, in their opinion, is not so much an alteration in the incidence of these offences, but that people are becoming more aware of the problem.

Only a small fraction of first sexual offences was reported to the authorities. For three in four females and nine in ten males, these incidents had been kept as closely guarded personal secrets. When assistance was sought it was mainly from the medical services and from the police. Few victims reported to other public services or other special services such as hotlines, rape crisis centres, sexual assault centres, clergy, school staff, mental health services etc. However, when the offences involved attempted, or actual, vaginal or anal intercourse, more than one in four female victims and one in six male victims had reported these offences.

Of course, many of the special services such as rape crisis centres and hotlines were only recently established and were not available to the older persons who had been assaulted as children.

The reasons most frequently cited for not seeking assistance were: the victims were too ashamed of what had happened; the victim said that it was too personal a matter; for females, the fear of the perpetrator was a factor; for males, the feeling that the act was not important enough to do anything about it.

The Badgley Committee noted that a recurring theme in many of the accounts was the sense of uncertainty about what constituted acceptable or unacceptable sexual activities. They concluded:

"Reflecting changes in social values, sexual customs are in transition about which partner is expected to initiate sexual activities, about which types of acts are acceptable, and about the nature of the signals connoting agreement, feigned reluctance or refusal. These are not situations in which the terms of contract are specified in advance. Many victims found themselves in situations in which they were frightened, embarrassed or ashamed. It is evident from these accounts that a sharp and absolute distinction must be taught to children concerning their involvement in sexual activities in which there is any element of authority, harassment, exploitation or force."⁴

The Badgley Committee also noted that there was a progressive diminution of the numbers of victims that became known in turn to the community services, health services, police and ultimately the courts. This further underlines the need for a multi-disciplinary approach towards the gathering of statistics to find the true incidence and prevalence of child sexual abuse in the population.

Dimensions of Sexual Assault

The Badgley Report, on the basis of the findings of their research, provided a summary of a number of dimensions of sexual assault, i.e. the circumstances involved in the assaults and the type of children who were sexually assaulted.

Gender of Victims and Gender of Assailants

On the basis of their findings, it appeared that about three in four victims of sexual assault are girls and that one in four is a boy. The proportion of girls to boys documented in this survey is somewhat lower than the most commonly cited estimate of nine in ten victims being girls. Virtually all sexual offences, 99.2% against female victims, were committed by males. Most of the boys were also assaulted by males. Four in five offences were heterosexual, one in five offences was homosexual. For 4.2%, i.e. one in twenty-four persons, the first act of sex or intercourse was with a person of the same sex, the proportion of males and females being about the same in this regard. This sexual act had first occurred when they had been children or youths. Therefore 72% of males were under eighteen when they were first involved in a homosexual act. 44% of the sexual acts were between a person aged under twenty-one and a person who was more than three years older or an adult when the act occurred.

Time of Occurrence

A large number of sexual offences against children, reported to the police, occurred during daylight hours and during the spring and summer months. There was some tendency for more assaults to occur on a Saturday. These times probably reflect the fact that it is then that children are free from school and are playing on the streets. However, this does not mean that the policy of "street proofing" children would reduce the occurrence of sexual assaults on them. This is because another finding in the survey showed that well over half of the sexual assaults occurred in the homes of victims or suspects. These are places which are usually considered to be safe and which are not open to scrutiny by the public. The public places where the assaults were committed were also potentially open to all persons. Among the large number of public places where both sexes were about equally at risk of being assaulted were open spaces, amusement centres, vehicles and a number of buildings accessible to the public. Girls were about twice as likely as boys to be attacked on the street, while boys were twice as likely as girls to be attacked in a number of other places such as beaches, construction sites, parking lots and summer camps. In addition, more female than male victims were living in the same household as their reported assailants. Sexual approaches to children also occurred more frequently in poorer city communities and in public housing. The report concluded that these findings cannot be extrapolated to show that there is an association between poverty and the occurrence of sexual offences. However, they do indicate that public housing conglomerations appear to constitute an easily visible target, where a large number of children living in the same location may attract sexual offenders on the look-out for child victims.

Threats and the Use of Force

On average, three in five sexually assaulted children under the age of sixteen had either been threatened or physically coerced by their assailants. Only

about one in sixteen, i.e. 6.4% of victims, had "consented" or "agreed" to the sexual acts. In the remainder of incidents the children had been persuaded, bribed or seduced. The findings clearly show that few of the assaults can be deemed casual or harmless contact and most were accomplished against the will of the child. The physical coercion of the victim involved the use of force, for example the child being physically held down, the child's breast being grabbed, the forced insertion of a penis in a child's mouth and the use of weapons.

Physical Injuries and Emotional Harm

The findings of the surveys showed that both male and female victims of sexual assaults were physically injured and were emotionally harmed. Proportionally more female than male victims of sexual assault were physically injured but proportionally more emotional harm than physical injury was sustained by victims. But as noted elsewhere, relatively few of the victims sought treatment or counsel. Of females, one in five had been physically injured and one in four had been emotionally harmed. With regard to male victims, only one in twenty-five had suffered a physical injury and one in fifteen had been emotionally harmed. The physical injuries sustained included bruising, scratching and vaginal injuries such as tearing, reddening, irritation, vaginal discharge or a broken hymen. Injured boys suffered anal injuries. Thirteen girls under the age of sixteen had become pregnant. About one in six children was diagnosed by health workers as potentially having sustained long-term emotional or behavioural harm attributable to sexual abuse. The greatest risk to young female victims in this type of attack is from groups of predatory and dangerous adolescent males.

Use of Alcohol and Drugs

The three national surveys showed that sexually assaulted children are no more likely to use alcohol and drugs than other children and indeed may have used them somewhat less often. In contrast to the relatively small number of victims reported to have been using alcohol or drugs when the sexual assaults were committed, on average over twice as many boys and over three times as many girls were reported to have been assaulted by suspects under the influence of these substances. About one in six of the girls and one in ten of the boys were reported to have been sexually assaulted by a person who had been using either alcohol or drugs. However, child protection workers reported a substantially higher proportion of suspected assailants to have been under the influence of alcohol or drugs. Almost a third of the girls and a quarter of the boys were documented as having been sexually attacked by a person using one or other of these substances. These findings suggest that either the types of sexual assault coming to the attention of child protection services differ significantly in this respect from those known to the police or hospitals, or that child protection workers may more consistently seek to learn if these substances have been used in their assessment of sexual assaults against children. The Badgley Report concluded, however, that with the

exception of the health care worker statistics, the use of alcohol and drugs by assailants does not appear to have been a contributing factor in most of the reported sexual assaults committed against children and youths.

Professionally Confirmed Assaults

The survey data showed that the police and doctors believed that virtually all the sexual assaults against children reported to them had occurred, while substantially fewer of the cases cared for by child protection workers were reported to have been confirmed. One half of the cases of suspected child abuse were "non-confirmed". The Badgley Report concluded "[i]n light of the statement sometimes made by observers that certain professional workers, most notably the police, may often disbelieve accounts given by sexually assaulted victims, the Committee's findings clearly show that when children and youths are victims, their veracity is highly trusted by the police and physicians".⁵

Charges Laid

Of the sexual assaults known to the police and hospitals, proportionally more suspected assailants whose victims were boys than those whose victims were girls, were reported to have been charged by the police. This trend was reversed for cases known to child protection workers, where one in five assailants whose victims were girls and one in six whose victims were boys, were reported to have been charged. For child protection workers, the more usual intervention was to seek a court hearing to obtain custody of the child.

Primary Sources of Assistance

Most victims do not seek assistance. The decision as to whether to seek help is affected by considerations such as the sexual acts committed, who the assailants were, the nature of the fears, injuries and traumas experienced by the victims, the reactions of their families, the type of services available and how these services are perceived. On the basis of the National Survey, there was a sharp gradient documented in relation to the average length of time between the time when sexual assaults had been committed and the time when different services had been contacted, notified or became aware of the incident. In the case of the police, three in five sexually assaulted children contacted the police within a twenty-four hour period after the incident had occurred. In the case of hospitals, about half of the children sought hospital within a day of being assaulted. In the case of child protection workers, only a fifth of the children contacted them within that time span. The police and hospital were notified within a week in about three quarters of the cases. Only a third of the case-load of sexually abused children known to child protection services were victims who had contacted these workers within a week, and in one in three cases, more than a year had elapsed. Of cases known to child protection services, between a quarter and a third of these were cases which were already open or for whom other types of assistance

were being provided. Most contacts had been made by a professional referral system to health care workers. A majority of the victims had been assaulted by family members and a sizeable proportion of the incidents had occurred weeks, or even months, before they had become known to the child protection workers.

Seeking Assistance

The personal accounts given to the Badgley Committee by people who contacted them, who had themselves experienced sexual abuse in their childhood, revealed that the family circumstances of the people when they were abused, the types of acts committed against them and the identity of the assailants all influenced their decision as to whether or not to seek assistance, and what source of assistance they chose. The Report noted that unlike the clinical descriptions of typical signs and reactions to child sexual abuse, most of these did not conform well to the clinical descriptions and to classifications described by clinicians. They also found that few of the victims had received any form of guidance or instruction about sex from their parents, school or other sources. They said that they would have been in a better position to know what they should have done had they known more about what was being done to them, that it was wrong and to whom they might have turned for help. Two-thirds of the adults who were abused as children did not immediately report their assault to anyone. When they were older, about half of them told a doctor but the remainder never consulted any helping service. Some confided later to a spouse. A few had told no-one before contacting the Badgley Committee to take part in their survey. The reason that those people who were sexually abused had not sought assistance, were that two-thirds felt that they were too young when the assault had occurred to know that the sexual contact was wrong, or they felt too ashamed about what had happened to them and were too afraid of their assailants to tell others. Among the few who told parents, most were initially disbelieved. There is more likelihood of the child telling when the assailant is not an intimate family member. In a third of the cases, the police were contacted and the sexual contact stopped completely, so the police intervention had a positive outcome. The work of the police was praised but much frustration was expressed about the inadequacy of existing laws regarding the acceptance of children's evidence, about the treatment of offenders and about their punishment. The personal accounts revealed that there were no witnesses to any of the incidents and only one incident in which there was evidence of physical injury. The age of the children or their perceived inability to give evidence were the reasons why charges were not laid. None of the assailants had been convicted. Psychological help was provided for only one offender. The Badgley Report concluded that what stood out sharply in these accounts about child sexual abuse was the sense of helpless uncertainty and ignorance about what the victims felt they might have done when they had been assaulted as children. These personal accounts were confirmed by statistical findings obtained in the other surveys undertaken by the Badgley Committee.

Summary

The Badgley Committee concluded that there were three distinctive groupings of sexually abused children served by police, hospitals and child protection services. Groups of victims known to police constitute the broadest cross-section of cases of sexual abuse. Most of these cases had been initiated by victims or their families and had been reported promptly after the incident. The cases known to the child protection workers mainly involved victims who had been professionally referred and who had been assaulted by a family member weeks, or even months, before the incident occurred. In many cases they involved families where the case workers already had a file open.

Social Science Data on Child Sexual Abuse

Social science research has also been steadily accumulating data with regard to child sexual abuse. In particular, they have been trying to document the characteristics of high-risk children, of those who abuse them, of the critical preconditions for sexual abuse to take place, and the long-term effects of sexual abuse on the victim.

Victims

Victims of child sexual abuse include both boys and girls, with the vast majority of sexual assaults taking place against girls. However, recent evidence suggests that sexual assault of boys occurs much more frequently than has been reported. Abuse occurs most commonly between the ages of eight and twelve years, though younger and older children are also abused. As more children are brought to the attention of health authorities, some clinicians are noting that the average of the sexually abused child victim is getting lower.⁶

The average age of onset of all forms of intra familiar abuse is between eight and nine years and the duration of the abuse about five years.⁷

In one study of nearly eight hundred American college students, it was found that 19% of the women and 9% of the men in the sample had been sexually victimized during childhood.⁸ On the basis of this study, some background factors most strongly associated with sexual victimization were identified. They were as follows:

LOW INCOME FAMILIES

Girls from lower income families were two-thirds more likely to be victimized than the average girl. However, this finding does not mean that sexual victimization does not occur in middle or upper-income families. For example, high prevalence rates have been found in college student groups.

SOCIAL ISOLATION

A large percentage of children who grew up on farms were victimized. Also girls who reported that they had only a small number of friends were more vulnerable. The physical presence of friends and neighbours seems to act as a deterrent to potential abusers. In addition, lonely children may be susceptible to offers of attention and affection in exchange for sexual activities.

THE PRESENCE OF STEP-FATHERS

The background factor most strongly associated with sexual victimization involved characteristics of a child's parents, in particular having a step-father. This was one of the strongest risk factors more than doubling a girl's vulnerability. Virtually half the girls with step-fathers were victimized by someone, though not necessarily by their step-father. The notion that step-fathers are more sexually predatory towards their daughters, than are fathers towards their daughters, was substantiated by this and other studies. For example, a step-father was five times more likely to sexually victimize a daughter than was a natural father. In another study, one out of six women who had a step-father as a principal figure in her childhood was sexually abused by him, compared to a rate of one out of forty in cases of abuse by natural fathers. The vulnerability of step-daughters was not, however, caused directly by the step-father. Girls with step-fathers were also more likely than other girls to be victimized by other men. In particular, they are five times more likely to be victimized by a friend of their parents. Being a step-daughter seemed to put a girl into contact with other sexually predatory men besides her step-father. Some of these men were friends of her step-father. Step-daughters were also victimized even before they met their step-father. The parents' friends also took advantage of them and were most probably friends of their mothers. The authors concluded "the high vulnerability of girls who have step-fathers is a function of both the presence of a step-father and the earlier exposure to a mother who was dating actively and may have put her daughter in jeopardy through the men she brought into the home."⁹

THE QUALITY OF THE FATHER-DAUGHTER RELATIONSHIP

A daughter is more at risk from sexual abuse when she has a father with very conservative family values, for example believing strongly in children's obedience and in the subordination of women and giving her little physical affection. Such daughters may find it more difficult to rebut the sexual advances of older men because they have been taught to obey. In addition, a daughter who is starved of physical affection from a father may be less able to discriminate between genuine affection on the part of an adult and a thinly-disguised sexual motivation.

THE PRESENCE OF MOTHERS

This study confirmed the idea that mothers are very important in the protection of daughters. Girls who ever lived without their natural mother were three times more vulnerable to sexual abuse than average girls. If a girl reported that her mother was emotionally distant, often ill or unaffectionate, the girl was also at much higher risk. The problem here may be partially, but not wholly, one of adequate supervision. This is because daughters of mothers who worked outside the home were not at higher risk, so it was not simply a matter of the mother being around. Another part of the problem may be a lack of communication. When daughters report to mothers who are interested in their about their activities, their mothers may alert them to potential danger. Girls whose mothers were physically or emotionally distant may not get such advice. Girls with absent or unavailable mothers may also have unmet emotional needs which make them more susceptible to the ploys of a sexual offender. In other words, their emotional neediness may make them conspicuous as potential victims of offenders.

THE ASSOCIATION BETWEEN THE OPPRESSION OF WIVES AND THE VICTIMIZATION OF DAUGHTERS

Girls whose mothers are substantially less educated than their fathers are more likely to be sexually abused. The most dangerous parental combination for the daughter is not when her mother and father are both poorly educated, but when her father is well-educated and her mother is not. A wife who is substantially less educated than her husband may be more likely to be subordinate to and dependent on him, and the daughter may learn from her mother that she too is powerless and must obey.

SEXUALLY PUNITIVE MOTHERS

Victimized girls were much more likely to have mothers who were punitive about sexual matters, i.e. mothers who warned, scolded and punished their daughters for asking questions about sex, for masturbating, and for looking at sexual pictures. A girl with a sexually punitive mother was 75% more vulnerable to sexual victimization than a typical girl. It was the second most powerful predictor of victimization after having a step-father. The study concluded: "it is possible that girls most bombarded with sexual prohibitions and punishments have the hardest time developing realistic standards about what constitutes danger. Blanket taboos often incite rebelliousness, and such girls may discard all the warnings they receive from their mothers about sex, including ones about sexual victimization. Moreover, if mothers have repressed all the healthy ways of satisfying sexual curiosity, these daughters may be more vulnerable to an adult or authority figure who appears to give them permission and opportunity to explore sex, albeit in the process of being exploited. Whatever the

precise mechanism, it is clear from this finding that it is not sexually lax but sexually severe families that foster a high risk for sexual exploitation, and some priority should be given to investigating this connection further".¹⁰

THE CONNECTION BETWEEN PHYSICAL AND SEXUAL ABUSE

Girls who were victimized did not report any higher levels of violence in their family. On the basis of these data and other research, Finkelhor concluded that violence and sexual abuse are not closely related.

On the basis of his research, Finkelhor constructed a Sexual Abuse Risk Factor Check List. This Check List includes eight of the strongest independent predictors of sexual victimization. [Step-father, ever live without mother, not close to mother, mother never finished high school, sexually punitive mother, no physical affection from father, low income, two friends or less in childhood]. Among children with none of these factors present in their backgrounds, victimization was virtually absent. Among those with five factors, two thirds had been victimized and the presence of each additional factor increased a child's vulnerability between 10% and 20%.

Blaming the Victim

Finkelhor warned that an important *caveat* needed to be entered about approaching sexual abuse by studying the victim. The research he reported on is victimization seen through the eyes of the victim. It was not possible in that study to gather information on the offender. He warns that such findings tend to over-emphasise the victim's role in the experience, and to obscure the role of the offender. "It is important to keep in mind that moral and factual responsibility for the victimization experiences studied here lies with the offenders. They initiated the activities in 97% of the cases according to our respondents. The most immediate and relevant cause of the victimization was a decision made by the offender".¹¹ However, he concluded that studying victims can provide a lot of very helpful and useful information, as only by identifying the characteristics of children at high risk can prevention programmes be targeted at the populations that are most vulnerable.

Boys as Victims

As more boy victims appear, there is increasing interest in understanding this type of sexual abuse though the evidence is more limited. There is growing concern that there is serious under-reporting of the sexual abuse of boys. On the basis of the data available, Finkelhor estimates that somewhere between 2.5% and 8.7% of men are sexually victimized as children.

- Comparison with similar studies of girls would suggest that two to three girls are victimized for every boy.
- Boys, like girls, are most commonly victimized by men.
- Boys are more likely than girls to be victimized by someone outside the family. Boys are also, for example, more likely to be abused in sex rings, i.e. in groups of children who become involved with the same adult, usually through some recreational or local activity, where the adult trades favours with many of the children for sexual activities. Boy victims are also more likely to be abused by an adult in a caretaking role such as teachers, coaches or babysitters.
- Boys are more likely than girls to be victimized in conjunction with other children. Boys are less likely to be abused alone. In the case of girls who are abused by a parent, in 65% of the cases the girl would be the only reported victim. If a boy is abused by a parent, however, 60% of the time there will be other victims, usually sisters. When boys are abused alone, it is more likely to be by a non-family member such as an older brother or a babysitter.
- Victimized boys are more likely than girls to come from impoverished and single-parent families and are more likely to be victimised of physical abuse as well.
- The abuse of boys is more likely to be reported to the police than to a hospital or child protection agency.

Offenders

There is a growing body of theory and empirical research attempting to understand why somebody would sexually molest a child. It should be noted at the outset that the most consistent and important finding in recent years is that most sexually abused children are abused by an adult they know and trust. In recent years also, there is much less emphasis on seeing the sex offender as a sexual deviant or somebody with severe psychological problems. Instead, the non-sexual motivation such as the need for power and domination are emphasised. More recently however, another view has been expressed that to deny the sexual component in child sexual abuse is too extreme as this overlooks important realities in sexual behaviour in general, and child sexual abuse in particular.¹² For example, the rapist decides to rape, not just to assault a child physically. In addition, in much paedophilic behaviour there is often a strong erotic component, with offenders being strongly sexually aroused by the child they are abusing. Many offenders have also clearly documented deviant patterns of sexual arousal.¹³ The over-emphasis on the offender's psychopathology in the older theory was probably due to the fact that studies were largely based on very unrepresentative samples: caught and convicted sex offenders.

"Caught and convicted sex offenders are those who are the most compulsive, repetitive, blatant and extreme in their offending, and thus also those whose behaviour stems from the most deviant developmental experiences. We now know much better than before how widespread sexual abuse is and how small a fraction of offenders are ever apprehended, let alone convicted. Although they have not been studied, it seems very probable that undetected offenders are persons with much less conspicuous psychological abnormality. The widespread existence of sexual abuse forces one away from an exclusive reliance on theories of psychopathology and towards the possibility that normative factors are at work. Widespread and conventional patterns of socialisation and cultural transmission also play a part in creating sexual abusers."¹⁴

Among the cultural factors that may encourage child sexual abuse are: the tendency to sexualize children in the media, child pornography and male socialisation patterns that emphasise that men should be dominant and that their sexual partners should be younger and smaller than themselves.

Finkelhor has reviewed the many theories regarding child sexual abusers. He has categorised them as follows:

FACTOR ONE

Why does an adult find it emotionally satisfying to relate sexually to a child? Many theories try to understand the "fit" between an adult's emotional needs and the child's characteristics. These accounts of the non-sexual motivations of sexual abusers are called "emotional congruence". They include theories that:

- Child molesters have arrested psychological development. They experience themselves as children and wish to relate to other children.
- Child molesters have no self-esteem. Relating to children gives them a feeling of power, of manipulation and of control. They experience inadequacy and immaturity and report that what is most salient when they describe victims is the child's "lack of dominance".
- Child molesters need relationships with children to overcome a sense of shame, humiliation or powerlessness that they have experienced as children at the hands of an adult. This process is called "identification with the aggressor". In other words, the child molester was himself or herself victimized and sought to overcome his or her trauma by further victimizing other children.
- Feminist explanations of child abuse emphasise that male socialisation makes children "appropriate" sex objects. In other words male socialisation emphasises being dominant, being powerful and being the

initiator in sexual relationships. Thus men prefer to relate to partners who are younger, smaller and weaker than themselves. Children fit these role requirements. Some men are more affected by desocialization experiences than others because they may belong to sub-cultures which give more or less emphasis to these themes.

FACTOR TWO

Why does a person find children sexually arousing? There are good experimental data to show that child molesters, including incest offenders, do show unusual levels of sexual arousal to children.

- One theory is that some people have early sexual experiences which cause them to find children arousing later, when they become adults. However, well over half of all children have childhood sexual experiences with other children, and since not all of those children become sexual abusers, it would suggest that some special circumstances under which such experiences occur condition a later sexual interest in children. These circumstances could include the possibility that the critical experiences are those where some special kind of fulfillment or frustration is involved. Another possibility is that the critical experience might be one associated with traumatic victimization. Several researchers have found more childhood sexual victimization in the backgrounds of sex abusers than in a variety of comparison groups.
- When an early experience of sexual arousal is incorporated into a fantasy that is repeated and becomes increasingly arousing in subsequent masturbatory repetitions, then it is more likely that this will develop into a fixation later in life.
- Another theory is that it is not being victimized oneself that is important, but having a model who finds children sexually stimulating. Thus if children grow up in families where other children besides themselves, such as their sisters or cousins, are the objects of sexual exploitation at the hands of adults, they may then become conditioned to become sexually aroused themselves by children. At this level of generality, however, they are not really specific explanations as to how a person comes to find children arousing.
- Other theories stress the role that child pornography and advertising play in conditioning people to become sexually aroused by children. For example, in some pornography, themes of sex with children are mixed in with themes of sex with adults. Thus in becoming aroused to one set of material the consumers may come to find children arousing. At a general level, the pornography may have the affect of increasing the legitimacy and removing the inhibitions about having, and acting on, whatever fantasy people may have developed about having sex with children.

FACTOR THREE

Why are some individuals blocked from having their sexual and emotional needs met in adult relationships? There are two types of blockages theorised: Developmental blockages and situational blockages.

Developmental blockages refer to theories where the person is prevented from moving into an adult sexual stage of development.

Situational blockages refer to situations where the individual is blocked from normal sexual outlets because of the loss of a relationship or some other transitory crisis. These theories include the following:

- Child molesters may have intense psychological conflict about their mothers or "castration anxiety" that makes it difficult or impossible for them to relate to adult women.
- Men who have been sexually frustrated or traumatised or hurt in their first phase of sexual behaviour, may come to associate adult sexuality with pain and frustration and may choose children as substitute gratification.
- Child molesters may be timid, unassertive, inadequate, even moralistic individuals with poor social skills, who have great difficulties developing adult social and sexual relationships. In the event of a marital relationship breaking down or a wife becoming alienated for some other reason, the father may be too inhibited or moralistic or inadequate to find sexual satisfaction outside the family. Being thus blocked in other avenues of sexual or emotional gratification, he may turn to his daughter as a substitute.
- Repressive sexual norms may act as a form of blockage. Thus adults may feel guilty about engaging in adult sexual relationships, and this may push some into choosing child partners. It has been found, for example, that child molesters are among the most repressed of all sex offenders and were the least permissive regarding pre-marital and extra-marital intercourse.

FACTOR FOUR

How can child molesters overcome the conventional inhibitions against having sex with children? This has been called the "disinhibition" factor.

- Some theories have stressed that child molesters are people with generally poor impulse control. A number of personality factors have been cited, including senility, alcoholism and psychosis but the evidence is very mixed.

- Conditions of great personal stress such as unemployment, loss of love or a bereavement are emphasised in some theories as factors which lower inhibitions about deviant types of behaviour.
- Some theories suggest that men engage in sexual acts with girls in their family when these girls are step-daughters or when have been away from the family during the child's early life. Being a step-daughter, or being separated, is presumed to work to reduce the ordinary inhibitions that would exist against sex between a natural father and a daughter who have lived with each other continuously since the child's birth.

Feminist theories highlight certain social and cultural elements which encourage or condone sexual behaviour towards children and thus weaken inhibitions. For example, the reluctance of the legal system to prosecute and punish offenders is seen as giving a green light to potential molesters. Also, feminists say that many men see families as private institutions where the fathers have socially-sanctioned authority over women and children to treat them as they wish. Finkelhor concludes that a complete theory about sexual abusers needs to address issues on a number of different levels. A full explanation has to show why the adult was capable of being aroused, why he or she directed his or her impulse towards the child and why no inhibitions halted the enacting of that impulse. Theories from only one level will never discriminate between those who engage and those who do not engage in such behaviour. Many people who do not become sexual abusers show arousal by children, shyness, impulsivity and a need for dominance.

A large number of child molesters report having been abused as children themselves, but there are problems with this theory. We do not know if child abusers suffered more abuse than other children in their neighbourhoods or families, who did not go on to become abusers themselves. Most children who are molested do not go on to become abusers themselves. This is particularly true among women who, whether victimized or not themselves, rarely go on to abuse. A history of victimization needs to be combined with a blockage of alternative sources of gratification and a low level of inhibition, before it produces a child molester.

Also there are many different types of molesters, those who prefer boys and those who prefer girls, those who are aggressive and those who are not, those whose sexual interest in children is a strong, life-long preference and those who have a more transitory interest. Many teachers, babysitters and neighbours who molest are not people with a primary sexual interest in children, but are acting in response to such things as stress or opportunity. Regarding the distinction between incest and extra-familial abuse, there appears to be no advantage from our empirical evidence in creating a wholly separate category of incest offender, as opposed to the non-incest offender. A lot of what is known about sexual offenders is based on what we know about sexual offenders who have been caught, detected and put in prison or in treatment. When information is gathered about undetected molesters, the

picture changes dramatically. Theories about offenders come mainly from men who molest children outside their own family, and incest theories come from those men who molest their daughters. But such sexual abuse by older brothers, uncles, grand-fathers and neighbours fell into neither category.

Finkelhor has attempted to construct a model of child sexual abuse based on the empirical findings and theories which we have reviewed earlier. In this model, there are four pre-conditions which need to be met before sexual abuse occurs.

- A potential offender needs to have some motivation to abuse a child sexually. That could include the child satisfying an important emotional need, sexual arousal by children or the blockage of alternative sources of sexual gratification.
- The potential offender has to overcome internal inhibitions against acting on this motivation. Means of doing so could include alcohol, weak impulse control, weak criminal sanctions against the offender or a characteristic of the family that could lower the incest taboo.
- The potential offender has to overcome external impediments to commit the abuse. These impediments could include the supervision the child receives from other people. Family members, neighbours and the children's friends all exert a restraining influence. Mothers also operate as a strong protection for their children. Thus when a mother is incapacitated by illness or emotional problems or is herself abused by the father, the child is less protected. Other factors that make it easier for the abuser to get at the child include the social isolation of the child and unusual opportunities to be alone with the child, for example unusual sleeping arrangements. Adequate supervision of a child does not mean being with the child all the time. What it does mean is knowing what is going on in a child's life, knowing when the child is troubled and being someone to whom the child can turn for help.
- The potential offender has to overcome a child's resistance to the sexual abuse. Children have a capacity to resist abuse but that means more than saying "no" and running away. It has been pointed out that much abuse is short-circuited by the potential offender choosing to avoid one child and instead picking on another. Abusers may sense that some children do not make good targets. Other children, however, may have what is called "a front of vulnerability". This is true for children who are abused both inside and outside the family. Many factors may combine to make a child more vulnerable, including anything that makes the child emotionally insecure, needy or unsupported. A needy child is more vulnerable to the ploys of potential abuser's attention and affectionate bribes. The needy child may have nobody to turn to. Children who are emotionally abused,

disabled, or disadvantaged in any way or who have a poor relationship with their parents are all the more at risk for those reasons. Having few friends, a physically unaffectionate father or a distant or punitive mother all erode a child's ability to resist. A special relationship with the offender may also reduce a child's resistance because he or she may trust that person, or because he or she is threatened by the offender.

- It is vital, however, to recognise that all these characteristics may be irrelevant in very many situations of child sexual abuse where threats or coercion are used. The key factor may be force. Responsibility has to remain firmly with the offender and not be displaced onto the victim or the mother. These characteristics do not come into play "until after the potential offender has already taken some giant strides on the road towards committing the offence".¹⁵

The Effects of Child Abuse on Children

There is now no shortage of data on the adverse psychological effects that child abuse has on children both on a short-term and long-term basis.¹⁶ The short-term effects include emotional and behavioural disturbances, somatic disturbances, concentration and school difficulties and health problems.

The many clinical reports available show that typical signs and reactions of sexually abused children include irritability, low self-esteem, general depression, excessive dependency, regressive behaviour, withdrawal, truancy, academic and school difficulties, physical injuries and even suicidal behaviour. Clinicians have also described what they claim to be the three typical stages that sexually abused children go through. These could be described broadly as (1) an acute phase, (2) a withdrawal phase, and (3) a recovery phase.

THE ACUTE PHASE

This could include disturbances in eating habits, nausea, insomnia, nightmares, somatic complaints such as headaches and general body pains, particularly if the child has sustained any injury. Emotional reactions include feelings of shock or disbelief, guilt, shame, fear, a sense of hopelessness and anger, and an acute distrust of other people.

THE WITHDRAWAL PHASE

This can be characterised by the child resuming normal activities but often in a rather hyperactive manner, the child appearing outwardly to be adjusting well but at an emotional level denying what has happened to it, being reluctant to discuss the experience and resenting offers of help and assistance.

THE RECOVERY PHASE

This includes the gradual return of the child to normal activities and the

putting of the sexual trauma in perspective, i.e. coming to some understanding of what happened and dealing with the feelings it created. Recovery may only be partial unless the child receives professional therapeutic help.

With regard to the long-term effects of child sexual abuse, there are many clinical reports of adults with substantial psychological problems which seem connected to a history of child sexual abuse. Reports on drug abusers, juvenile offenders, adolescent runaways, prostitutes and adults with sexual disfunctions, show high proportions of these troubled individuals were sexually victimised as children.

- One of the long-term effects of child sexual abuse is lower levels of sexual self-esteem in both men and women who had been sexually abused as children.
- Adults who have been sexually abused as children often experience relationship problems, difficulty in developing trust in other people and other general psychological difficulties. Women who are victims of childhood sexual abuse often become victims later in life as well. For example, there is an unusually high incidence of childhood sexual victimisation in the history of rape victims, including marital rape victims, and also in the histories of women who become victims of wife abuse. Victimised women are likely to report that they often got into awkward sexual situations, while victimised men revealed high levels of dissatisfaction after current sexual experiences.
- Boys victimised by older men were found in one study to be four times more likely to be currently engaged in homosexual activity than were non-victims. Close to half the male respondents who had a childhood sexual experience with an older man were currently involved in homosexual activity. This did not hold true for boys who had had homosexual experiences as children. It was only for those with sexual experiences with much older partners that there appeared to be some carry-over effect into adulthood. However, it must be noted that these results are tentative since the number of victimised men in the sample was small, and although the results were significant statistically, they cannot be taken as proof that sexual victimisation in a boy's childhood leads to later homosexuality.

It must be stressed that though the effects of child sexual victimisation are traumatic for children and can have adverse consequences for them, both in an immediate and long-term way, the long-term effects are not inevitable. Many of the reports of the long-term effects of child sexual abuse are based on those who had no appropriate treatment. It may be that by providing a calm and supportive reaction to victimisation, and proper treatment and help, that the effects on the child can be attenuated and that children can make a full recovery.

FOOTNOTES TO APPENDIX I

- 1 David Finkelhor, *Child Sexual Abuse: New Theory and Research* (1984) (which will be referred to as "*Finkelhor Study*").
- 2 Ruth S Kempe & C Henry Kempe, *The Common Secret: Sexual Abuse of Children and Adolescence* (1984).
- 3 Patricia Beezley Mrazek & C Henry Kempe, *Sexually Abused Children and their Families* (1981).
- 4 At p 192.
- 5 *Id.*, p 224.
- 6 B.P.S. Journal.
- 7 Ruth S Kempe and C Henry Kempe, *op cit.*
- 8 *Finkelhor Study.*
- 9 *Id.*, p 25.
- 10 *Id.*, p 27.
- 11 *Id.*, p 30.
- 12 *Id.*
- 13 K Freund, *Erotic Preference in Paedophilia*, 5 Behaviourial Research & Therapy, 339 (1967) (Roy Wyre's reference).
- 14 *Finkelhor Study*, p 35.
- 15 *Id.*, p 64.
- 16 See Mrazek & Kempe, Kempe & Kempe, Finklehor, The Badgley Report, The Department of Health Guidelines and so on for a discussion and review of the literature.

APPENDIX II

*STAGES IN INTERVIEWING**

1. Free play period. Observation of child with fully clothed dolls and drawing materials.
2. Undressing the dolls and naming body parts. Therapist asks child to name parts of the body, including private parts.
3. Types of touching. Nice\appropriate. Not nice - bad\inappropriate. Icky - funny\confusing.

Therapist asks the child to say or to show with dolls what sort of touch is nice, not nice?

4. Naming the dolls. A child may spontaneously name the perpetrator and identify a doll early on at any stage in the interviews. Therapists now use this named doll in further re-enactment.
5. Re-enactment of the abuse. Scene set by asking the child for details of room, furniture, clothes, time of day, etc. when the abuse happened. Child asked directly to show possible abuse with dolls. If child cannot show any abuse spontaneously, therapist asks child direct [non-leading] questions about types of abuse, i.e. 'did he touch you?' [pointing to the dolls]. 'Where?' 'What with?' 'Can you show me on the dolls?' If the child is unable to do any of this spontaneously, the therapist may help the child by offering:

* A Bentovim & M Tranter, *The Sexual Abuse of Children and the Courts*, in G Davies & J Drinkwater eds, *The Child Witness - Do the Courts Abuse Children?*, p 55, at pp 59-60 (British Psychological Society for the Division of Criminological and Legal Psychology, 1988).

- (a) Multi choice questions - 'did he touch you there or there?'
 - (b) Hypothetical questions - 'Supposing Uncle Jimmy had touched you there'. These are reserved for use near the end of the interview or when the child has been given ample opportunity to speak spontaneously or has been asked simple direct questions and has been unable to respond.
6. Recapping, reassurances and relief. Therapists should ask child [if possible] to *say in words* what was done to child and by whom. Therapist asks child if he/she would like to say/do anything to the perpetrator? Child can vent angry feelings, etc. on perpetrator doll, if wished."

