Law Reform Commission of Victoria

SEXUAL OFFENCES AGAINST CHILDREN

rch 1988

a discussion paper, not a report. Your comments on the matters raised in the paper e most welcome. They will be taken into account by the Commission in compiling its report.

Comments should be sent to the Executive Director, Law Reform Commission of Victoria, 7th Floor, 160 Queen Street, Melbourne (Telephone: (03) 602 4566) by 27 May, 1988.

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1. INTRODUCTION

The purpose of this discussion paper.

1. The Law Reform Commission of Victoria is preparing a report for the Victorian Government on the laws relating to sexual offences against children. It will cover the offences and the laws relating to their prosecution. In preparing its report the Commission wishes to take account of the views of individuals and organisations in the community. This discussion paper will serve as a major means for community consultation by the Commission on the issues and options for reform.

Background to the review

2. The Commission's review of the law relating to sexual offences against children is part of a general review of the law relating to sexual offences in Victoria, which it was formally requested to undertake on 21 October 1985. The Terms of Reference of the review direct the Commission:

- to review the law relating to sexual offences in Victoria, in particular the adequacy of the operation in practice of the amendments to the law made by the Crimes (Sexual Offences) Act 1980; and
- to recommend what, if any, reforms should be made.

3. Work on the reference has been divided into four parts:

- the substantive law relating to general sexual offences — a report on this part was published in September 1987;[1]
- the procedural and evidentiary law relating to general sexual offences — a report on this part was given to the Attorney-General in March 1988;
- the substantive, procedural and evidentiary law relating to sexual offences against victims with impaired mental functioning — a discussion paper on this part was released in January 1988;[2] and
- the substantive, procedural and evidentiary law relating to sexual offences against children — the subject of this discussion paper.

1. Report No 7, Rape and Allied Offences: Substantive Aspects.
2. Discussion Paper No 9, Rape and Allied Offences: Victims With Impaired Mental Functioning.

Research on sexual offences against children

4. To assist the review three research projects have been commissioned, dealing with:

- the attitudes of staff in sexual assault centres to the reporting of sexual offences against children to criminal justice agencies.
- what happens to child sexual assault victims seen at a major hospital. This project will provide a picture of the relationship between health and welfare agencies and the criminal justice system. It forms a component of a larger project being conducted by the Social Work Department of Monash University.
- obstacles to the prosecution of cases reported to the police. This project will assist in identifying the legal and other factors which determine whether reports of alleged offences are prosecuted.

5. Funds for the projects have been provided by Community Services Victoria. The Victoria Police have released a member of the Force to undertake research on obstacles to prosecution. The Commission is being assisted in the management of the projects by officers from Community Services Victoria, the Ministry for Police and Emergency Services and Victoria Police.

Scope of this paper

6. This paper is concerned only with the criminal law relating to sexual offences against children. There are three other relevant areas of law which the paper does not examine: the law relating to child protection and welfare, which was reviewed by the Carney Committee;[3] legislation relating to child prostitution, which was reviewed by the Neave Inquiry,[4] and family law, which is mainly a matter for the Commonwealth Government.

7. The Commission's terms of reference confine the paper to the laws relating to sexual offences against children. Proposals to improve the capacity of the key agencies such as Community Services and the Police to respond to child sexual assault were made by Lesley Hewitt in a major paper released in 1986.[5] Therefore this paper examines the operations of those agencies only where they are directly linked to specific legal issues.

8. Hewitt also identified a number of legal issues in relation to sexual offences against children, and suggested how some of them might be addressed. Her paper was prepared in the knowledge that the Commission was undertaking a general review of the law relating to sexual offences. This paper looks at those issues in greater detail, and also at other issues which were outside the main areas dealt with by Hewitt.

9. For some time sexual offences against children have been a subject of major attention in Australia and other countries. This paper makes extensive use of the reviews undertaken in other jurisdictions. Among those reviews which have been of particular value are:

3. Child Welfare Practice and Legislation Review, Report — Equity and Social Justice for Children, Families and Communities, Victoria, 1984.
4. Inquiry into Prostitution, Marcia Neave, Inquirer, Final Report, Victoria, 1985.
5. L. Hewitt, Child Sexual Assault Discussion Paper, VGP Melbourne 1986.

- Final Report of the Royal Commission on Human Relationships, 1977;
- Final Report of the South Australian Government Task Force on Child Sexual Abuse, 1986;
- Report of the New South Wales Child Sexual Assault Task Force, 1985;
- NSW Government Violence Against Women and Children Law Reform Task Force Consultation Paper, 1987;
- An inquiry into sexual offences involving children and related matters, by D.G. Sturgess QC, Queensland Director of Prosecutions, 1985;
- Child Witnesses in Sexual Assault Discussion Paper 1, prepared by K. Warner for the Law Reform Commission of Tasmania, 1987;
- Sexual Offences Against Children, Report of the Committee on Sexual Offences Against Children and Youths, R. Badgley Chairman, Canada, 1984; and
- Criminal Law Revision Committee, Fifteenth Report, Sexual Offences, Cmnd 9213, HMSO, London, 1984.

Terminology used in the paper

10. This paper examines 'sexual offences against children', by which we mean common law and statutory crimes involving prohibited sexual activity with or against children. The paper uses the term 'sexual abuse' to describe the behaviour which is, or should be, prohibited by the offences. It is common to hear or read the terms 'incest' and 'sexual assault' used to broadly cover sexual abuse of children. They are not used in that way in this paper, except where other documents using the terms are cited, because they have specific legal meanings:

- 'incest' is the common term for an offence which relates only to sexual penetration,and only when it involves close family members;
- 'assault' is a legal concept which is used specifically in just one of the existing offences, 'indecent assault'.

11. By 'child' and 'children', the paper means persons under 18 years of age, which is the present general 'age of consent'—unless there is a specified defence, a person who has sexual intercourse with someone under 18, even with the child's consent, commits a serious criminal offence. 'Victim' refers to a child against whom an offence has been committed; the victim becomes a 'complainant' when the offence has been reported to the police, by the child or someone else. The 'offender' is the person who has committed the offence; the 'accused' is the person whom the police allege has committed the offence, and whom they have charged.

12. The paper presents what the Commission believes are the key matters requiring review in relation to sexual offences against children, and the laws regulating how the offences are prosecuted and adjudicated. The Commission has formed tentative views of appropriate reforms, and these are described as 'proposals'. It should be stressed that these are tentative conclusions, which will be assessed in the light of information gathered through research and consultations. The Commission welcomes comment on both the proposals and any other matters which are relevant to its review.

Plan of the Discussion Paper

13. The issues covered by this discussion paper are dealt with as follows:

- Chapter 2 sets out the major considerations and principles which underlie this review of the laws relating to sexual offences against children.
- Chapter 3 examines the offences, looking at whether they are appropriate and necessary, and whether there is scope for simplification and rationalisation.
- Chapter 4 looks at the issue of whether there should be a legal duty imposed on any adults to report suspected sexual abuse of children to the police or Community Services.
- Chapter 5 examines procedural matters in the period between a complaint being made to the police, and the trial of a person charged with committing the offence.
- Chapter 6 examines the treatment of child witnesses and their testimony by the courts, particularly in a trial.
- Chapter 7 considers whether Victoria should adopt a new criminal justice approach to offenders, which focuses upon treatment rather than punishment.

2. REFORM CONSIDERATIONS

The need for legislation specially relating to children

14. In the case of adults, the primary purpose of the law relating to sexual offences is to protect the individual's autonomy and integrity. The law prohibits sexual activity with an adult who does not freely consent to that activity. Consent has not been freely given if it is induced by fear or fraud, or the person is regarded as lacking the capacity to consent because of mental impairment. The law does not otherwise protect adults from perhaps ill-informed judgments about relationships they enter voluntarily.

15. All the non-consensual sexual offences, such as rape and indecent assault, apply to children as well as to adults. There are also a number of offences which apply specifically to children, and which prohibit sexual activity with children regardless of their consent. These offences reflect the judgment of the community that sexual activity by children may be psychologically and physically harmful to them, and that children cannot give true consent in the sense that adults do, because they are less well-informed, more dependent on others, and developmentally immature.

16. There is a compelling case for restricting sexual activity with children. This has been outlined by Hewitt, and documented by other reviews and studies[1] and will not be considered in this paper. The issues for this paper are not whether the law should prohibit sexual activity with children, but when and how the prohibitions should operate.

The role of the criminal law

17. There has been considerable debate about the role which the criminal law, rather than child protection laws or family laws, should play in protecting children. Even strong supporters of the application of criminal laws have been highly critical of the impact the criminal justice process sometimes has upon victims.

1. See for example D. Finkelhor, A Sourcebook on Child Sexual Abuse, Beverly Hills, Sage Publications, 1986.

> The legal procedure may do more harm to the child than the original offence, and in some cases it may be the only cause of serious upset.[2]

Other criticisms made of the criminal justice system are that it is concerned with punishment rather than with treatment of the offender, and pays no attention to the needs of the victim and his or her family. One consequence of these negative aspects of legal intervention is that victims and their families are deterred from asking for assistance. Further, the prospect of harsh penalties is said to deter undetected offenders from seeking treatment, and to deter accused offenders from pleading guilty. Encouraging offenders to plead guilty is seen as important because a guilty plea saves victims from the stresses of giving evidence and being cross-examined at the trial.

18. There has also been criticism that governments tend to rely on the criminal law as a response to sexual abuse of children, but that the law does not effectively address basic causes such as the attitudes of males to females, and is therefore of limited preventive value. This view came out strongly in the community response to Hewitt's firm view that child sexual abuse should continue to be dealt with by the criminal law. An overview of the response stated:

> No one is taking issue with child sexual assault as a criminal offence. The difficulty for a significant number of respondents is the emphasis on the criminal justice system and other forms of intervention at the expense of strategies for prevention and long term structural change. The position of these respondents can be summed up as follows: The present legal system is inadequate. Reform is needed. But in the long run, there are limits to what the law can achieve.[3]

19. Despite its present drawbacks, the criminal justice system must continue to be a central element in the community's response to child sexual abuse. In the first place, although the law can have only a limited effect in preventing criminal behaviour, its symbolic and educative functions are of considerable importance.

> A significant role of the criminal law is to define unacceptable conduct. In declaring certain types of sexual behaviour to be criminal, the law plays a crucial part in the development and maintenance of community attitudes and expectations.[4]

Second, identification and punishment of an offender are entirely appropriate goals. They designate who the community regards as responsible for conduct which disrupts families and puts the welfare of children at risk. This may be very important to the victims of abuse, who not uncommonly feel that they are to blame for becoming sexually involved, and the adverse consequences that has for other people. Third, the system is vital for appropriate protection of children who are sexually abused at home. Unless a court is satisfied that a person is properly accused or is the probable offender, that person cannot be ordered to leave the home.[5] The

2. Royal Commission on Human Relationships Final Report, Volume 5, AGPS Canberra, 1977.
3. Victorian Council of Social Service, Community Responses to Child Sexual Assault Discussion Paper by Ms Lesley Hewitt, Melbourne, 1987, 9.
4. Law Reform Commission of Victoria, Report No 7 Rape and Allied Offences: Substantive Aspects, 1987, 8.
5. A person charged with an offence may be ordered to leave his or her home as a condition of bail. A person who has not been charged can be ordered to leave the home if a court is satisfied on the balance of probabilities that he or she molested a family member and is likely to do so again: See chapter 5, 'Protection of victims'.

child's protection therefore requires that the child be removed from the home, and in effect be punished for being a victim. Finally, the criminal justice system may be essential to securing treatment of many offenders who, in the absence of the threat of criminal sanctions, would not enter and continue in treatment programs.

20. The criticisms made of the criminal justice system do not lead to the conclusion some commentators have suggested, that it has no proper role to play,[6] or that its only real purpose is to punish the small proportion of offenders who are detected and successfully prosecuted. We believe that with appropriate reforms the criminal law can be a very effective component of an overall community strategy, including a range of programs and services, which will improve the prevention and detection of child sexual abuse, and treatment of abusers, as well as imposing punishment where desirable. That is the Commission's objective. If it is to be realized, the following must happen

- the criminal justice system must be connected more closely with the other systems which assist sexually abused children, that is, those focusing on child protection and on treatment of offenders and victims. The need for an integrated approach was strongly stressed by Hewitt:

  > This Report accepts that all three approaches (criminal, protective and treatment) have some value in assisting sexually assaulted children. Operating in isolation however, each will fail to meet the needs of the sexually assaulted child. Interventions need to be developed that will incorporate all three approaches. Adequate assessments of individual cases will determine which approach predominates for that particular case.[7]

- the criminal justice system must adopt procedural and evidentiary practices which take more account of the needs of children. However, such adjustments must be consistent with fundamental legal principles, in particular the presumption of innocence and the requirement that the prosecution must prove all the elements of its case beyond reasonable doubt.

6. See for example E. Brongersma 'The Meaning of "Indecency" with respect to moral offences involving children', British Journal of Criminology, Vol 20, No 1, January 1980, 20.
7. L. Hewitt, Child Sexual Assault Discussion Paper, VGP, Melbourne, 1986, 73.

3. THE OFFENCES

21. The sexual offences examined in this paper fall into two broad categories. 'Offences directly involving sexual activity with children' prohibit specified sexual behaviour of an offender with a child. These are examined in part A of this chapter. Part B examines 'Offences related to sexual activity with children'. These prohibit specified conduct by an offender which encourages or facilitates sexual activity between children and another person, not necessarily the offender.

A. Offences directly involving sexual activity between child and offender

22. The main offences which prohibit sexual activity by a person with a child are outlined in Table 1. They vary on a number of bases: the nature of the act (sexual penetration or other activity); the age of the victim; and the relationship of the offender to the victim (whether family or not). This part of the paper examines the scope and nature of the offences, some of the defences available to a person charged under them, and whether the offences are appropriate and necessary.

TABLE 1: OVERVIEW OF THE MAIN OFFENCES DIRECTLY INVOLVING SEXUAL ACTIVITY WITH CHILDREN

Offence	Penalty	Statutory Defence
Sexual Penetration with Child under 10 — s.47 Crimes Act	Up to 20 years imprisonment.	Consent of the child is no defence.
Incest with Child/sibling aged 10 or more — s.52 Crimes Act	Up to 20 years imprisonment for lineally-related offender (eg. parent–child); 7 years for sibling.	Consent by person with whom act of sexual penetration committed is a defence. Coercion by person with whom act of sexual penetration committed is a defence.

Sexual Penetration with Child aged 10–15 — s.48 Crimes Act	Up to 10 years imprisonment; up to 15 years if child under care, supervision or authority of offender.	Consent of the child is a defence if: the accused reasonably believed he or she and the child are married to each other; or the accused reasonably believed the child was 16 or more; or the accused was not more than 2 years older than the child.
Sexual Penetration with Child 16–17 — s.49 Crimes Act	Up to 2 years imprisonment; 3 years if child under offender's care, supervision or authority.	Consent of the child is a defence if: accused reasonably believed he or she and the child are married to each other; or accused reasonbly believed child 18 or more; or child had previously willingly participated in an act of sexual penetration with someone other than the accused; or accused was not more than 5 years older than the child.
Indecent Assault — s.44 Crimes Act	Up to 5 years imprisonment; 10 years imprisonment if there are aggravating circumstances.	Consent of a child under 16 is a defence if: the accused and the child are married; or the accused reasonably believed he or she was married to the child; or the accused reasonably believed the child was 16 or more; or the accused was not more than 2 years older than the child.

Gross Indecency with Child under 16 — s.50 Crimes Act	Up to 2 years imprisonment; 3 years if child under offender's care, supervision or authority, or offender previously convicted of this offence.	Consent of the child is a defence if: accused reasonably believed child 16 or more; or accused was not more than 2 years older; or accused and child are married to each other; or accused reasonably believed he or she was married to the child.

A child may also be the victim of various other sexual offences which are also applicable to adult victims. The most common of these in relation to adults is rape, that is, sexual penetration of a person without that person's consent. It is not a commonly charged offence in relation to young children. Incest and the child-specific sexual penetration offences are easier to prosecute, because lack of consent does not have to be shown unless specific defences are involved, and the offences carry penalties of the same or similar severity to rape. The procedural and evidentiary issues in relation to prosecution of the offence of rape where the victim is a child are generally the same as those in relation to prosecuting the offences which are examined in this paper.

I Offences involving sexual penetration

(a) Should there be a distinction between penetrative and non-penetrative offences?

23. The offences under sections 47 (victims aged under 10), 48 (victims aged 10-15), 49 (victims aged 16-17) and 52 (incest) of the Crimes Act have as a common criterion that the prohibited conduct is taking part in an act of sexual penetration. The Crimes Act provides that both the person committing the penetration and the person who is penetrated are deemed to be involved in the act. The effect is that either person may be an offender under whichever offence applies. Thus, for example, the offence of incest may be committed by a mother who has sexual intercourse with her son, just as it may by a father who has sexual intercourse with his daughter. Similarly, a person who puts a child's penis into his or her mouth, and a person who puts his penis into a child's mouth, would both be deemed to be taking part in an act of sexual penetration under the relevant offences. In this respect the offences differ from rape, the main penetrative offence relevant to adults. Rape is committed only if the offender penetrates the victim. If the offender forces the victim to penetrate him or her (for example, by committing fellatio on the victim), it constitutes the lesser offence of indecent assault.

24. Hewitt suggested that the maintenance of a separate category of penetration offences was inadvisable.

> The emphasis given to actual penetration as constituting the offensive act reflects a male view of sexuality which is focused largely on penetration. Women on the other hand do not focus solely on actual penetration in their

experience of the sexual act. The child's experience of the sexual assault is likely to be diffuse and non-focused.[1]

While recognizing that there is force in Hewitt's observations, the Commission's tentative view is that a distinction should continue to be made between penetrative and non-penetrative offences. In its report Rape and Allied Offences: Substantive Aspects, concerned with adults, the Commission similarly considered whether, in order to simplify the law, there should be a single offence to cover all assaults, sexual or not. This idea was rejected on two grounds: that there is community support for treating sexual penetration as a special phenomenon which should be reflected in the structure of offences,[2] and that having distinct offences provides legislative guidance to the judiciary on appropriate sentencing.

25. The same arguments apply to sexual abuse of children. While all forms of sexual abuse must be seriously regarded, Parliament and the community should indicate whether the courts are to deal with certain forms of conduct more harshly than others. One of the criteria in the present laws is whether sexual penetration occurred,[3] and this is appropriate on two grounds:

- sexual activity involving penetration of a child is more likely to cause physical harm, and
- sexual activity involving penetration is generally the most intimate form of sexual conduct, and would therefore constitute the most serious breach of an older person's responsibility for a child's welfare. Sexual penetration is likely to be symptomatic of a relationship with the greatest danger of harming a child's emotional development, whether the child is being penetrated or committing the penetration. The Commission therefore endorses the approach of the present law to treat on an equal footing offenders involved in acts of sexual penetration with children, whether an offender sexually penetrates a child or causes a child to penetrate the offender.

Proposal 1

Offences against children should continue to distinguish between conduct involving sexual penetration and other behaviour.

(b) What acts should the penetrative offences cover?

26. The Crimes Act defines rape as including the introduction of the penis of a person into another person's anus, or mouth, or the introduction of an object other than part of the body into another person's vagina or anus.[4] With respect to the other sexual penetration offences, including incest, an act of sexual penetration is similarly defined as the introduction of a person's penis into another person's vagina, anus or mouth, or an object other than a part of the body into another person's vagina or anus.[5] Therefore penetration by an offender's finger or tongue constitutes the far less serious offence of indecent assault. There is no sound reason for regarding

1. L. Hewitt, Child Sexual Assault Discussion Paper, VGP, Melbourne, 1986, 131.
2. On this basis the Commission recommended that the law treat all forms of sexual penetration as equally serious, rather than distinguishing between penetration by a penis and another part of the body. See Section B which follows this section.
3. The other two are the age of the child, which the Commission believes is generally accepted, and the relationship between the child and the offender, which is discussed in the context of incest and other offences.
4. Section 2A(1).
5. Section 2A(2)

penetration by 'an object' as inherently more serious than digital penetration or cunnilingus. The Commission has already recommended that rape should include non-consensual penetration of the vagina or anus by any part of the body.[6] The same should apply to sexual penetration of children.

Proposal 2

The definition of an act of sexual penetration should include penetration of a person's vagina or anus by any part of another person's body.

(c) What is the most appropriate offence for intra-familial abuse of a child aged over ten?

Under the sub-heading 'Incest', section 52(1) of the Crimes Act provides that:

> A person who takes part in an act of sexual penetration with a person who is of or above the age of ten years and whom he knows to be his child or other lineal descendant or his step-child is guilty of an indictable offence and liable to imprisonment for a term of not more than twenty years.

The child (or other descendant) who permits the act to take place with a person speci fied in this section is guilty of the offence only if he or she is aged eighteen or older. The child's consent is not a defence. It is a defence if a person charged with a section 52 offence was coerced into committing the act of sexual penetration by the other person involved in the act.

28. Section 52(4) provides that:

> A person who takes part in an act of sexual penetration with a person who is of or above the age of ten years and whom he knows to be his sister, half-sister, brother or half-brother is guilty of an indictable offence and liable to imprisonment for a term of not more than seven years.

Again, consent is not a defence and coercion is a defence. Unlike a section 52(1) offence, no age limit is applicable: siblings under 18 can be offenders.

29. There are various reasons for the offence.[7]

- Where the parties are related in the first degree (father-daughter, brother-sister) there is a risk that a child born to them will have a genetic defect
- a child is very vulnerable to exploitation within a family situation and the violation of a child's trust and dependence is greater than in other relationships
- a child may be more seriously harmed by a sexual relationship with a family member than with another person:

  > A child who suffers abuse at the hand of a stranger can expect comfort and protection from his or her family; incest victims often have no one to whom to turn — those who should support have been the cause of suffering.[8]

  Hence the offence covers non-blood relations, such as step-parents.
- an incestuous relationship can harm other family members as well as the child directly involved.

6. Rape and Allied Offences: Substantive Aspects, 16-18.
7. Criminal Law Revision Committee Fifteenth Report, Sexual Offences, HMSO, Cmnd 9213, 1984 paras 8.9-8.13.
8. Criminal Law Revision Com: ittee para 8.11.

30. There is no offence of incest in relation to children under ten years of age because that would simply duplicate the section 47 offence, sexual penetration with a child under ten. The maximum penalty for both offences is the same, twenty years imprisonment.

31. The scope of the offence of incest makes it clear that the genetic consideration — the basis of which is in any event in doubt — is now a minor aspect of the offence. The specified relationships include people not related by blood, and the specified physical acts are not restricted to heterosexual intercourse. In relation to children, therefore, the justification for the offence is essentially similar to the general sexual penetration offences. Is there any need to retain it for children aged over 10, when there appears to be no need for children under 10?

32. The major argument of dealing with all cases of sexual penetration of children under the general offences is that it would create a more coherent set of offences. That is, offences could be distinguished on the basis of the distinct criteria of seriousness, such as the victim's age, and relationship of offender to victim. This is not satisfactorily achieved by the present offences. The most significant shortcoming is that the offence of incest is apparently distinctive in that it deals exclusively with intrafamilial abuse. However, it does not do so comprehensively. Most importantly, de facto spouses who are not the biological parents of children in their families are not included. Cases of sexual abuse by de facto spouses are not uncommon, and should be treated as no less grave than abuse by step-parents, who are included within the incest offence. However, the difference in available maximum sentence between incest and the other offences can be considerable.

33. This shortcoming could be remedied by extending the offence of incest to cover other people normally living as part of the child's household, with parental authority. In the Australian Capital Territory, for example, the offence of incest can be committed by a person who is in loco parentis in relation to a child, that is, a person "who assumes the liability for providing for a minor in the way a parent would do."[9]

34. The Commission does not favour this approach. Historically, incest is based on a taboo widespread throughout the world about sexual intercourse between blood relations. It has become a wider offence, concerned with abuse of certain positions of authority and responsibility. However, within the general offences there are already higher sentences available where a child is under the offender's care, supervision or authority. There seems little to be gained by extending incest to cover cases where the offender's position of care, supervision or authority was equivalent to that of a parent. It would create uncertainty about the scope of the offence and lead to extended argument in trials about whether the offence applied in a particular case.

35. The Commission tentatively favours the alternative approach, which is to deal with intrafamilial sexual penetration of children under the general offences. This is already the case in relation to children under 10. It should also be noted that intrafamilial sexual abuse other than penetration is dealt with under the general offences of indecent assault and gross indecency.

Proposal 3

Intrafamilial sexual abuse of children involving sexual penetration should be included in the general offences, not as incest.

9. R. Bird ed., Osborn's Concise Law Dictionary, Sweet and Matied, London 1984.

(d) The age of consent

36. There are three ages stipulated by law as relevant to a child's capacity to give legally effective consent to an act of sexual penetration — 10, 16 and 18. Below age 10 a child's consent is irrelevant. A person who takes part in an act of sexual penetration with the child commits an offence.[10] Between the ages of 10 and 18 a child can give consent in certain restricted circumstances; at age 16 the degree of restriction is reduced. In the eyes of the law, age 18 is what is commonly known as the age of consent. Some restrictions remain (for example, under the offence of incest), but they apply to all people irrespective of age.

37. There is no objective manner of determining what the age of consent should be. It reflects a political and community judgement about the age at which we are prepared to grant young people autonomy over their sexual choices. Communities similar to Victoria's have made different judgements. In Tasmania, for example, the age of consent is 17. In South Australia the age of general consent is 17, but 18 in the case of sexual relations with a guardian, schoolmaster, schoolmistress, or teacher of the child. New South Wales and the Australian Capital Territory also have the approach of setting a general age, with a higher age for specified relationships defined in terms of people's occupations, rather than in terms of their age relative to the child, as in Victoria. Their general age of consent in those jurisdictions is 16, and 17 in the case of a teacher. The Royal Commission on Human Relationships also favoured this approach, and proposed a general age of consent of 15.

> We think this would be a more realistic reflection of the sexual behaviour of young people and of their ability to make personal decisions. At this age children can leave school, get jobs, and start playing a responsible role in society.[11]

The Royal Commission suggested that age 17 should apply in the case of relationships involving people who exert influence over a child, such as teachers.

38. 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.

39. The Commission's view is that the present law relating to 16 and 17 year old children is excessively protective, and does not realistically reflect contemporary social patterns of this age group. There should therefore be modification of two aspects of the present offence, the age of the children covered, and the type of prohibited relationship.

40. With respect to consensual sexual conduct the maximum age of a child with whom the criminal law is concerned should be 17 rather than 18. This would also

10. However, if the person is another child below a certain age or level of development he or she cannot be criminally charged.
11. Royal Commission on Human Relationships Final Report Volume 5, AGPS Canberra, 1977, 210.

make it consistent with the maximum age of children with whom child protection legislation is concerned.[12]

41. In the case of a child aged 16, sexual relationships should be prohibited where there is a significant imbalance of power between the parties, but this should not be defined by their age difference, as it is at present. In the case of younger children, age difference may be a very good indicator of a likely imbalance of power, and it is appropriate to protect them by a measure of this kind. By age 16 the law should intervene only where there is a clearly defined risk of the abuse of power.

Proposal 4

The age of consent should be reduced from 18 to 17. A child aged 16 should be able to give effective consent to another person of any age. However, it should be an offence for a person to take part in an act of sexual penetration with a child aged 16 if that person occupies a position of care, supervision or authority over the child. Comment is invited as to whether the proposed offence should be defined in terms of the broad concepts such as "care" and "authority", or in terms of specific positions of authority, such as a school teacher, guardian or employer.

(e) The ages of restricted consent

42. Between the ages of 10 and 18, a child can effectively give consent to sexual intercourse where there is only a relatively small age difference between the child and the other person, or the child is married to the other person.[13] Allowing sexual relationships in such situations can be seen as reflecting either a judgement that the relationships are not abusive, and are therefore acceptable, or a judgement that while the relationships are undesirable, the likelihood of harm is not serious enough to involve criminal law sanctions. General agreement may be presumed that if children have a right to marry, they and their spouses have a right to have sex. But there are likely to be different views about a defence of age similarity where the persons are not married to each other.

43. Many jurisdictions impose a complete prohibition on sexual intercourse for a child under the age of consent, apart from with a person to whom the child is married. This is the case in New South Wales. The New South Wales Violence Against Women and Children Law Reform Task Force recently proposed that there should be a defence where there is not more than two years age difference between the parties, believing that it is inappropriate 'that such mutual and sexual activity should involve a young person in the criminal justice system'.[14] The New South Wales Government rejected the proposal. In England too, age similarity is not a defence, and the Policy Advisory Committee on Sexual Offences in that country considered it appropriate that there should not be such a defence. Sexual relationships between boys and girls of similar ages could be abusive, the Committee argued, and therefore the possibility of legal action should be retained.

12. Section 31 of the Community Welfare Services Act allows the Community Services Department to admit children or young people into care if they are under 17. The Children and Young Persons Bill which has been drafted to replace that act also restricts protective action to children aged under 17.
13. A female may marry from age 14. At 14 and 15 a female requires her parents' consent and a magistrate's order granting permission; at 16 and 17 she needs only her parents' consent. A male may marry from age 16. At age 16 and 17 a male requires his parents' consent and a magistrate's order granting permission.
14. Consultation Paper, NSW Government Printer, 1987, 18.

> We do not think that any advantage would be gained if the law disabled itself from dealing with all young men below a certain age or near in age to the girl involved. In our opinion whether young men should be prosecuted for the offence and, if convicted, how they should be disposed of, are more appropriately regarded as matters for the exercise of discretion, of the police on the one hand and the trial judge on the other.[15]

The Committee's arguments were cited with approval by the Canadian Committee on Sexual Offences Against Children and Youths.[16]

44. The Commission's tentative view is that there should continue to be an age range within which a child's consent is a defence in specific situations. Sexual experimentation and relationships between children are common below the general age of consent. The children are arguably more likely to be harmed by being brought before a criminal court than by the sexual activity. The criminal law is an appropriate response only in situations where a serious abuse of trust occurs. These situations should be defined in the legislation and not left entirely to police or prosecutorial discretion on a case by case basis. If there were scope for discretion, it might be exercised because of the degree of parental pressure for action, rather than strictly on consideration of the interests of the affected children. The Commission believes the situations requiring action can be adequately identified in the law, and therefore believes the present approach is correct.

Proposal 5

Consent of a child below the general age of consent should continue to be a defence where there is only a small age difference between the child and the other person.

(f) The defence of similarity in age

45. If there is to be a defence of similarity in ages, what should be the age similarity? Section 48 provides for a 2 year maximum in the case of children aged 10-15 years, and section 49 provides for a maximum of 5 years in the case of those aged 16 or 17. The Commission has already indicated its view that in relation to children aged 16 the offence should be defined in terms of relationships, not by reference to age, but that age should remain an indicator for younger children. Is the 2 year difference reasonable for children aged 10-15?

46. In Tasmania it is a defence to a charge that the accused is not more than 5 years older if the child is 15 or more, and not more than 3 years older if the child is aged 12-14. In South Australia, only a one year age difference is allowed — it is a defence to a charge of sexual intercourse with a person aged 16 that the accused was under 17. The Royal Commission on Human Relationships proposed a 5 year age difference where the child is aged 13-15, and 2-3 years in the case of a child between 10 and 13.[17]

47. The Swedish Penal Code equivalent is cast in terms of 'little difference in age and development between the offender and the child'.[18] This approach seems to be too uncertain. Stipulating an age difference is an arbitrary approach, but at least those affected have a definite basis for knowing their legal standing.

15. Report on the age of consent in relation to sexual offences, HMSO, London, 1981, 9.
16. Sexual Offences Against Children Volume 1, Canada, 1984, 50.
17. Final Report Volume 5, at para 23 page 211 and recommendation 34 page 234.
18. Section 13, Chapter 6.

48. The Commission's tentative conclusion is that in relation to children aged 10 to 15, two years age difference is a reasonable assessment of peer relationships, and therefore indicative of non-abusive situations. Certainly a difference of 5 years would appear to substantially increase the likelihood of there being considerable inequality in personal development between the parties.

Proposal 6

Consent of a child aged between 10 and 16 should continue to be a defence if there is two years or less in age difference between the child and the other person.

(g) The defence of reasonable belief as to age

49. The offences created by section 48 (sexual penetration of a person aged 10-15) and section 49 (sexual penetration of a person aged 16 or 17) each contains the defence that the accused reasonably thought the child was older than the relevant age in the offence. The Commission supports the principle embodied in the defence, that a person should not be guilty of a criminal offence if he or she believed in certain facts which, had they been as believed, would mean that the conduct would not constitute an offence. However, there are two aspects of the defence as presently formulated which require consideration — should an honest, even if unreasonable, belief, be adequate; and, on whom should the burden of proof lie?

Should an honest belief be sufficient?

50. The defence in relation to sections 48 and 49, and also in relation to the offences of indecent assault (s.44) and gross indecency, requires the accused to have been not only genuinely mistaken as to the age of the child, but reasonable in that mistake.

51. The issue whether criminal responsibility should be imposed upon people who are negligent is a controversial one, particularly in relation to sexual offences. In its report on rape and allied offences the Commission examined the issue with respect to rape. The law is that a person is not guilty of rape if he or she honestly but mistakenly believed the other person was consenting to sexual intercourse, even if that belief was unreasonable. The Commission recommended that the law be retained, on the grounds that it 'does not believe a person should be guilty of an extremely serious crime because his or her genuine belief falls outside what is considered to be reasonable.'[19] As the Heilbron Committee put the argument:

> The law recognises that man is susceptible to error and does not demand that he may never be mistaken in his mental appreciation or perception of the actual circumstances surrounding his actions.[20]

52. It may be objected that a defence of honest belief alone would make it relatively easy for an accused charged with a sexual offence against a child to simply assert it, however falsely. The assertion could be made in the context of unsworn evidence or an unsworn statement,[21] so the accused could not be cross-examined on it. The

19. Report No 7 Rape and Allied Offences, at 24.
20. Report of the Advisory Group on the law of Rape, HMSO, London, 1975, 9.
21. An accused who is not represented may make an 'unsworn statement', that is, a statement without taking the oath. No cross-examination on the statement is permitted. An accused who is represented may give 'unsworn evidence', that is, testify in response to questions put by his or her lawyer, without taking the oath. The prosecution is not permitted to cross examine on this evidence.

Commission does not see a substantial risk of many prosecutions failing because of convincing but false assertions by offenders. If an accused gives sworn evidence, the credibility of any asserted belief will be tested in cross- examination. As the English Criminal Law Revision Committee argued:

> In practice the distinction between a defence of 'genuine' belief and one of belief on reasonable grounds is rarely significant. If the defendant gives evidence — and in almost every case where mistake is in issue he will have to do so in order to raise the defence — he will be cross-examined about the grounds for his belief. If they are slight or fanciful, the magistrates or the jury may well accept the prosecution's case that he did not believe the girl to be under 16.[22]

53. If the accused gives unsworn evidence or makes an unsworn statement, he or she takes the risk that it will be given less weight by a court or jury than sworn evidence. The procedure for unsworn evidence and unsworn statements is designed to ensure that juries are aware that it is evidence of a different kind. The statement cannot be made or evidence given from the witness box. The judge must tell the jury that the accused had the choice of giving or not giving sworn evidence, and was informed about the consequences of the choice. Although the accused cannot be cross-examined on the unsworn statement or unsworn evidence, a judge may comment on any matter contained in it.

54. The requirement that a belief must be reasonable should be retained where the accused has a position of care, authority or supervision over a child. The circumstances of such a person's contact with the child are significantly different from a relationship formed at a discotheque or on the beach. The person's general responsibilities for the child can appropriately be regarded as including a responsibility not to become sexually involved without serious consideration of the broader implications. The person should certainly be under an onus to enquire about the child's age.

Proposal 7

It should be a defence for the accused to have honestly believed that the child was of an age which made the child's consent effective, as a defence, even if that belief was not reasonably based. If the accused has a position of authority in relation to the child, the accused's belief should be reasonably based.

On whom should the burden of proof lie?

55. A central principle of the criminal law is the presumption that an accused is innocent. This has the effect of requiring the prosecution to prove beyond reasonable doubt the elements of the offence, for example, that the accused committed the prohibited act, and that he or she had a blameworthy intent at the time. In relation to the child sexual offences, the relevant blameworthy intent should be that the accused intended to have sexual intercourse with a child knowing that the other person was a child. It appears however, that if the accused raises the defence of belief as to the child's age, he or she has not only to introduce evidence for it (the 'evidential' burden of proof), but also to satisfy the jury on the balance of probabilities that

22. Criminal Law Revision Committee, Fifteenth Report, Sexual Offences, HMSO London, 1984, para 5.13.

he or she had the belief (the 'persuasive' or 'legal' burden of proof).[23] This situation effectively reverses the presumption of innocence, because the accused is required to prove his or her innocence. The Commission believes that this is undesirable, particularly in view of the very serious nature of the offences.

56. It has been argued that it is appropriate to place on an accused the burden of proving a defence where it relates to a matter peculiarly within the accused's knowledge. Belief as to age would certainly fall within this category. The argument was considered by the Criminal Law Revision Committee in England, which concluded:

> It seems to us that it is entirely justifiable to impose a burden on the defence for this purpose but that purpose is sufficiently served by making the burden an evidential one.[24]

The Commission agrees.

Proposal 8

If the accused wishes to raise the defence of belief as to the child's age, he or she should be required to introduce evidence supporting the existence of the belief, but should not be required to prove its existence. The prosecution should have the onus of proof that the defence does not apply.

(h) The defence of prior sexual experience

57. A person charged with an offence under section 49, taking part in an act of sexual penetration with someone aged 16 or 17, may raise the defence that the other person had previously willingly taken part in an act of sexual penetration with a person other than the accused.

58. There appear to be two grounds for the existence of this defence:

- that the essence of the offence is protection of virginity
- that a young person who has previously engaged in sexual activity does not need or deserve protection from exploitation by older people.

59. The Commission does not accept the validity of either of these arguments. It sees the primary purpose of the law as being to protect young persons from relationships which might be very harmful. The fact that a young person has previously willingly had sexual intercourse should not be regarded as automatically rendering them immune from harm on a subsequent occasion, or make them any less deserving of the community's interest in their welfare. As the Neave Report concluded: "If the law is concerned to protect young people this defence seems unjustified".[25]

Proposal 9

The defence that a person had previously taken part in an act of sexual penetration with a person other than the accused should be abolished.

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23. I. Heath and J. Hassett, Indictable Offences in Victoria, Director of Public Prosecutions, Victoria, 1983, 105. Heath and Hassett believe that it 'appears to be clear that the onus rests on the accused,' but cite one commentator, I.W. Elliot, as putting a contrary view. The same issue arises in relation to the defence of reasonable belief that the accused was married to the child.
24. Eleventh Report Evidence (General) HMSO London, 1972, 90.
25. Inquiry into Prostitution, Final Report, 274.

(i) Time-limit on prosecution

60. Section 48(6) provides that a person cannot be prosecuted for an offence against that section if the child involved was aged 12 or over, and more than 12 months has elapsed since the offence was committed. This provision is sometimes referred to as the '12/12 warranty' against prosecution. Section 49(6) similarly provides that a prosecution cannot be commenced against a person for an offence against that section if more than 12 months has elapsed since the offence was committed.

61. This provision originally reflected concern to protect girls from pregnancy outside marriage. If after the passage of a reasonable period of time an incident involving sexual intercourse did not result in pregnancy, it was seen as of insufficient seriousness to invoke the criminal law. More recently, the English Criminal Law Revision Committee has given its support for retention of the equivalent provision on other grounds.

> In our opinion a period of limitation for this offence — which is only exceptionally found in the case of indictable offences — is of value in that it ensures that a prosecution may not be brought in respect of events that have become stale.[26]

62. The Commission is not convinced by this reasoning. Why should it be presumed that events a year old are 'stale', or any more stale in the case of these sexual offences than others which have no time limitations such as rape, causing bodily injury, and theft? Sexual activity between a child and an older person may not come to light for lengthy periods because of the child's fear or shame about revealing the relationship. The older person may have been well-known to the child — for example, the de facto husband of the child's mother, or a teacher — and the sexual incidents may have occurred over a lengthy period. Many people carry disturbing memories of childhood contact with older people well into adulthood.[27] A child might want a prosecution to occur when, after a lapse of time, he or she feels confident enough to report the matter. Prosecution should not be barred by an arbitrary time-limit.

Proposal 10

The time-limits on prosecuting offences against sections 48 and 49 should be repealed.

II Offences involving non-penetrative sexual conduct

(a) Indecent Assault

63. An indecent assault is an assault accompanied by circumstances of indecency, that is, contravening contemporary standards of decency, or sexual modesty and privacy. The Commission examined the offence in relation to adults in its report, Rape and Allied Offences: Substantive Aspects, and recommended no substantive changes.

64. There is one major difference between the offence in relation to adults and in relation to children — the element of consent. If the person against whom the act

26. Criminal Law Revision Committee, Fifteenth Report, Sexual Offences, para 5.22.
27. See for example, Child Sexual Abuse, a report based on the Adelaide Rape Crisis Centre Incest Phone In, March 1983, Office of Minister of Health, Adelaide, 1984, 57-61.

was committed is sixteen or more, the prosecution must prove lack of consent. If the person is younger than sixteen, his or her consent is not a defence to a charge unless the accused was married to the person, or reasonably beleved he or she was married to the person, or the accused reasonably believed the person was older than sixteen, or the accused was not more than two years older than the person.

65. The Commission's tentative view is that it is undesirable and unnecessary to retain the offence in its present form. Ordinarily, the offence of assault is concerned with non-consensual conduct.[28] In relation to adults, indecent assault is in practice limited to non-consensual activity. It seems desirable to have distinct offences where they can be distinguished by a criterion of such importance as the presence or absence of consent. Analogously, sexual penetration of children should not be treated as a sub-category of rape by deeming the issue of consent to be irrelevant for certain age groups. Such an approach would dilute the conceptual coherence of the offence of rape as an offence concerned with protection of sexual autonomy.

66. Reviewing the English offence of indecent assault, which is similar to Victoria's, the Criminal Law Revision Committee stated that the use of a provision deeming consent to be irrelevant created a 'legal fiction':

> The fiction is in itself a source of confusion and its removal will clear the way for a plainer description of what the offence should be.[29]

The Criminal Law Revision Committee proposed that indecent assault should be restricted to cases where consent is lacking, and other cases dealt with as the offence of gross indecency. The Commission agrees with this approach. It would mean that cases where the accused touches a child with the child's consent (presently indecent assault), and cases involving other kinds of indecent conduct, such as the accused inducing a child to touch him or her (presently gross indecency) would be covered by a single offence. The Commission sees no compelling reason to retain distinct offences for these forms of conduct.

Proposal 11

The offence of indecent assault should be restricted to non-consensual acts.

(b) Gross Indecency

67. Section 50(1) of the Crimes Act provides that:

> A person who in public or in private —
>
> (a) commits, or is in any way a party to the commission of, an act of gross indecency by, with or in the presence of a person under the age of sixteen years; or
>
> (b) procures or attempts to procure the commission of an act of gross indecency by, with or in the presence of a person under the age of sixteen years —
>
> is guilty of an indictable offence and, subject to sub-section (2), liable to imprisonment for a term of not more than two years.

68. Sub-section (2) empowers a court to imprison a person for up to three years if

28. There are exceptions, for example a person cannot consent to being seriously injured.
29. para 7.4

the child was under the offender's care, supervision or authority, or the offender had previously been convicted of an offence of gross indecency.

69. It is a defence to a charge of gross indecency if the child consented and

- the accused reasonably believed the child was over sixteen; or
- the accused was not more than two years older than the child; or
- the accused was married to the child, or believed on reasonable grounds that they were married to each other.

70. The precise meaning of an act of gross indecency is unclear. Aspects of its definition determined by courts are:

- the offence can be committed without any overt act by the accused. In *R v Speck* the facts were that an eight year old girl put her hand on the accused's penis and left it there for five minutes. He remained inactive 'with the exception of an erection,' and did nothing to encourage her. It was held that in the circumstances his passive behaviour could be construed as an invitation for continuation of the act.[30]
- 'gross' is an adjective to indecency and describes the kind of indecency involved. It means that 'something more than indecency' has to be proven, and is to be interpreted according to the 'ordinary' meaning of the word.[31]

Should there be a more precisely defined offence?

71. The ambit of the offence is extremely unclear because there is no legislative or judicial definition of the specific situations which can be described as 'gross' or 'indecent'. The Canadian Committee on Sexual Offences Against Children and Youths concluded that the equivalent offence in that country should be repealed, and replaced by a number of specific offences:

- abuse of a position of trust by sexual touching of a person under 18
- genital exposure for a sexual purpose to a person under 16
- inviting a child under 14 to touch another persons' body for a sexual purpose
- touching persons under 16 in the anal or genital region for a sexual purpose.

72. These offences would exclude certain types of behaviour which have been experienced as sexually abusive by respondents to a South Australian survey.[32] They include:

- "talked 'dirty'"
- "watched her"
- "child made or asked to show genitals"
- "made to bath jointly"
- "took photos"

30. [1977] Crim LR 689.
31. R v Whitehorse [1955] QWN 76.
32. Child Sexual Abuse, a report based on the Adelaide Rape Crisis Centre Incest Phone-In, March 1983, 38-40.

- "forced to watch sexual intercourse and other sexual behaviour between adults".

It is quite possible that a jury hearing a case involving evidence of such conduct would find that it was grossly indecent.

73. The fact that conduct which is experienced as sexually abusive can take many forms led the English Criminal Law Revision Committee to reject the idea of replacing the offence of gross indecency by one explicitly describing certain forms of physical conduct:

> A test based upon the areas of a girl's body that it would be an offence to touch (and the areas of a man's body that it would be an offence for him to incite a girl to touch) would be inadequate. There are activities with children not involving genital contact, or contact with the anus or with a girl's breasts for that matter, which ought to remain covered by the criminal law because of the circumstances of gross indecency in which they occur. In our opinion this is best done by an offence which describes the essence of the act, namely its gross indecency, rather than concentrates upon anatomical detail.[33]

The Commission agrees with this approach. It would be difficult to specify every form of conduct which might be indecent, and experienced as sexually abusive. That is unsatisfactory in that the offence has an uncertain ambit, but it reflects the fact that the conduct to be prohibited may take many forms. It is appropriate for a jury to consider the facts in each case in the light of contemporary standards. There is no alternative concept, such as 'sexual purpose' which would give substantially greater certainty, without jeopardising the desirable flexibility of the present offence.

Proposal 12

A broad offence covering indecent behaviour with or in the presence of children should be retained.

Should grossness remain a requirement for the offence?

74. The English Criminal Law Revision Committee rejected the suggestion that the offence should be described in more modern terms by replacing 'gross' with 'serious'. It felt that there had been no difficulties in the interpretation of the term, and the introduction of new, and untried term, such as 'serious' indecency, would create new uncertainty in the law. In the Committee's view:

> the use of an expression such as 'gross indecency' gives a clear statement of the type of conduct at which the offence is aimed, with the right connotation of social disapproval, and, moreover, in terms which are readily understandable by the public.[34]

75. The Commission agrees that there is little to be gained by simply changing the name of the offence unless there is evidence that it is misleading, or unless it is intended to significantly change its nature. However, the term 'gross' could safely and advantageously be removed from the offence. If the term does restrict the ambit of the offence to certain kinds of indecency, there is no apparent reason in principle to maintain such a restriction. All acts of indecency with children should be pro-

33. para 7.19.
34. para 7.16.

hibited. If the term is simply describing the fact that an indecent act with a child is inherently considered to be gross, it is redundant. The Commission can see no adverse consequences for the courts flowing from repeal of the term. Judges and juries will simply have one less term of uncertainty to interpret.

76. If the term 'gross' were deleted the offence would be clearly concerned with all indecent acts involving children under sixteen, not just those which might be considered to be qualitatively more serious. It would therefore completely cover the conduct prohibited by the offence of indecent assault in relation to children under sixteen. In turn, that would ensure that the proposed repeal of section 44(3) of the Crimes Act, which creates the offence of indecent assault against children even where there is consent, could be effected without the possibility of decriminalizing presently prohibited conduct.

Proposal 13

The term 'gross' should be repealed from the offence of 'gross indecency'.

What ages should the offence cover?

77. The sexual penetration offences protect a child up to age eighteen, but gross indecency — and the 'consensual assault' offence in indecent assault — are concerned with children only to age sixteen. Arguably, this is an anomaly which should be remedied. Sexual activity often becomes progressively more intimate as a relationship develops. Therefore, if the law wishes to effectively prohibit sexual penetration in a particular relationship, it should also prohibit activity which is likely to be a prelude to penetration. The English Criminal Law Revision Committee took this view:

> it would clearly be unrealistic for sexual familiarities to be allowed at an age younger than the present age of consent for sexual intercourse as this would be bound to undermine the protection afforded by the law against unlawful sexual intercourse.[35]

78. As well, it can be argued that the anomaly establishes an unacceptably divergent legal response to two forms of the one problem, child sexual abuse. While sexual activity with older children which does not involve penetration might be less serious than that involving acts of penetration, it is nonetheless of sufficient gravity to be the subject of an offence.

79. The alternative point of view is that the anomaly is reasonable, because the criminal law should only be concerned with the more serious situations — all sexual activity in relation to the youngest children, and only sexual penetration in relation to the older ones. Intimate touching not involving intercourse is common, does not have consequences such as pregnancy, and should be acceptable, or at least not subject to criminal sanctions.

80. The Commission sees merit in the arguments that the offence of indecency should be extended to cover the same age groups as the sexual penetration offences. However, it has reservations about extending the offence to complement the present section 49 offence, on the grounds argued earlier that from the time a child reaches 16 the prohibited relationships should not be described in terms of age difference. The offence of indecency should not be extended to complement an unsatisfactory

35. para 7.5.

sexual penetration offence. The offence should, however, extend to complement the proposed offence of sexual penetration between a person and a child aged 16 in that person's authority.

Proposal 14

It should be an offence for a person to commit an indecent act with another person aged 16 who is in the person's care, supervision or authority.

What should the defences to a charge of indecency be?

81. The defences to a charge of gross indecency are the same as for a charge of taking part in an act of sexual penetration with a child aged 10 — 15, that is, unless the accused was married to the child, or that the accused reasonably believed he or she was married to the child, or that the child was sixteen or more, or that the accused was not more than two years older than the person. It is appropriate that the same defences should apply where the same age group is involved. If the Commissions proposals for changes to the defences in relation to the sexual penetration offences are accepted, the same changes should be made to the defences to the offence of gross indecency, or the proposed offence of indecency.

Proposal 15

The defences to a charge of indecency should be the same as those applying to a charge of sexual penetration with a child of the same age.

What is the appropriate sentence for the offence of indecency?

82. The present sentence structure for the offence of gross indecency is appropriate — two years imprisonment, or three years where the child is in the offender's care, or the offender has previously been convicted of the offence. However it should be reviewed if the proposed offence of indecency were to replace concensual indecent assault in relation to children. The offence of indecent assault carries a penalty of up to five years, and ten years if there are aggravating circumstances (such as the infliction of serious violence, or the offender being armed with an offensive weapon).

83. One approach to combining the offences in relation to children would be to increase the penalty for the offence of indecency to five years. That should be adequate to cover virtually all conduct included in the present offence of indecent assault where a child was consenting. Where the child was not consenting, a lengthier sentence might be desirable in the most serious cases, for example involving violence or the use of a weapon. In such cases, it would seem appropriate to prosecute on a charge of indecent assault, as the circumstances should make it relatively straightforward to establish that there was no consent. The following proposal is made on the presumption that the offence of indecent assault is confined to non-consensual conduct, and that consensual behaviour previously prosecuted as indecent assault is prosecuted under the proposed offence of indecency with children.

Proposal 16

The maximum penalty for the offence of indecency with children should be five years.

B. Offences Related to Sexual Activity with Children

84. The offences examined in this part are those which prohibit conduct which can be regarded as facilitating sexual activity with children. The sexual activity need not necessarily be between an offender and the child involved. The offences are outlined in Table 2, and the next section.

TABLE 2: OVERVIEW OF THE OFFENCES RELATED TO SEXUAL ACTIVITY WITH CHILDREN

Offence	Penalty	Statutory Defence
Abduction of Child under 18 for Sexual Penetration — s.57 Crimes Act	Up to 5 years imprisonment	
Procuring Child under 18 for Sexual Penetration outside Marriage — s.59 Crimes Act.	Up to 5 years imprisonment.	
Householder who permits use of premises for Sexual Penetration of a Child under 18 — s.60 Crimes Act	Up to 10 years imprisonment if child under 13; up to 5 years if child aged 13–17	The legislation provides no statutory defences to these offences.
Soliciting Act of Sexual Penetration or Gross Indecency with Child under 18 under Offender's Care, Supervision or Authority — s.18 Summary Offences Act	$5000 or imprisonment for one year.	

(a) Outline of the offences

85. Section 57 of the Crimes Act provides that:

> A person who, with intent that another person under the age of eighteen years should take part in an act of sexual penetration outside marriage with him or any third person or generally takes the other person, or causes the other person to be taken, out of the possession and against the will of his father, mother or other person having the lawful charge of him is guilty of an indictable offence and liable to imprisonment for a term of not more than five years.

'Takes' does not necessarily mean physically, against the child's will. For example, the equivalent English offence has been found to be committed where a girl voluntarily left home as a result of the persuasion of the accused, met him at a place some distance from her home and went away with him willingly.[36]

36. R v Kipps (1850) 4 Cox CC 167; R v Manktelow (1853) 6 Cox CC 143. cited in Bourke's Criminal Law Victoria [1350].

86. Section 59 of the Crimes Act provides that:

> A person who procures or attempts to procure-
>
> (a) a person under the age of eighteen years to take part in an act of sexual penetration outside marriage with a third person in any part of the world;
>
> (b) any other person to take part in an act of sexual penetration outside marriage with a person under the age of eighteen years;
>
> is guilty of an indictable offence and liable to imprisonment for a term of not more than five years.

Initially, courts interpreted 'procure' as involving moral corruption: only 'decent' girls could be procured. It has more recently been held that the jury is entitled to give the word an ordinary meaning. In a trial the judge's direction to the jury referred to the word 'recruit', and on appeal this was held to be acceptable.[37]

87. Section 60 of the Crimes Act provides that:

> A person who, being the owner or occupier of any premises or managing or acting or assisting in the management of any premises, induces or knowingly allows any unmarried person under the age of eighteen years to enter or remain upon the premises for the purposes of taking part in an act of sexual penetration is guilty of an indictable offence and-
>
> (a) if the other person is under the age of thirteen years, liable to imprisonment for a term of not more than ten years; or
>
> (b) if the other person is of or above the age of thirteen years but under the age of eighteen years, liable to imprisonment for a term of not more than five years.

All that is necessary to prove the offence is that the occupier knew a person of the requisite age was on the premises for the purpose of taking part in an act of sexual penetration. In *R v Webster* a woman was convicted of an offence under the equivalent English law where, with her knowledge and without her objection, her daughter brought a man home and they were found together in bed by a policeman. It did not matter that the place was the girl's home and she was not using the premises merely to have intercourse.[38]

88. Section 18(c)(1) of the Summary Offences Act provides that:

> A person who solicits or otherwise actively encourages another person to take part in an act of sexual penetration or gross indecency with him or another person or generally is, if—
>
> (a) the second-mentioned person is under the age of eighteen years; and
>
> (b) the second-mentioned person is, either generally or at the time of the solicitation or encouragement, under the care, supervision or authority of the first-mentioned person—
>
> guilty of an offence.
>
> Penalty: $5000 or imprisonment for one year.

37. R v Broadfoot [1976] 3 All ER 752.
38. (1885) 16 QBD 134 cited in Bourke's Criminal Law Victoria [1425].

(b) Are these offences desirable in relation to legal sexual conduct?

89. A key element which these offences have in common is that they are concerned with both legal and illegal acts of sexual penetration and gross indecency involving people under 18. For example, a mother who permitted her 17 year old son to have intercourse with his 18 year old friend at home would be committing the offence, while neither of the the sexual partners could be convicted of an offence under the child sexual offences.[39] The Commission believes that the criminal law should be concerned only with illegal sexual activity with children. It should not be a criminal offence to permit an activity which itself is not against the law. The primary purpose of the laws relating to sexual offences against children is to protect them from harmful, exploitative relationships. If a particular relationship is not seen as harmful and exploitative, and therefore not illegal, it is anomalous to regard encouraging or permitting that relationship as deserving of criminal punishment. If a relationship might be harmful even though not against the criminal law, then other means of intervention should be used.

90. In so far as the offences cover conduct in relation to the commission of sexual offences against children, they appear to duplicate other, general offences. These include:

(i) Section 323 of the Crimes Act:
A person who aids, abets, counsels or procures the commission of an indictable offence may be tried, indicted or presented and punished as a principal offender.

(ii) Section 321 of the Crimes Act:
. . . If a person agrees with any other person or persons that a course of conduct shall be pursued which will involve the commission of an offence by one or more of the parties to the agreement, he is guilty of the indictable offence of conspiracy to commit that offence.

(iii) Section 321 G (1) of the Crimes Act:
. . . Where a person . . . incites any other person to pursue a course of conduct which will involve the commission of an offence by—

(a) the person incited;

(b) the inciter; or

(c) both the inciter and the person incited—

if the inciting is acted on in accordance with the incitor's intention, the incitor is guilty of the indictable offence of incitement.

These offences appear effectively to remove the necessity for the offences related to sexual activity with children, where that activity constitutes an offence. There are also other relevant offences. If a child is taken or detained against his or her will for the purpose of sexual penetration, this could be covered not only by section 57, but by the common law offences of false imprisonment or kidnapping, or the statutory offences of child stealing or kidnapping. Section 60 has sometimes been used to prosecute brothel operators who have young girls working for them, but this con-

39. The pre 1981 equivalents of sections 57 and 60 referred to 'unlawful' carnal knowledge, but unlawful in this context has been held to mean illicit, that is outside the bond of marriage, not forbidden by law: R v Chapman [1959] 1 QB 100; [1958] 3 All ER 143 cited by Bourke's Criminal Law Victoria [1349].

duct could be prosecuted under section 7(1) of the Prostitution Regulation Act. This provides that a person who owns, occupies or manages any premises must not allow a child to enter or remain on the premises for the purpose of taking part in an act of prostitution.

Proposal 17

Sections 57, 58 and 60 of the Crimes Act, and section 18 of the Summary Offences Act, should be repealed.

C. Provisions dealing with attempted offences and assault with intent to commit offences.

91. Each of the Crimes Act sections creating a sexual penetration offence against a child, and the section creating the offence of incest, contains a provision making it an offence to attempt to commit that offence, or to assault a child with intent to commit that offence. These additional offences are unnecessary. Section 421(3) of the Crimes Act states that the allegation of an offence is to be taken as including an allegation of an attempt to commit that offence. Section 31 of the Crimes Act states that an assault with intent to commit an indictable offence is an offence. These general provisions adequately cover the conduct prohibited by the specific offences.

Proposal 18

The provisions in the Crimes Act containing the offences of attempts to commit sexual offences against children and the offence of incest, and the provisions containing the offences of assault with intent to commit these offences, should be repealed.

D. Provisions establishing alternative verdicts

92. Section 425 of the Crimes Act provides that where a jury is not satisfied that an accused is guilty of a specified sexual offence with which he or she is charged, but is satisfied that the person committed another specified offence, it can find him or her guilty of that offence. The offences specified in the legislation are rape, rape with aggravating circumstances, taking part in an act of sexual penetration with a child aged under 10, or over 10 and less than 16, and an offence against section 52 (incest). The specified alternative verdicts of particular relevance to children can be summarised as follows:

Section 425(1)
Charge: rape
Alternative verdicts: assault of child aged under 16 with intent to take part in an act of sexual penetration.

Section 425(3) and 425(4)
Charge: sexual penetration with child under 10, or aged between 10 and 16
Alternative verdicts: assault with intent to take part in an act of sexual penetration with the child; indecent assault; assault occasioning bodily harm; common assault.

Section 425(5)
Charge: incest
Alternative verdicts: indecent assault; assault with intent to commit the offence; assault occasioning bodily harm, common assault.

93. In its report on the substantive offences relating to adult victims, the Commission drew attention to section 421(2) of the Crimes Act, which provides that:

> Where, on a person's trial on indictment or presentment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged therein, but the allegations in the indictment or presentment amount to or include (expressly or by necessary implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence.

94. The Commission concluded that the general nature of this provision means that there is no need for specific alternative verdict provisions in relation to sexual offences against adult victims.[40] It takes the same view in relation to child victims.

Proposal 19

The alternative verdict provisions in section 425 of the Crimes Act should be repealed.

40. Report No 7 Rape and Allied Offences: Substantive Aspects, 37.

4. REPORTING SEXUAL ABUSE

> Very young children cannot talk about their miseries, cannot tell us if they are being battered, burned or neglected. Older children are sometimes afraid to talk, or out of loyalty to their parents they will not talk. Ultimately, therefore, it is a community responsibility to take action when a child is in danger.[1]

95. Prompt reporting of suspected abuse, to a person authorized to intervene, may be essential step in preventing further maltreatment. Victoria seeks to encourage people to report by providing protection for anyone who, believing on reasonable grounds that a child is at risk, notifies the police or Community Services Victoria.[2] By law notification does not constitute a breach of professional etiquette, ethics or standards of conduct, the notification cannot provide a basis for litigation, and the identity of the reporter must be treated as confidential. The protection covers notification of any kind of abuse, not just sexual abuse.

96. All other states except Western Australia have so-called mandatory reporting laws, which require specified persons to report suspected child abuse, whether sexual abuse or not, to designated agencies, generally the police or the statutory social welfare department, or both. In the Northern Territory the legislation applies to any person, in Queensland it applies to medical practitioners, and in New South Wales, Tasmania and South Australia to a variety of specified professionals with responsibility for the care of children. The sanctions for failure to report differ considerably. The harshest maximum is provided in New South Wales, where the penalty can be a fine of up to $1,000, imprisonment for up to 12 months, or both. At the other extreme is Tasmania, which provides no penalty at all. Overseas legislatures vary in their approaches to mandatory reporting. For example, in the United States of America all states have mandatory reporting laws on child abuse; England does not.

97. Mandatory reporting has been the subject of frequent review and continuing debate in Australia and overseas. The Royal Commission on Human Relationships summarised the arguments for and against legislation as follows:

1. Royal Commission on Human Relationships, Final Report Volume 4, AGPS, Canberra, 1977, 183.
2. Section 31 Community Welfare Services Act 1970.

Arguments in favour of legislation requiring certain persons to notify suspected cases of child abuse are that this would:

(a) denote a public commitment and enable the community to become involved;

(b) provide protection for the person reporting a suspected case;

(c) make it easier for the doctor not to have a choice in the matter and to explain his action to the parents; to learn that it is too complicated a field for any professional to deal with alone;

(d) ensure that a process can be set in train leading to counselling for the parents and protection for the child;

(e) define the boundaries of responsibility and help ensure the rebattering does not occur.

On the other hand there are several arguments against compulsory notification:

(a) it might discourage parents from seeking medical attention for children they have injured;

(b) it might jeopardise patient-doctor relationships and patient-doctor trust;

(c) it is virtually unenforceable (experience in the field of venereal disease reporting shows that doctors only report about one in ten cases);

(d) it does not guarantee effective services and might lull people into believing the problem has been solved.[3]

98. The Royal Commission concluded that while the first priority was to establish good preventative and supportive services, 'it is essential that all cases be brought to the notice of the appropriate agency'.[4] To this end, it believed that there should be a duty on specified persons to notify cases of suspected abuse.

> Detection or suspicion of child abuse and notification to an appropriate agency are essential to set in train the necessary inquiries, emergency action, treatment, counselling and support of the family. Compulsory reporting laws by themselves do not resolve the problem of child abuse, nor do they prevent it. Probably the strongest argument in favour of reporting laws is that reporting to a designated agency (rather then the police) helps ensure control of knowledge. Many tragedies have occurred because too many people knew too little.[5]

99. Both the New South Wales Child Sexual Assault Task Force and the South Australian Task Force on child sexual abuse recommended extending the range of persons obliged to report, and the respective governments accepted the recommendations.[6] In Queensland, Sturgess noted that an extension of the groups covered by the requirement to report was already mooted in that state, and expressed the view that teachers should be included.[7]

3. Final Report Volume 4, 189.
4. Final Report Volume 4, 189.
5. Final Report Volume 4, 190.
6. Report of the New South Wales Child Sexual Assault Task Force, 157; Final Report of the South Australian Government Task Force on Child Sexual Abuse, 87.
7. An Inquiry Into Sexual Offences Involving Children and Related Matters, 135.

100. The issue whether Victoria should have mandatory reporting requirements has been a contentious one for some time. The Carney Committee recommended that Victoria retain the voluntary reporting system, and suggested that reporting practice should be enhanced by a community education program for members of the public and professionals, and the development of 'protocols' (agreed sets of procedures) between agencies to deal with child maltreatment.[8] Hewitt disagreed. She took the view 'that there are strong persuasive arguments in favour of mandatory reporting if combined with adequate provision of services'.[9] The Victorian Council of Social Services (VCOSS) co-ordinated community consultation on the Hewitt report and concluded:

> On the weight of numbers, merit of argument and representativeness of responses, the indications favour retention and tightening of accountability under the current reporting code in Victoria.[10]

101. However, VCOSS's detailed outline of the source of the submissions suggests that respondents were fairly evenly divided about mandatory reporting, and that support and opposition were both from a wide range of sources. The VCOSS report does not indicate how it assessed the merit of the respective arguments.

102. A recent survey in Melbourne of public attitudes about child abuse found strong support for professionals to be legally obliged to report if they suspected or were aware a child was being abused. The level of support was much greater in relation to reporting sexual abuse (76.4% in favour) than physical abuse (63.8%).[11]

103. The Commission's terms of reference do not permit it to consider the question of mandatory reporting of child abuse in all its forms. It is clear that some of the key reservations about the impact of mandatory reporting of all forms of abuse do not apply to mandatory reporting of sexual abuse. For example, a parent who hits a child may or may not be regarded as abusive. The action might be regarded as a reasonable form of discipline. There can be no doubt that a parent who has sexual intercourse with a child has committed a serious crime. Whatever the strength of the arguments about reporting abuse generally, the only question for the Commission is whether there should be mandatory reporting of sexual offences against children.[12] The tentative, majority view is that there should be a statutory duty on specified persons with professional responsibility for the care or welfare of children under 16 to notify cases where they reasonably suspect sexual abuse has taken place to an authority with a statutory role to protect children. The kinds of persons who should be required to report these offences are medical practitioners, teachers, and infant and child welfare workers.

104. In advancing this proposal the Commission is aware that there appears to be no research which reliably documents the impact of mandatory reporting. It has commissioned research into the attitudes of sexual assault centre staff to reporting, and to mandatory reporting, but this cannot provide conclusive evidence about the effects of the introduction of a law requiring reporting. Conflicting claims are made by researchers and commentators. A study of health professionals in Victoria con-

8. Child Welfare Practice and Legislation Review, 221.
9. Child Sexual Assault Discussion Paper, 174.
10. Community Responses to Child Sexual Assault Discussion Paper, 39.
11. J. Martin and S. Pitman, Public Attitudes About Child Abuse, Family Action, Melbourne 1987, 12.
12. The Brotherhood of St. Laurence is undertaking a literature and data review to assess the impact of mandatory reporting on child abuse generally. It is anticipated that this will be completed early in 1988. The Commission has been advised that there is little literature specifically concerned with sexual abuse.

cluded that 'the introduction of compulsory reporting in the State of Victoria would not markedly increase professional's willingness to report'.[13] In some jurisdictions, reporting has increased dramatically following the introduction of mandatory reporting. However, it is difficult to determine to what extent the increase is attributable to the reporting laws, as distinct from other influences such as publicity.[14] It is perhaps even more difficult to establish whether the adverse consequences feared by some, such as families not seeking medical treatment, have occurred.

105. The Commission believes that in respect of sexual offences the benefits of mandatory reporting outweigh the possible disadvantages associated with it, always provided that it forms part of a package of services dealing with child sexual abuse. Sexual abuse of children is apparently widespread. The damage done to victims is incalculable. There is a need for a clear community expression of opposition to this conduct, and in favour of it being dealt with promptly and effectively. Those with special caring roles in relation to children should be made clearly aware of their responsibility to put the protection of the child above all other considerations. A teacher or a doctor is not qualified to assess whether the interests of a sexually abused child are best served by formal intervention by an authorised agency, and are not trained to provide the assistance which abused children and their families might need.

> . . . [D]octors must learn to work with other professional persons in the area of child sexual abuse. Successful work in the area of child sexual abuse rarely can be undertaken by a single practitioner, regardless of his or her training, and it is certainly not exclusvely the province of the medical profession . . . Only in rare cases is the general practitioner likely to be the person who is best equipped to undertake primary case management of the sexually-abused child and his or her family.[15]

106. Nor do teachers, doctors and other professionals have the authority to intervene to prevent further abuse if an offender refuses to co-operate with their efforts to assist a child. Yet in many cases, as Hewitt found, professionals are reluctant to involve government authorities in the problem, because they feared that incarceration of the offender alone would not be beneficial to the child.[16]

107. But the failure to alert agencies authorised to intervene may leave the victims exposed to continuing abuse. Heath's study of incest cases in Victoria contains some illustrations of this fact, including these two:

> (17) Two victims (sisters) told their mother and achieved nothing. They then told two teachers at school, again this achieved nothing. They then both ran away from home, went to a relative's house and told him. He went to the police.
>
> (18) The victim told her mother, the mother spoke to a doctor, who then saw the offender and referred him to a psychiatrist. The molestation continued. The mother saw a social worker who spoke to the husband. The molestation continued. Finally the mother saw the social worker again who this time

13. D. Shamley, L. Kingston, and M. Smith, 'Reporting Laws on Child Abuse: Health Professionals Knowledge of and Attitudes Towards Child Abuse Laws and Case Management, in Victoria', Australian Child Family Welfare, Vol. 9, No. 1, 1984, 3.
14. See for example T. Vinson, 'Child Abuse and the Media', paper presented at Sydney University Institute of Criminology Seminar, 15 April, 1987.
15. R. Adler, 'Doctors and the Sexually-Abused Child', The Medical Journal of Australia, Vol. 145, October 6, 1986, 305.
16. Child Sexual Assault Discussion Paper, 1984.

suggested she see the police, which she did. While all this was going on the child was subjected to an extra ten months of molestation.[17]

On the basis of his overall review of the cases, Heath concluded:

> From this material, it can be seen that qualified 'helpers' often did try to help, but were frequently misguided in their attempt. I reiterate that the proper and only effective method of stopping incestuous behaviour is to alert the police. Stringent action must be taken and taken immediately.[18]

108. The reluctance to report is based in part on people's apprehension that, directly or indirectly, the criminal justice system may cause more harm to the victim than the abuse. This apprehension must be addressed by the kinds of reform proposed in this paper, such as making it less stressful for children to give evidence, and establishing an alternative to imprisonment for offenders. The community must also be assured that the relevant authorities are sensitive to the needs and wishes of victims, and that reporting will not automatically invoke the full machinery of the criminal justice system if that is assessed as likely to be more damaging than other forms of intervention. The aim of a law requiring people to report is not to increase the rate of criminal prosecution. It is to ensure that cases where there are reasonable grounds for concern are investigated by agencies with the necessary skills and power to determine whether the concern is well-founded, and to take action to ensure that victims are protected from further abuse.

109. Reform of the criminal justice system, and the availability of effective services for victims and their families, will probably do more to encourage reporting than a mandatory reporting law. However, the Commission is of the view that the package of reforms should include mandatory reporting. Undoubtedly in some cases professionals make a rational and informed judgment that it is not in the interests of a child to report. In other cases, the decision might be well-intentioned, but without adequate information at all. In some cases, the reluctance of professional and other persons to report instances of sexual abuse may arise from self-interest, unconnected with the interests of the victim children. For example, a survey 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).[19] A statutory duty to report may counterbalance the reluctance to get involved, where it is based on such considerations.

110. The people upon whom the duty to report is imposed must be advised about the law and what is expected of them under it. Guidelines should be issued to the affected groups to explain the kinds of circumstances which should lead them to make a report. That would assist those people, and help to avoid the possibility that protective services will be overwhelmed by a vast number of reports of unfounded, vague suspicions. That would only deflect resources from assisting the genuine cases of abuse. If there is an increase of reporting on well-informed grounds, the community must ensure that adequate resources are devoted to responding effectively.

17. I. Heath, Incest: A Crime Against Children, Director of Public Prosecutions, Victoria, 1985, 38.
18. Page 39.
19. D. Shamley, 'Reporting Laws on Child Abuse', Australian Child Family Welfare Vol. 9, No. 1, 1984.

111. Apprehensions about mandatory reporting by people in Victoria do not appear to be widely shared in the States where it has existed for some years. The New South Wales Child Sexual Assault Task Force proposal to extend the class of persons required to report was endorsed with no reservations by 78. 8% of respondents to a community consultation paper, and opposed by only 5.9%. The proposal was also overwhelmingly endorsed by respondents among the types of persons proposed to be included in the duty to report. The proposal included extending the reporting duty to teachers and school counsellors; it was endorsed without reservations by 86. 2% of education-based respondents, and opposed by none. The proposal included imposing a duty to report on child care workers; it was endorsed without reservations by 84. 6% of child-care based respondents and opposed by 3.8%.[20]

112. A 1985 survey of South Australian general practitioners found very broad support for the legal obligation to report suspected cases to statutory authorities: 21.8% of respondents felt it should be extended to more groups; 64. 8% wanted it left as it was; 4. 7% wanted it restricted to fewer groups; and 4.7% wanted it abolished altogether.[21] As a Victorian doctor has commented on this study:

> These findings may partially allay the anxieties of those general practitioners who are opposed to mandatory notification of child abuse to statutory authorities.[22]

113. The Commission accepts the argument made by some critics of mandatory reporting that it may have relatively little direct impact on the behaviour of many professionals. But even if only a few professionals change their behaviour as a result, that would mean a few more children than at present having their plight brought to notice and, hopefully, being given worthwhile assistance. Mandatory reporting does not guarantee that effective services will be available, but neither does voluntary reporting. The failure to report, to break the silence, provides the victims with no help at all.

Proposal 20

There should be a statutory duty on doctors, maternal and child health nurses, professional child care workers and school teachers to notify Community Services or the police if they have grounds to suspect on a reasonable basis that a child under 16 years of age who is in their care or under their supervision has been sexually abused.

The penalty for failure to notify should be a maximum of $5000.

20. Report of the New South Wales Child Sexual Assault Task Force, Appendix C, 67.
21. H. R. Winefield and S. N. Castell-McGregor, 'Experiences and Views of General Practitioners Concerning Sexually-Abused Children', The Medical Journal of Australia, Vol. 145, October 6, 1986, 311-313.
22. R. Adler, 'Doctors and the Sexually-abused Child', The Medical Journal of Australia, Vol. 145, October 6, 1986, 305.

5. PROCEDURE

114. This chapter examines the laws relating to certain procedures between the time an offence is reported to the police, and the trial of a person accused of having committed it. Three major issues of concern have been identified — medically examining a complainant to obtain forensic evidence; protecting a complainant from intimidation or possible further abuse by the accused person; and the rules for the conduct of the preliminary examinations which determines whether an accused person is to be committed for trial.

A. Medical Examination of the Child

115. Prompt medical examination of a child who may have been sexually abused may be important for the discovery of forensic evidence. The general rule is that a doctor cannot examine a person without that person's consent. A child's right to give or withhold consent is unclear:

> There is no Victorian law which fixes the age at which a minor has legal capacity to either give or withhold consent to treatment in her own right.[1]

116. A doctor would not generally conduct an examination of a young child[2] without the consent of a parent or guardian. In certain cases, particularly those involving intrafamilial abuse, that consent may not be given. A parent's refusal to give consent might be circumvented if the child was admitted to the custody of the Community Services Department, in which case the Department's Director-General would become the guardian. The Community Welfare Services Act provides that the Director-General may order that any 'person lawfully in his custody be examined to determine his medical physical or mental condition.'[3] This appears to be a greater

1. Fitzroy Legal Service, The Law Handbook, Nelson Wadsworth, Melbourne, 1987, 234.
2. A child's legal capacity to consent to medical treatment, without parental consent, is determined not by age but by assessing whether the child is capable of forming a sound and reasoned judgment on the matter involved in the consent. The Victorian branch of the Australian Medical Association advises its members that a person aged 16 or more may be assumed to have full capacity to consent: Fitzroy Legal Service, The Law Handbook, Nelson Wadsworth, Melbourne, 1987, 234.
3. S.199

power than a parent has. The Children and Young Persons Bill presently before Parliament aims to restrict this power, by providing that the Director — General's rights, powers and duties are the same as a 'natural guardian would have'.[4]

117. The powers in the present legislation appear to be adequate to secure a medical examination of a child, despite the parents' refusal, in cases where a Court is satisfied that a protection application was generally necessary to prevent further abuse of the child. If, however, the abuse is unlikely to recur, for example, because the offender is a stranger who has left the area, a protection application would not appear to be appropriate. In that case, a parent's refusal of consent could prevent a medical examination being conducted, which in turn might jeopardise the successful prosecution of the offence.

118. The right of a child to give or withhold consent must be respected. The Commission's tentative view is that the community should also accept the general right of parents to be involved in determining whether or not a child in their custody should be medically examined to gather forensic evidence. The parents' responsibilities and powers are particularly significant in the case of an infant or very young child. A medical examination may be very intrusive and distressing for a child, and the parents' judgement as to the best interests of the child should be given due weight.

Proposal 21

There should be no change to the laws requiring a parent's or guardian's consent for a child to be medically examined in relation to suspected or alleged sexual abuse.

B. Protection of Victims

119. It is important to ensure that a child who has allegedly been sexually abused is protected from possible further abuse and intimidation by the offender as soon as the situation is known to the relevant authorities. There are three main means by which this can be done:

(i) *Custody and Bail Conditions* If the alleged offender has been charged, a court can order that he or she be kept in custody until the matter has been tried, or release him or her on an undertaking of bail. There is a presumption that bail will be granted except in certain circumstances, such as the court being satisfied that there is an unacceptable risk that the accused on bail will commit new offences or interfere with witnesses. Under section 5 of the Bail Act 1977, a court may stipulate special conditions of bail if it considers these are necessary to ensuring that the alleged offender does not commit an offence while on bail, or endanger the safety or welfare of the public. In a case of alleged intrafamilial sexual abuse for example, a court might consider it necessary to impose a condition of bail that the alleged offender should leave the home.

(ii) *Intervention Orders* The recently proclaimed Crimes (Family Violence) Act 1987, empowers a Magistrates' Court to make an 'intervention order' in respect of a person alleged to have assaulted, harassed or molested a family member, where the person is likely to do so again. The order may impose any restrictions on the person that the court believes are necessary or desirable, including prohibiting him or her from remaining in the aggrieved family member's house. The court may

4. Clause 100(1)(b)

make an order if it is satisfied 'on the balance of probabilities,' that the alleged conduct took place. It is not necessary for a criminal charge to have been laid against the person. A complaint for an intervention order may be made by a member of the police force, the aggrieved family member or, in the case of a child under 18, a parent of the child.

(iii) *Protection Orders* The Community Welfare Services Act provides that Community Services Victoria may take into care a child under 17 who has been maltreated, or is in danger of maltreatment. 'Maltreatment' includes sexual abuse. The child may then be placed in accommodation, such as a special reception centre. Following the Carney Committee review, the Government has prepared new child protection legislation which provides that a child is in need of protection if he or she —

> has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from harm of that type.[5]

The Bill retains the option of a child being removed from his or her home as a form of protection.

120. There is considerable community concern that taking an abused child into care may effectively mean punishing the victim rather than the offender. As Hewitt reported:

> Consultation showed that it is widely considered unjust that in these cases it is almost invariably the child who is removed from the family home, and not the alleged offender.[6]

The Commission agrees. A child at risk of sexual abuse should not be removed from the home unless it is inappropriate to remove, instead, the person suspected of committing the abuse. One circumstance where it might be made appropriate for the child to move is where that is the wish of the child. If the alleged offender is charged, it should generally be a condition of bail that the person leave the home. Hewitt recommended that this be done in all cases of intrafamilial sexual abuse.[7] If the person is not charged but sufficient evidence is available for an intervention order to be made, that course should be considered before a care order is made. The Commission has suggested to the Attorney-General's Department that the Children and Young Person's Bill 1987 should be amended to provide that a child should not normally be removed from the home unless an intervention order requiring an alleged offender to leave the home is inappropriate.

Proposal 22

Proceedings to remove a sexually abused child from his or her home should not be undertaken unless it is not possible or inappropriate to require an alleged offender to leave the home.

C. Preliminary Examinations

121. Virtually all the offences considered in this paper must be, or can be, tried

5. S.41(a) Children and Young Persons Bill.
6. Child Sexual Assault Discussion Paper, 176.
7. Child Sexual Assault Discussion Paper, 1977

before a jury. A jury trial of a criminal offence is normally preceded by a preliminary examination, commonly referred to as a committal hearing. This takes place in a Magistrates' Court. Its purpose is to assess whether the prosecution evidence is of sufficient weight to warrant a trial. If not, the accused is discharged, and neither the accused nor the victim are subjected to a stressful trial.[8] The community is spared the considerable costs associated with a trial.

122. Unless the accused pleads guilty, a victim has to face the prospect of presenting evidence and being cross-examined at both the preliminary examination and the trial. Because the experience is particularly stressful for a victim of a serious sexual offence, preliminary examinations of cases involving rape, attempted rape and assault with intent to rape are governed by special rules. These provide that:

- the evidence of the complainant is presented in the form of a written statement ('hand-up brief') but he or she may still be cross-examined in person if requested by the defence;
- the prosecution case must be presented by a legally qualified person;
- there are time-limits within which the preliminary examination must be commenced;
- there are restrictions on who can be present in the court while the complainant testifies or the complainant's evidence is presented.

123. The Magistrates' Courts Bill which is presently under consideration proposes that these special rules should also apply to preliminary examinations of charges involving offences against sections 47 (sexual penetration with a child under 10), 48 (sexual penetration with a child between 10 and 16), 50 (gross indecency) and 52 (incest) of the Crimes Act.[9] The Commission supports the application to these offences of three rules: requiring the use of hand-up briefs; initiating proceedings within special time-limits; and restricting who can be in the court during the examination of the complainant's evidence. Some commentators however strongly believe that the hand-up brief procedure is not necessarily in the best interests of some complainants, particularly children, if they are cross-examined by the defence. In the view of these commentators it is of benefit to a complainant to be settled into the courtroom environment and processes by being examined by a sympathetic prosecutor, before being confronted by cross-examination. They therefore argue that the use of a hand-up brief should be left to the prosecution's discretion. The Commission would welcome further comment on this issue.

124. The Commission tentatively differs from the Magistrates' Courts Bill proposals to extend the application of the special rules in two respects: it believes there is doubt about the necessity for the prosecution case to be conducted by a legally qualified person, and it believes that the rule restricting who can be present during the complainant's evidence should be extended to charges relating to section 49 offences (sexual penetration of a child aged 16-17).

(a) Who should present the prosecution case?

125. The rule requiring legally qualified practitioners in rape cases was introduced

8. The Director of Public Prosecution or a crown prosecutor is entitled to pursue the matter further by 'direct presentment' but rarely does so if the prosecution case is unsuccessful at the preliminary hearing.
9. Draft proposals for a Bill to establish the Magistrates' Court of Victoria, 1987.

to help ensure the application of legal rules designed to protect victims from improper cross-examination as to their sexual history.

> . . . Strong opinions have been expressed, by persons well qualified to know, that in some cases the complainant at the committal hearing in respect of a rape offence, is cross-examined in such oppressive and repetitive detail, and at such inordinate length, as to suggest that an attempt is being made to intimidate her. Furthermore, even where there is no ground for any such imputation, the strains upon her are sometimes allowed to be aggravated by a failure to require strict compliance with the rules of evidence, relating to her previous sexual activities. Those rules . . . make up a complex body of law, and their proper application often requires the drawing of difficult distinctions of law and fact. But the justices who hear, and the prosecutors who conduct, rape committal proceedings, though they are in some cases very experienced, commonly lack the advantage of an education in the law.[10]

126. The special rules restricting cross-examination as to sexual history do not presently apply to the offences relating to children.[11] However, examination as to sexual history does not frequently happen in cases involving sexual offences against children, because in these cases the question of whether there was consent is not generally at issue. Therefore there do not appear to be grounds to extend the rule on this basis. There do not appear to be other compelling grounds in relation to these offences. Some commentators believe that all prosecutions should be conducted by qualified legal practitioners, but the arguments for this are of a general character, for example about the general knowledge and skills of qualified practitioners, not specifically about sexual offences against children.

127. Hewitt suggested that using qualified legal practitioners to conduct examinations of sexual offences against children should be considered as a means of providing increased expertise in the prosecution of those cases. However, the alternative she suggested would be for sexual offences against children to be prosecuted by specially trained police prosecutors.[12] The Commission agrees that this should be an alternative. There are two kinds of expertise required: knowledge of the rules of procedure and evidence, and ability to work well with children. A requirement that qualified legal practitioners are used does not ensure the presence of both kinds of skill. The expertise required to work effectively with child witnesses is not automatically gained in legal training and general legal practice. If the police are able to specially train prosecutors in the relevant areas of legal knowledge as well as in examining child witnesses, there is no reason to suppose that they will perform inadequately. Both qualified legal practitioners and specially trained police should therefore be acceptable.

Proposal 23

The prosecution case should be presented by legally qualified practitioners or specially trained police prosecutors.

(b) Who should be present in the court?

128. In its report on procedure and evidence the Commission recommended that

10. Law Reform Commissioner, Rape Prosecutions (Court Procedures and Rules of Evidence), Melbourne 1976, 21.
11. The Commission proposes that the rules should apply: See Chapter 6.
12. Child Sexual Assault Discussion Paper, 83.

the restrictions on who can be present when complainants give evidence should apply to all sexual offences, including those against children, on the grounds that matters which are distressing or embarrassing to a complainant could arise in any such case. As well, the Commission recommended that the complainant and the defendant should each be allowed as of right to have present a person of their choice who is unconnected with the proceedings.

Proposal 24

The restrictions on who can be present in court at a preliminary examination when the evidence of a rape complainant is presented should apply to all sexual offences, including those against children.

(c) Should the other special rules apply to section 49 cases?

129. The Commission tentatively agrees with proposals of the Magistrates' Court Bill that the other rules should not be extended to the hearing of an offence against section 49 as the offence is at present. Changes to the offence were proposed in Chapter 3 which would change the nature of the offence and modify the Commission's comments on the special rules.

130. (a) *The rule requiring a hand-up brief to be used.* The Bill proposes that a section 49 offence should be triable summarily (that is, in a Magistrates' Court), which the Commission agrees is appropriate. There is no preliminary examination for cases tried summarily, and complainants not have to appear twice to give evidence. It would be wasteful to require the prosecution to prepare hand-up briefs if a large number of cases were to be heard summarily. In that event, the prosecution should be left discretion to use a hand-up brief where it appears desirable.

131. (b) *Time-limits.* The quickest possible conclusion of a prosecution is obviously in the interests of both the complainant and the accused in any criminal matter. The special time-limits governing the pre-trial process in cases involving rape and allied sexual offence reflect the likelihood of particularly great stress felt by complainants in such cases. There may be additional factors where young children are involved, or any child where the alleged offender is a family member:

> The child may have been removed from the family home, and his or her recall of the events on which the charge is based may become confused or faded or complicated with feelings of guilt or resentment for the disruptions to the life of the family.[13]

132. The major argument against giving sexual cases priority is that the effect may be to delay the prosecution of serious non-sexual cases, which are also likely to be a source of great anxiety for both the complainants and accused, and which could give rise to other ill-effects for the latter if they are in remand. The New South Wales Child Sexual Assault Task Force took the view that proceedings involving persons in custody should receive top priority, and child sexual assault cases should have the next priority. The South Australian Task Force similarly believed that while cases involving children should be given 'some priority...this priority cannot be absolute as other priorities in listing, such as priority to persons held in custody, must also be retained'.[14]

13. Child Sexual Assault Discussion Paper, 154
14. Final Report of the Task Force on Child Sexual Abuse, 205

133. While the Commission's view is that the interests of the welfare of children are so strong that cases involving them should generally be given priority by specifying time-limits, these grounds are not as compelling in relation to section 49 cases. The offence presently covers sexual penetration involving a person aged 16-17, and someone more than 5 years older. There may or may not be a broader relationship between the parties which the older person has abused or exploited, so the sexual relationship may be completely consensual. Such cases will be stressful for the complainant, but greater priority must be given to people whose liberty has been taken away pending their cases being heard. The balance of considerations would be different if the Commission's proposals are accepted to change the nature of the offence to abuse of power and authority, including intrafamilial abuse. Strict time-limits would then be appropriate.

Proposal 25

The rules requiring the use of hand-up briefs and imposing special time-limits for rape cases should not apply in relation to offences under the present section 49 of the Crimes Act. The rules should apply if the offence is amended, to cover sexual abuse of authority, as proposed in this paper.

(d) Should other changes be made to the preliminary examination of sexual offences t against children?

134. There are three additional areas in which reforms might be made to further assist child complainants in preliminary examinations of sexual offence cases: the method used to take and present statements at the preliminary examination; restricting cross- examination; and reducing confrontation between the child and the accused person in the court-room.

(i) Videotaped statements

135. If the complainant is a young child it may be difficult to compile a statement and have it sworn to present in the hand-up brief. In South Australia, where the hand-up procedure is also used, the Task Force on Child Sexual Abuse noted the problem that a child victim may be too young to make a sworn statement, which creates difficulties for admitting his or her evidence. Following the recommendations of the Task Force, the Government passed legislation enabling a child's statement to be taken in the form of a written document prepared by a member of the police force at an interview with a child, or in the form of a videotape record of an interview with the child, accompanied by a written transcript.[15] This procedure should be available in Victoria, as a practical measure to assist in the presentation of a child's evidence. There are significant evidentiary issues involved with the admission of video-recording as evidence at a trial, and these are considered in the next chapter. The proposal being made here raises no equivalent matters of principle.

Proposal 26

It should be possible for a child's statement in a hand-up brief to be presented in the form of a written statement by a police officer who interviewed the child, or a transcript of a video-recorded interview.

15. S.5(2)(c) Justices Act Amendment Act 1987.

(ii) Should the right to cross-examination be restricted?

136. If the accused wishes, the complainant may be required to attend the preliminary examination for cross-examination. A magistrate is entitled to set aside a notice requiring a witness to attend, but only if it would be 'frivolous, vexatious or oppressive in all the circumstances to require the witness to attend'.[16]

137. The South Australian requirements are more restrictive. The complainant is allowed to be cross-examined only if the court is satisfied there are special reasons why he or she should be. Successful applications for complainants to appear for cross-examination are said to be infrequent.[17] The South Australian Child Sexual Abuse Task Force considered that in some cases there would be advantages for the prosecution and a child victim, such as preparation for the trial processes, if the child could be called to give evidence at the preliminary examinations.

> However, it was acknowledged that there would be strong public resistance to any change which would require child victims of sexual abuse to undergo the court process on more than one occasion .[18]

138. With respect to adults, the Commission recommended in its report on procedure and evidence that similar restrictions on cross-examination should not be adopted in Victoria.[19] Further restrictions on the cross-examination of complainants might significantly undermine the effective assessment of the evidence, which is the primary purpose of the examination. If that happened, it might disadvantage the victims themselves. If the strength of the prosecution's key witness has not been thoroughly tested, accused people may be far less likely to plead guilty, and thereby spare the complainant the need to be examined at the trial. The same considerations are relevant in relation to sexual offences against children.

Proposal 27

The restrictions on the right to cross-examine child complainants in cases of sexual offences should not be extended.

(iii) Reducing confrontation between the complainant and the accused

139. Being in the presence of the accused may be a significant source of distress to any complainant. It is likely to be particularly so for children in sexual abuse cases, where the accused is commonly a person occupying a position of authority over the child. In the report on procedure and evidence the Commission made recommendations which should contribute to reducing confrontation between complainants and accused persons. The recommendations relate to the conduct of the trial as well as to the preliminary examination of a sexual offence case, and are therefore considered in detail in the next part of this paper.

16. S.45B(7), Magistrates (Summary Proceedings) Act (1975).
17. Information provided to Commission by police and legal practitioners in South Australia.
18. Final Report of the Task Force on Child Sexual Abuse, 214.
19. Paragraphs 32-40; dissenting view, paragraph 41.

6. EVIDENCE

140. There are three major types of issues relating to the rules governing how evidence is presented in cases involving sexual offences against children: the rules under which children are accepted as witnesses, and the manner in which their evidence is assessed; the restrictions on admitting evidence about children's complaints that they have been abused; and the difficulties children face in giving evidence under present arrangements. This chapter looks at each of these issues in turn.

A. Rules relating to accepting children as witnesses and their testimony

141. Unless they are known to be mentally impaired, adults are generally presumed to be competent to testify, that is, acceptable to a court as able to give reliable evidence. Adults give evidence on oath or, if they object to swearing on oath, by making a solemn affirmation to tell the truth.[1] Children are not automatically presumed to be competent. There is no specific age of a child set by law below which a court must assess rather than presume. There are two ways in which a child is regarded as 'competent'. The first is if he or she understands the nature of the oath. In that case the child, like an adult, can give sworn evidence by taking the oath or by making a solemn affirmation. A child who does not understand the nature of an oath cannot give evidence on oath or affirmation, but he or she may give unsworn evidence if:

> 'in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth'.[2]

142. In the case of both sworn and unsworn evidence the child's testimony is currently regarded by the law as significantly more unreliable than that of adults. When a child gives sworn evidence, a judge is required to warn the jury that there is a risk in acting on the evidence unless it is corroborated, that is, supported by other evidence. However, a jury can convict on a child's evidence 'if it is convinced that the witness is telling the truth'.[3] There is conflicting authority on whether the judge is

1. There is also special provision for an accused to give unsworn evidence or to make an unsworn statement to a court. Section 23(1) Evidence Act 1958.
2. Section 23(1) Evidence Act 1958.
3. D. Byrne and J. Heydon, Cross on Evidence, Butterworths, Sydney, 1986, para 8.28.

required to give a warning as a matter of law, or as a rule of practice, that is, whether it is at the discretion of the judge.[4] Unsworn evidence is subject to a significantly stricter requirement. Section 23(2) of the Evidence Act stipulates that a person cannot be convicted of any offence on the basis of the unsworn evidence of a child aged under fourteen, 'unless that evidence is corroborated by some other material evidence in support thereof implicating him'. The House of Lords has held that unsworn evidence admitted by virtue of this section cannot be corroborated by the unsworn evidence of another child, but only by sworn evidence.[5] The Australian Law Reform Commission disagrees. In its view unsworn evidence can be corroborated by any other kind of evidence.[6]

143. The oath test and the corroboration rules have been strongly questioned by recent inquiries and research, and have been the subject of reform in jurisdictions with legal systems similar to Victoria. The following sections consider the criticisms and whether reform is desirable in Victoria.

Criticisms of the oath test

144. In its recent review of the law of evidence the Australian Law Reform Commission (ALRC) was extremely critical of the use of the oath by courts as an indirect test of competence to give evidence.

> 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.[7]

It recommended a test for competence 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.[8]

The ALRC recommended that, in determining these matters, a court should be entitled to inform itself as it thinks fit.[9]

145. The ALRC test is similar to the test for admitting unsworn evidence where a child does not understand the nature and consequences of an oath. It differs in that the ALRC regards 'cognitive development' as a more appropriate basis for assessing competence than 'intelligence'.

> 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 . . . It would be preferable to frame a test of competency in terms of cognitive development, rather than in terms of intelligence—ie to assess the child's actual stage of mental functioning rather than to concentrate on his potential.[10]

146. The South Australian Child Sexual Abuse Task Force agreed that the 'Oath

4. Cross on Evidence, para 8.28. G
5. Director of Public Prosecutions v Hester [1973] AC 296, [1972] 3 AllER 1056.
6. The Law Reform Commission Report No.26 Interim, Evidence Volume 2, AGPS, Canberra, 1985,334.
7. The Law Reform Commission Report No.26 Interim Evidence Volume 1, AGPS, Canberra, 1985, 129.
8. The Law Reform Commission Report No 38 Evidence, G AGPS, Canberra, 1987, 150.
9. Report No.38 Evidence, 150.
10. Report No.26 Evidence, Volume 1, 130.

Test is not a satisfactory means of assessing competency and supports the use of a cognitive competency test along the lines envisaged in the Australian Law Reform Commission Report.'[11] The New South Wales Child Sexual Abuse Task Force reached a similar conclusion. It favoured:

> the enactment of a section which provides a uniform test for the reception of the evidence of children in all criminal proceedings. The relevant test should be that the child is possessed of sufficient intelligence to justify the reception of evidence and understands the duty of speaking the truth. Thus, the child's evidence admitted in accordance with this test would not be characterized as unsworn evidence and would not require corroboration.[12]

Criticism of the corroboration rules

147. In recent years there has been a significant body of research findings which, in the words of the Canadian Committee on Sexual Offences Against Children and Youths, 'indicate that the assumptions on which the special requirement of corroboration for young children's evidence are based, are largely unfounded'.[13] The New South Wales Child Sexual Assault Task Force and Sturgess inquiry in Queensland reached similar conclusions on the basis of the evidence put before them. For example, Sturgess asked psychologists at the University of Queensland to review research into criticisms of the reliability of children s evidence. Their advice was:

> "Criticism 1: Children do not have the mental capacity necessary to record accurate impressions of an occurrence".
>
> "Conclusion: Although it is common to view children's memory capacity as improving as they advance through a series of developmental stages psychological research indicates that children's memory may, under certain circumstances, be superior to adults. Careful questioning, particularly when the situation of material to be recalled is familiar to them, can result in children's recall that is equal to or better than adults".
>
> "Criticism: 2: Children are highly suggestible and easily misled".
>
> "Conclusion: The assertion that children are not more suggestible than adults would have surprised early researchers. But it appears that age is not the crucial variable affecting suggestibility. If an event is interesting and understandable to both adults and children, then no age differences are found in suggestibility. But when events are vague or outside one's experience then people of all ages are suggestible".
>
> "Criticism 3: Children cannot distinguish between fantasy and reality."
>
> "Conclusion: Children do not consistently confuse fantasy with reality although they may have trouble discriminating their intentions (and the intentions of others) from their actions."[14]

On the basis of information of this kind Sturgess, the New South Wales Child Sexual Assault Task Force and the Canadian Committee on Sexual Offences Against Chil-

11. Final Report of the Task Force on Child Sexual Abuse, 223.
12. Report of the New South Wales Child Sexual Assault Task Force, 182.
13. Sexual Offences Against Children Volume 1, 69.
14. An Inquiry into Sexual Offences Involving Children and Related Matters, 106. The psychologists' advice referred mainly to children aged over 6 to early adolescence, as there has been little research of this type with younger children.

dren and Youths[15] recommended repeal of the corroboration rules in their respective jurisdictions. The recommendations have been accepted by the New South Wales and Canadian governments and are under consideration in Queensland. In contrast, the South Australian Task Force on Child Sexual Abuse recommended retention of both the corroboration warning rule for sworn evidence, and the corroboration requirement for unsworn evidence, but the report does not outline what led it to this conclusion.[16] The South Australian Government has however recently introduced legislation which would remove the corroboration requirement in the case of a child who gives unsworn evidence, and who meets a test of cognitive development. It provides that:

> If a young child, who is not obliged to submit to the obligation of an oath, is to give evidence before a court and—
>
> (a) the child appears to the judge to have reached a level of cognitive development that enables the child—
>
> (i) to understand and respond rationally to questions; and
>
> (ii) to give an intelligible account of his or her experiences;
>
> (b) the child promises to tell the truth and appears to understand the obligations entailed by that promise, unsworn evidence of the child will be treated in the same way as evidence given on oath.[17]

Conclusion

148. The Commission accepts the strength of the criticism of the oath test and the corroboration rules. The competence of any witness to give evidence should be assessed by the test proposed by the ALRC. A child's understanding of the oath should not be a criterion by which the credibility of his or her evidence—and therefore the need for corroboration—is determined. If a child is assessed as competent to testify, it should be up to the magistrate, or judge and jury, to decide the credibility of the evidence. Alternatively, if it is felt that unsworn evidence should be given less weight, and require corroboration, the unsworn evidence of another child should be admissible as corroborative evidence.

149. Some commentators suggest that removal of the corroboration requirement may have an adverse consequence for complainants:

> Because corroboration is not required for a conviction, then a fortiori it is not required for the police to lay a charge. There will be strong pressure on police (by virtue of the philosophy of the new legislation, and especially the non-corroboration change) to lay a charge wherever there is a complaint. . . There will be a further increase due to the statutory obligation to report cases. . . . the upshot must be—if acting for an accused who denies such an allegation —that the process of cross-examination must be far more searching than before this legislation was enacted . . . (A)s the case may turn on the testimony of one person, the defence lawyer must focus close attention on the credibility of that testimony.[18]

15. Sexual Offences Against Children Volume 1, 69.
16. Final Report of the Task Force on Child Sexual Abuse, 224.
17. Section 5, A Bill for an Act to amend the Evidence Act 1929.
18. T.Nyman, 'Some implications for defence lawyers in child sexual assault' New South Wales Law Society Journal, April, 1986, 28-9.

150. The Commission acknowledges that there may be good reasons for apprehension. However, the aim of repealing the statutory corroboration requirement is to remove the barrier to certain cases being prosecuted at all. It is, of course, legitimate for the credibility of complainants in such cases to be rigorously examined, as it is in relation to any other complainants.

Proposal 28

(a) A child should be competent to give evidence if he or she understands that he or she is under an obligation to tell the truth, and can give a rational reply to questions about the facts in issue.

(b) Competence should be assessed by the court, as it thinks fit.

(c) The category of unsworn evidence, as an alternative to evidence on oath or affirmation, should be abolished.

(d) The rules that a child's testimony must be corroborated, and that a judge must warn a jury about relying on the uncorroborated testimony of a child, should be repealed. A judge should retain the discretion to comment upon the reliability of the evidence of a child witness in each case where the circumstances of the case make comment appropriate.

B. The status of out-of-court statements as evidence

151. If a child who has been sexually interfered with tells another person that he or she has been sexually interfered with, the other person would not generally be permitted to testify in court about what the child said, as evidence that the incident occurred. Nor would the child be permitted to testify about the statement as evidence of its truth. The barrier to admission of evidence about statements made out-of-court by a complainant is the hearsay rule, which has been defined as follows:

> An assertion other than one made by a witness while testifying in the proceedings is inadmissible as evidence of the truth of that which was asserted.[19]

152. One of the primary reasons for excluding evidence of a complainant's statement is that it might have been concocted by the complainant to support an untrue allegation. Further, if the person who made the statement is not available to testify, there is a danger that other people testifying about the statement might have misunderstood what was said at the time. The hearsay rule does not totally prohibit the admission of evidence about what the complainant said or did after an alleged offence was committed, but the exceptions have strict conditions attached to them.

Res gestae rule

153. Evidence of what a person said or did in relation to an alleged offence may be admissible if it forms part of the res gestae that is, if it is regarded as being sufficiently contemporaneous with the event as to virtually be part of the event. Thus, for example, the spontaneous statement or exclamation of a child shortly before, during or soon after being sexually abused could be admitted. 'Contemporaneity' does not have a precise definition. It is a matter for the court to determine whether the time

19. Cross on Evidence, 728.

elapsed between the offence and the complainant's conduct or statement is sufficiently short to preclude the possibility of concoction or distortion. In *R v Christie*[20] a statement made within a half hour of an alleged indecent assault on a young boy was held not to be part of the res gestae. Another condition for the admission of such evidence is that there must be other evidence of the event as well as the statement.[21]

Recent complaint rule[22]

154. In sexual cases, evidence of the fact of a complaint about an incident, and its terms, are admissible if the complaint was made at the first reasonable opportunity after the alleged offence (a complaint made a week later has been accepted) and that it was made voluntarily, not in response to leading questions. The evidence is admitted under the so-called recent complaint rule.

155. There are three significant limitations on evidence admitted under the rule.[23] First, the evidence is admitted to show only the complainant's consistency, and therefore credibility, not to prove the truth of what is alleged. Second, if the complainant is not called as a witness, only the fact that a complaint was made and not its terms is admissible. Third, although evidence of a complaint is admitted to buttress the reliability of a complainant's testimony, it does not constitute corroboration as required by law, because it is not independent of the witness to be corroborated.

Should there be a new hearsay exception?

156. It is clear that the conditions restricting the admission of evidence of out-of-court statements mean that in many cases such evidence will be excluded. Consequently, those cases will be more difficult, if not impossible, to prosecute successfully. As an American Court has stated:

> Often the child victim's out-of-court statements constitute the only proof of the crime of sexual abuse. Witnesses other than the victim and perpetrator are rare as people simply do not molest children in front of others . . . Most often the offender is a relative or close acquaintance who has the opportunity to be alone with the child . . . Depending on the type of sexual contact, corroborating physical evidence may be absent or inconclusive.... The child may be unable to testify at trial due to fading memory, retraction of earlier statements due to guilt or fear, tender age, or inability to appreciate the proceedings in which he or she is a participant. Therefore, these hearsay statements are usually necessary to the proceedings as the only probative evidence available.[24]

157. In response to concern that the strict hearsay rules were excluding important and reliable evidence, a number of states in the United States of America have created statutory hearsay exceptions in the prosecution of sexual offences against children. For example, Florida has legislated to provide that an out-of-court statement made by a child with a physical or developmental age of 11 or less is admissible 'unless the source of information or the method or circumstances by which the

20. [1914] AC 544.
21. Cross on Evidence, 989-990.
22. The Commission considered the rule in its report, Rape and Allied Offences—Procedure and Evidence and, despite considerable reservations, has recommended its retention.
23. K. Warner, Child Witnesses in Sexual Assault, Law Reform Commission of Tasmania, 1987, 39-40.
24. *State v Myatt*, 237 Kan. 17, 697 p. 2d 836 (1985) G cited in M. Graham, 'Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions', University of Miami Law Review, 40:19, 1985, 22.

statement is reported indicates a lack of trustworthiness'. The legislation requires the court to conduct a hearing outside the presence of the jury to determine whether the 'time, content, and circumstances of the statement provide sufficient safeguards of reliability'. It provides guidance as to the factors to be taken into account by the court in making its determination, including the child's age, the nature and duration of the abuse, and the relationship of the child to the accused. For a statement to be admitted the child must testify or, if he or she is unavailable as a witness, there must be evidence corroborating the occurrence of the offence. Grounds for a child being unavailable include 'substantial likelihood of severe emotional or mental harm' by participating in the proceedings, where additional factors are present.[25] The accused must be notified at least 10 days before the trial that a statement will be offered as evidence and given the contents of the statement and notice of the circumstances surrounding the statement which indicate its reliability.

158. The South Australian Task Force concluded that there should be a hearsay exception in that state, but was divided on the question of whether hearsay evidence should be admitted even if the child is unavailable as a witness. The majority was of the view that the child should testify or be available. The Government has accepted its recommendation to that effect, and has recently introduced legislation into the Parliament to provide that:

> (1) . . . where the alleged victim of a sexual offence is a young child,[26] the court may, in its discretion, admit evidence of the nature and contents of the complaint from a witness to whom the alleged victim complained of the offence if the court, after considering the nature of the complaint, the circumstances in which it was made and any other relevant factors, is of the opinion that the evidence has sufficient probative value to justify its admission.
>
> (2) Such evidence may not be admitted at the trial unless the alleged victim has been called, or is available to be called, as a witness.[27]

159. In its review of the laws of evidence, ALRC concluded that the rules governing the admissibility of hearsay evidence were not based on a coherent policy framework and unnecessarily excluded evidence of substantial probative value, and has recommended major reform of the rules. While the proposals are not concerned specifically with children's evidence in sexual offence cases, implementation would have the effect of admitting some evidence covered by the special hearsay exceptions. Under the ALRC proposals, hearsay evidence would be admissible whether or not the person who made the out-of-court statement was available to testify. Where the person who made the out-of-court statement is not available, evidence about the statement is to be admissible if it 'was made at or shortly after the time when the asserted fact occurred and in circumstances that make it unlikely that the representation (statement) is a fabrication'.[28] The ALRC proposes that where the person who made the statement is available to testify, evidence about the statement should be admissible if it was made at a time when the occurrence of the asserted fact was fresh in the person's memory.

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25. 'Unavailability' is defined in terms of a range of factors, including that the person refuses to testify despite a court order, and that the witness has suffered a memory loss such that he or she would be an ineffective witness. The legislations in Florida and some other states is outlined in M.H.Graham, 'Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Abuse Prosecutions', 40 University of Miami Law Review, 19.
26. 'Young child' is defined as aged 12 or less.
27. Section 6, Bill for an Act to amend the Evidence Act 1929.
28. Report No.38, 164.

160. The Commission will shortly review the ALRC report to assess whether its recommendations should be adopted in Victoria. Whatever outcome that might produce for the hearsay rules generally, it is desirable in the context of the present review to consider whether there should be a special hearsay rule for out-of-court statements by child complainants. This will allow consideration of whether particular criteria should apply for the admission of such evidence, which might not apply in the case of adults.

162. Hearsay rules reflect a proper concern that an accused person should not be convicted on evidence of questionable reliability. The issue here is whether the restrictiveness of the present rules is appropriate, or excessive. The Commission has tentatively concluded that a court should be given greater flexibility in assessing whether evidence about an out-of-court statement is sufficiently reliable to be admitted, by the creation of a new hearsay exception. The new exception should include certain safeguards, along the lines of those specified in Florida. First, the evidence should be admitted only with the leave of the court after it has assessed the evidence in the absence of the jury. This will prevent the admission of matter which a court finds unacceptable, but which may have a prejudicial effect on the defendant. Secondly, the legislation establishing the exception should indicate factors a court should take into account in assessing the admissibility of the evidence. This will help ensure rigorous assessment and promote consistency between cases. Thirdly, evidence about an out-of-court statement should not be a sufficient basis for a conviction. If the complainant is not available to be cross-examined about the statement and therefore about the offence itself, then another person should not be permitted to testify about the statement unless there is other evidence that the offence occurred. The grounds for unavailability of a child should include that the child's emotional or mental health would be seriously at risk if he or she participated in the trial.

Proposal 29

(a) A new rule should be established to permit the admission of evidence of out-of-court statements by children about sexual abuse. The evidence should be admitted to prove the truth of what is alleged.

(b) The legislation establishing the rule should indicate the considerations which a court should take into account in determining whether the circumstances of the statement justify its admission.

(c) Evidence of a statement should not be admitted unless the child is available to testify or, if the child is not available, there is evidence to corroborate that the alleged offence occurred.

(d) Grounds for unavailability should include substantial likelihood that the child will be severely emotionally or mentally harmed.

C. Making it easier for children to give evidence

162. It is frequently argued that the process and rules of the criminal justice system make it very difficult for many children, particularly young ones, to give effective testimony. The assessment that a child may be too intimidated by the trial process to testify influences decisions by police and prosecutors about discontinuing the investigation and prosecution of individual cases. Instances where a child has been

unable to begin or continue to give evidence in a trial are common. Some people argue that the experiences of the legal processes may even seriously psychologically harm some children.[29]

163. These considerations have led to a variety of changes in practices and procedures in many jurisdictions designed to make it easier for children to give evidence. Some measures, such as acquainting child witnesses before a trial with how a court looks and how a trial is conducted, do not require legislation and raise no issues of principle. Others, such as the admission of testimony recorded prior to the trial, are the subject of considerable debate in relation to the possibility of prejudice to the right of an accused person to a fair trial. This section of the paper examines a range of changes which have been adopted or proposed.

(a) Preparation of Witnesses

164. The courtroom and legal proceedings can be intimidating to adults, and are likely to be even more so for children. Research suggests that preparing children for stressful experiences such as hospitalisation can help reduce their anxiety and assist them to cope with the experience, and may therefore be useful in preparing them for appearance in court.[30] The preparation of witnesses for their participation in court is outside the scope of the Commission's reference. However, it welcomes initiatives which have been drawn to its attention. For example, staff of the office of the Director of Public Prosecutions in Victoria help prepare child victims of sexual offences as a matter of course:

> In cases where sexual offences against a child under the age of 16 years are alleged, legal staff adopt measures designed to alleviate the young person's anxieties. An invitation is extended to parents or guardians to attend with the child at the Office to have explained to them the procedures adopted in a trial hearing and to answer any related questions. Efforts are made to dispel fears, correct misapprehensions and to explain the roles of the participants in any trial. Where practicable a visit to a vacant court room is made in an endeavour to familiarise the witness with the surroundings.[31]

(b) Modification of courtrooms

165. Various measures have been adopted or proposed to modify courtrooms, and the appearance and location of the parties, in order to make the setting less intimidating for child witnesses. These include:

- judicial and other legal personnel dispensing with traditional garb such as wigs and robes: this was proposed a decade ago by the Royal Commission on Human Relationships[32] and adopted in a recent English case for the first time in a criminal trial in that country.[33]
- courts using furniture of appropriate size for children: this was recommended by the New South Wales Sexual Assault Task Force.

29. Warner, Child Witnesses in Sexual Assault, 17-21, examines the research and describes anecdotal accounts, and concludes that the evidence of adverse effects is scarce and not conclusive.
30. Sturgess, 101-103.
31. Annual Report of the Office of the Director of Public Prosecutions for the year ended 30th June 1987, 14-15.
32. Final Report Volume 5,220.
33. Times 21 October 1987.

> Some court rooms are by their very design intimidating and frightening. The chairs in the witness box and the height of the witness box itself allow adults to sit comfortably in the witness box and be seen, whereas children cannot. In these circumstances, children are often required to stand for lengthy periods whilst giving evidence. Furniture should be used which will allow children to be accommodated.[34]

- positioning the child and the accused so that they do not look at each other: in the English case referred to above, the child complainants gave evidence from behind a screen which concealed them from the accused, but not from the jury, counsel and the judge.

166. The New South Wales Government has recently introduced legislation to permit the use of 'alternative arrangements' for the giving of evidence by child victims of 'personal' assault offences. These arrangements are 'such as the Attorney-General considers appropriate to reduce the trauma for or intimidation of the child when giving evidence'.[35] The provision applies to children under 16. The types of alternative arrangements which may be prescribed are illustrated as 'seating arrangements, including the level at which people are seated and the people in the child's line of vision', and 'the premises where the proceedings are conducted'.

167. The use of certain alternative arrangements, such as screening the child from the accused, might be regarded as reflecting on the accused's innocence or guilt. To counter this possibility the legislation provides that the judge may, at the request of the accused,

> inform the jury that the use of the alternative arrangement is standard procedure required by law; and
>
> warn the jury not to drawn any inferences or give the evidence any greater or lesser weight because of the use of the alternative arrangements.

168. Legislation is not required to permit courtroom modification. In its report on procedure and evidence in rape and other sexual offence trials, the Commission recommended that the Secretary of the Attorney-General's Department take account of reducing the risk of unnecessary confrontation between the complainant and the accused as a factor in courtroom design. If this recommendation is accepted, discussion between the Secretary of the Department and the judiciary could be promptly convened to consider changes to existing facilities as well as the design of new courts. Certain changes to existing facilities, such as moveable screens, could be made available very quickly. It might be necessary to modify only one courtroom in a number of central locations, which could be used to hear all cases involving child complainants.

(c) Should the public be excluded from the trial?

169. A complainant in a sexual offence case may find it extremely embarrassing to testify when members of the public are present. However, the obvious remedy, excluding the public, conflicts with the basic principle that the judicial process should be conducted as openly as possible. Closing a court during the preliminary examination does not raise this conflict because, as its title suggests, that hearing is preliminary. It is the trial which determines whether the evidence is sufficient to establish that the accused person is guilty of the offence, and public confidence that

34. Report of the New South Wales Child Sexual Assault Task Force, 173.
35. Schedule 3, s.405E Crimes (Personal and Family Violence) Amendment Bill 1987.

justice is being done requires that the conduct of the proceedings be open to scrutiny.

170. In its report on procedure and evidence in sexual offence trials the Commission concluded that the principle of open justice is too important to impose a rule that all sexual offence cases should automatically be closed to the public when the complainant gives evidence. The exclusion of the public should remain a matter for the discretion of the court. In order to bolster the preparedness of judges and magistrates to exclude members of the public in specific cases where the complainant was being badly affected, the Commission recommended:

- that the grounds on which a court can exclude members of the public, other than support persons for the complainant and defendant, should be extended to include protection of a complainant from distress or embarrassment;
- that the Australian Institute of Judicial Administration should develop educational programs for judicial officers on issues in sexual assault cases, including the complainant's testimony.

Are additional measures necessary or desirable for child complainants?

171. South Australian courts already have power to exclude people in order to prevent hardship or embarrassment to any person. The South Australian Task Force believed this is inadequate protection for children, and recommended that courts should be closed while a child victim gave evidence, 'to minimise the harmful effects of court proceedings on the victim'.[36] Legislation implementing this recommendation is presently before the Parliament.[37] Hewitt also believed that the public should be excluded while child witnesses in sexual assault cases testify.

> By maintaining an open court for the greater part of the trial the public's right to access and information with respect to criminal trials would be satisfied while the child would be protected from the public gaze. By keeping the child witness in court rather than removing him or her to the privacy of the judge's chambers, both the appearance and the substance of a fair trial for the accused is maintained.[38]

VCOSS reports that fifteen submissions addressed Hewitt's recommendation and all supported it.[39]

172. The New South Wales Child Sexual Assault Task Force reached a different conclusion, very similar to that of the Commission in its procedure and evidence report. It recommended that closing of the court should remain a matter for the court's discretion, and that in making a determination whether to close the court the interests of the child who is the alleged victim of sexual assault be taken into account.[40]

173. The Commission's tentative view is that the closure of a court should be a matter of discretion for the court, to be exercised on consideration of the circumstances in each case. The measures it has recommended in relation to the exercise of that discretion in sexual cases generally should provide adequate protection to child victims. Further, the use of closed-circuit television (discussed in the follow-

36. Final Report of the Task Force on Child Sexual Abuse, 208.
37. Section 8, Bill for an Act to amend the Evidence Act 1929.
38. Child Sexual Assault Discussion Paper, 155.
39. Community Responses to Child Sexual Assault Discussion Paper, 33.
40. Report of the New South Wales Child Sexual Assault Task Force, 179.

ing section) would allow complainants to testify without being directly aware of the public in the courtroom.

Proposal 30

Exclusion of members of the public from the court while a child testifies should remain a matter for the court's discretion.

(d) Children's evidence by closed-circuit television

174. A number of American States permit child victims to testify via closed-circuit television. The child gives evidence in a separate room, but can be seen and heard by all in the courtroom. The procedure has recently been adopted in New South Wales and legislation to introduce it is before the Parliament in England.

175. The procedures which have been adopted by the various jurisdictions differ in certain key respects:

- Presence of the lawyers. In Texas the lawyers for both sides are in the room with the child; in California, they remain in the court.
- The age of the child. In New South Wales and California the procedure is available to children aged 10 and under, the English bill specifies children under 14 and in Florida, the procedure is for children under 16.
- The availability of the procedure. In Florida, the procedure is applicable when 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'.[41] In New South Wales it is to be used in all cases of 'personal assault' on children under 10, unless the facilities are not available in the premises being used for the proceedings.

176. The main advantage claimed for closed-circuit television is that it allows the child to be examined in less intimidating surroundings than the conventional courtroom.[42] In particular, it allows the child to give evidence without directly confronting the accused person. The major objection to the procedure is that it may suggest the child has a valid reason not to confront the accused, and thereby indicate that the accused is guilty. Other issues raised by critics of the use of closed-circuit television are that a complainant is more likely to tell the truth when compelled to face the accused, and that a jury should be able to evaluate the demeanour of the complainant when he or she is repeating the accusation in the immediate presence of the accused. The California Court of Appeals has expressed concern about the impact of television on a jury.

> . . . (T)here 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 commenting on what is seen . . . [T]here 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

41. Fla. Statutes, Art. 92. 54 (supp.1985), cited in Warner, Child Witnesses in Sexual Assault, 102.
42. There is debate among experts whether closed-circuit television will in fact greatly assist children. One British expert has criticised the English proposal arguing that 'children might not be able to give good account of what they say or experienced while speaking to a disembodied voice or looking at video images of the courtroom. Professor Graham Davies, cited in The Independent, 18 December 1987.

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 . . . [A]nd 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 jurors' 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 legitimizing 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.[43]

177. The Commission is very conscious of the importance of these matters and, in particular, the danger that the procedure may be prejudicial to the accused. New South Wales seeks to minimise this danger by having the procedure apply to all cases involving children aged under 10, and requiring the judge:

(a) to inform the jury that the use of those facilities is standard procedure required by law in all cases of evidence given by young children on whom it is alleged that an offence such as that charged has been committed; and

(b) to warn the jury not to draw any inferences or give the evidence any greater or lesser weight because of the use of those facilities.

Whether the New South Wales approach will have the desired effect remains to be seen. At least one critic believes it will not:

> [T]he solution devalues the highly prejudicial nature of the procedure. The only reason why it could be going on is because the accused is regarded as guilty. There is no other possible reason. Telling a jury that black is white will have no positive effects at all.[44]

178. The Commission does not agree that the only reason for the procedure is to avoid confrontation on the assumption that the accused is guilty. There is a strong, broader argument that children— and other witnesses as well—might be better able to testify in less intimidating surroundings than the traditional courtroom.

> Children may also be intimidated or disturbed by other aspects of the courtroom environment. The size of the courtroom, the size of the witness chair, the location of the other participants—raised bench, bar tables, public galleries, etc. — may increase the child's feelings of discomfort and lack of stature in the proceedings.[45]

The Commission is confident that a jury would heed an explanation from a judge about such general considerations, and not simply conclude that a child complainant was being shielded from a person whose guilt was assumed.

179. Nor is the Commission convinced by the objections that a child is more likely to tell the truth when faced by the accused, or that a child complainant's demeanour in the presence of the accused will tell a jury whether the complaint is true or false.

43. *Hochheiser v Superior Court* 161 Cal.App. 3d at 786, 208 Cal.Rptr. at 278-79, cited in M.Graham, 'Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions', University of Miami Law Review 1985, Vol 40:19, 74-75.
44. Correspondence to the Commission from M.Goode, consultant.
45. NSW Violence Against Women and Children Task Force, 7.

Is a child who is unable to speak about incest in court petrified with fear because she is lying about her father, sitting in the court looking at her, or because of what he did to her? The argument about the need for confrontation has also been strongly made in England by critics of the proposed use of closed-circuit television, or video-link as it is also known. A supporter of the proposal has responded in the following way:

> The obvious objection to this is that with a small child such a confrontation does not make it tell the truth, but makes it too frightened to say anything at all; which, whilst excellent for child-molesters and their defending lawyers, is bad for everybody else. Small children have been known when confronted in court with their attackers to dive screaming under the Clerk's desk in terror and to hide there for the rest of the proceedings . . . If the basic traditions of British justice really require the Colin James Evanses* 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.[46] [*Evans is a man with a long record of child sexual abuse in England who in 1984 was sentenced to life imprisonment for murdering a child of four whom he had abducted and sexually assaulted.]

180. Undoubtedly there are offences which are not reported, or not prosecuted, because of soundly based doubts concerns about childrens' ability to cope with the stresses of the courtroom. The question is whether to propose a procedure to assist these cases to come forward, though the procedure might have an adverse impact on the fairness of the hearing which some accused person's receive. A judgement must be made about the advantage to complainants, weighed against the degree of risk of prejudice to the accused. On balance, the Commission's tentative view is that there is not a substantial degree of risk that the fairness of the trial for the accused will be jeopardized. Closed-circuit television should be introduced and be generally available for children. The Commission's tentative view is that it should not necessarily be used in every case, but that children who are able and willing should testify in the courtroom. Before the procedure is introduced detailed consideration will need to be given about the manner of assessing whether it should be used in a particular case, the physical arrangements, the type of equipment, and the circumstances of its use. For example, who will be permitted to be in the room with the child during the examination? Overseas experience must be drawn upon. In its report on procedure and evidence in sexual offence trials, the Commission has already recommended that the Secretary of the Attorney-General's Department should consider the use of closed-circuit television for taking witnesses' evidence in the context of the Department's current investigation of the use of video technology in the courts. The Commission's recommendation presumed that the facility might be available to a complainant of any age.

Proposal 31

In cases involving sexual offences all complainants aged under 16 should be permitted to give evidence and be cross-examined by closed-circuit television.

46. J.Spencer, 'Child Witnesses, Video-Technology and the Law of Evidence', [1987] Criminal Law Review, 83.

(e) Presenting evidence without the child's participation at the trial

181. There are two means by which the evidence of a child might be admitted without the child being required to appear at the trial at all, or at least being required to appear under more restricted circumstances than at present. One is by using a 'surrogate witness', that is, someone who presents the child's evidence on the child's behalf. The other is presenting the child's evidence in the form of a recording, such as on videotape. Neither of these means is generally possible at present in Victoria because the complainant is required to present his or her testimony in the court, and be available to be cross-examined on it. However, other jurisdictions have adopted these means of presenting the child's evidence, and the question arises whether either approach should be followed here as well.

(i) Surrogate witness

182. The best-known example of the 'surrogate witness' approach is that introduced in Israel, in 1955. Its main features are:

- a child victim of a sexual offence is interviewed at an early stage by a specially trained 'youth interrogator';
- the child is not required to give evidence in court unless the interrogator gives permission; if the child does testify, the court may excuse the child if the interrogator considers continuation may cause emotional harm;
- if the child does not testify, the youth interrogator presents the evidence and may be cross-examined; an accused cannot be convicted on the evidence of a youth interrogator unless it is supported by additional evidence.

183. The major advantage of this approach is obviously that it greatly restricts the exposure of the child to proceedings which may be harmful because of their nature and the length of time involved. As soon as the examination by the youth interrogator is over, the participation of vulnerable children is ended, and they can commence the process of getting over the incident. If they are involved in the trial, the youth interrogator can effectively intervene if a child's welfare is in jeopardy. 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 interests 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.

Proposal 32

A child's testimony should not be presented to a court via a 'surrogate witness'.

(ii) Admitting a record of the child's evidence

184. The law permits a record of a witness's evidence to be admitted at a trial if the witness is unavailable to give testimony, but the circumstances for this are narrowly drawn. A person's evidence may be presented to a County Court by a deposition, that is a statement on oath taken in writing by or before an authorised person, if certain conditions are met, for example, it was taken in the presence of the person being tried, and the person or his or her legal representative had an opportunity to

cross-examine the witness,[47] and the witness is unavailable for specified reasons such as 'unable through sickness or infirmity to attend at the hearing, or is about to quit Victoria'.[48]

185. A number of American States have legislated to permit videotaped depositions to be used at trial instead of the witness giving testimony. In most States which have this provision the procedure is restricted to child victims; in Montana it applies to any victim. In Florida the videotaped deposition can be used only if the trial court finds that there is a substantial likelihood the witness would suffer at least moderate emotional or mental harm if required to testify in open court.[49]

186. More general admission of recorded interviews with child complainants has also been adopted in a few jurisdictions, and widely canvassed in the United Kingdom and Australia. The models are of two main kinds. One permits a recording to replace or supplement the child's testimony, but requires the child to be available for cross-examination. The second uses the recording to completely replace the child's participation in the trial.

187. *The child available for cross-examination*: The first approach simply uses the recording as the means of presenting the child's evidence-in-chief, in the same way that a complainant's statement is presented in a hand-up brief at a preliminary examination.[50] Twenty years ago a number of Scandinavian countries had made provision for child victims of sexual assault to be interviewed by specially trained policewomen and for a recording of the interview to be admissible at the trial.[51] A number of American States have legislated to allow video-taped interviews to be admitted as evidence, though there is doubt about whether this breaches constitutional rights to confrontation between the complainant and the accused. The Texas Court of Criminal Appeal has recently held the provision in that State to be unconstitutional.[52]

188. The major advantages of the use of recorded evidence would be:[53]

- less trauma for the child, which in turn may encourage parents to allow children to participate in criminal proceedings.
- the freshest possible evidence is obtained, and presented to the court—the court hears statements made while the details are freshest in the child's mind, and obtained by a skilled person in a setting less intimidating than a court room.
- the interview method is apparent—the accused and the court can assess whether an appropriate form of questioning was used to elicit the information.

47. Section 163, Magistrates Courts Proceedings Act 1975.
48. Rule 15, Order 23, Evidence, County Court Rules, 1979.
49. Warner, Child Witnesses in Sexual Assault, 100-101.
50. 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.
51. D. Libai, 'The Protection of the Child Victim of a Sexual Offence in the Criminal Justice System,' (1969), 15 Wayne Law Review, 977.
52. *Long v Texas*, 1987 July 1, No.867-85, cited in Warner, Child Witnesses in Sexual Assault, footnote 72, page 86.
53. An overview of advantages and disadvantages is provided by Warner, Child Witnesses in Sexual Assault, 87-99.

- the child's responses are apparent—the court can assess in what manner the child gave the testimony and how he or she reacted to questions.
- pleas of guilty are encouraged—an offender cannot, as now, hope that the child victim will be unable to effectively present his or her evidence in court.

189. A number of disadvantages or difficulties associated with video-recording children's interviews for evidence have been identified. They include:

- children's interviews are seldom straightforward, and the child may volunteer information that is detrimental to the case and cannot be excised. In some cases, the child may deny the allegation at the time the interview is being made;
- effective interviewing of a child may require leading questions to be asked, but these can be attacked by the defence as improper, thereby discrediting the reliability of the statement, and rendering the recording inadmissible;
- to show the victims' video-recorded statements at the trial would be time-consuming and an inefficient use of court time, as all but the inadmissible parts would need to be shown. A method would also need to be established whereby an authorised independent person could excise out inadmissible parts of the recording.
- giving oral evidence in court may assist the child, because the prosecutor can use the opportunity to settle the child into the courtroom and get the child accustomed to answering questions. Otherwise, the child is immediately confronted by defence counsel's cross-examination and may find it more difficult to testify effectively.

191. Australian inquiries and commentators have reached different conclusions about the use of video-recordings as evidence. Sturgess recommended to the Queensland Government that the evidence-in-chief of a child under 12 years of age should be allowed to be given by presenting a video-recording of an interview. The proposed conditions for admissibility of the evidence included that the child was available for cross-examination; and that evidence was given of the history of the interviews of the child leading up to the recorded interview.[54] Other Australian commentators who have proposed the admission of videotaped recordings have suggested other conditions of admissibility. One was that a recording should be admitted only if there is expert evidence that the child's welfare requires it.[55]

191. After examining the issues a majority of the South Australian Task Force recommended that video-recording should not be used to replace or supplement examination or cross-examination of child victims. A minority disagreed, believing that a child should not undergo any examination in the courtroom.[56] The NSW Violence Against Women and Children Law Reform Task Force considered that the issues needed to be considered in detail before the use of video-recording for evidentiary purposes in court proceedings could be endorsed.[57] It proposed that the Child Protection Council should prepare a report for the Government on the use of recorded statements as evidence in trials.

192. The Commission sees no objection in principle to the use of a video-recording as the means of presenting the examination-in-chief, or to supplement it. The pro-

54. An Inquiry Into Sexual Offences Involving Children and Related Matters, 91 and 105.
55. B. Naylor 'The Law and the Child Victim', (1985) 10 Legal Series Bulletin, 72.
56. Final Report of the Task Force on Child Sexual Abuse, 218-220.
57. Consultation Paper, 11-17.

cedure offers a court the opportunity to examine in detail the content and presentation of the complainant's account of the alleged offence, given at a time very close to the complaint to the police, not months afterwards. Unlike closed-circuit television, the use of a recording is not susceptible to the argument that it undermines the presumption of innocence. The availability of a video-recording need not be used to completely supplant the oral evidence of the child. As noted in Chapter 5 in relation to the use of hand-up briefs, it may be beneficial for the child to be questioned by the prosecutor before being subjected to cross-examination.

193. If recordings are to be admitted as evidence, rules would have to be established about the procedure. The prosecution should have a discretion to decide whether to introduce a recording as evidence in a particular case. Whether a recording is admissible should be determined by the court, perhaps as part of the pre-trial procedure, and certainly not in the jury's presence. A copy of the recording should be provided to the accused before the preliminary examination.

194. Overseas experience should be drawn upon to establish the best practical means of recording interviews with children for evidentiary use. Police and other interviewers will need to be trained to ensure their techniques are effective, sensitive to the children's interests, and comply with the laws of evidence. It may be desirable to establish a pilot scheme before the procedure is formally introduced. The introduction of video-recordings also has resource implications for the police, prosecution and courts. Whether the costs should be borne by reallocation of existing funds, or additional funds, is clearly a matter for the Government.

Proposal 33

At the discretion of the court, a video-recording of an interview of a child complainant should be admissible as evidence if the child is available for cross-examination at the trial.

195. *The child to be cross-examined at trial only if there are special circumstances*: The second approach to the use of video-recorded evidence is that it should be admissible as the child's entire testimony, and cross-examination allowed only if the evidence at the trial indicates that this is necessary or desirable in the interests of justice. This approach may be possible under some of the American statutory hearsay exceptions, though its constitutionality in that country would be in doubt.

196. Hewitt recommended that consideration be given to the admission of a videotape of an original interview of a child as evidence, and suggested conditions under which cross-examination might be prohibited:

> This may be feasible if the evidence that was recorded came into being through responses to questioning by an independent person or a trained psychologist with an expertise in developmental psychology. In such a situation it may be left open to the defence to challenge the evidence by calling its own expert in that area.
>
> Another option would be to allow the child to be cross-examined at trial only. One way of achieving this would be to have the video tape of the original interview tendered in evidence and make the child available at trial to be cross-examined if the defendant's counsel wishes to do so. The right to cross-examination could also be by leave of the court only and then confined to specific areas.[58]

58. Child Sexual Assault Discussion Paper, 151-152.

197. The English lawyers Glanville Williams and J R Spencer have suggested an alternative approach which would restrict cross-examination at the trial.[59] This involves the following procedures:

- the child is interviewed by a specially trained examiner;
- the interview is witnessed by the accused and his or her legal adviser through a one-way mirror;
- a child examiner wears a miniature earphone, so that the accused's lawyer can ask the examiner to ask the child specific questions;
- the conduct of the interview is by the ordinary rules of court;
- anything that happens in the interview room must be recorded;
- the child would not be required to give evidence at the trial, or be cross-examined unless the court believed there were special reasons which made this desirable.

198. As well as the advantages of the first approach to using recorded evidence, this approach offers the prospect of ending a child's participation in the proceedings at a very early stage, with clear benefits for his or her welfare. Despite the strong appeal of this approach, the Commission does not support its introduction, at least at the present. The proposal in effect involves a form of trial before the trial and there are significant issues of principle and practical problems which would have to be addressed before the procedure could be regarded as acceptable.

Proposal 34

The proposal that a child should not be cross-examined at the trial if the defence had an opportunity to cross-examine at a prior, recorded interview, should not be adopted.

(f) How specific should an allegation be?

199. The prosecution must specify an offence, the conduct constituting the offence and the date on which it was committed. If the exact date is unknown, and time is not of the essence, the prosecution can allege that the offence was committed on an unknown day between stated dates. The dates might be determined by reference to certain events, such as a holiday, or where a child lived for a time.

200. These requirements create no problems where there has been a single offence which is reported fairly promptly. In the case of sexual abuse, particularly within a family, it is common for there to be a large number of incidents over a lengthy period, with no reporting until some time after the conduct has ceased. Understandably, a young victim may have considerable difficulty recalling the number of incidents and when they occurred. Such a situation can create significant problems for the prosecution. It cannot allege a number of offences on unknown dates unless it can specify a date or period when each occurred, or otherwise identify a specific incident, because there would be a lack of certainty about which conduct related to which offence.

201. One solution is to identify a particular incident and charge only that, even though others took place. This is unsatisfactory from the point of view of presenting

59. See for example, G. Williams 'Videotaping Children's Evidence' (1987) New Law Journal, 108, and J. Spencer 'Child Witnesses, Video-technology and the law of Evidence,' [1987] Criminal law Review, 76.

a picture of the alleged offender's entire conduct in order to secure an appropriate sentence on conviction, but it can avoid the problem of uncertainty which *Trotter*'s[60] case illustrates. The accused was charged on one count (i.e. one incident constituting the offence) of indecent assault on a boy. At the trial the boy gave evidence of two separate incidents. The accused denied both, but was found guilty. He appealed successfully against the conviction, on the grounds that it was uncertain whether the jury was unanimous that either incident had occurred: while all members of the jury agreed he had committed the offence charged, this may have been because some believed one incident happened, and some believed the other incident happened.

202. It does appear anomalous that it may be easier to prosecute a single offence than a large number of offences. The Commission has considered at length whether the present rules can be amended without prejudicing the right of the accused to a fair trial, but has not found a satisfactory way to do so. The requirement that a charge be precise is vital to the accused's capacity to defend himself or herself. The jury must know the specific conduct which is being alleged in order to determine whether the prosecution has proved each allegation beyond reasonable doubt. If evidence could be admitted of an unspecified, undifferentiated number of incidents which were not the subject of charges, that would be highly prejudicial to the hearing of the actual charges themselves. Finally, the judge must know what the jury has found proven, in order to set an appropriate sentence. The Commission has therefore concluded that the present rules for prosecuting offences should not be changed.

Proposal 35

There should be no change to the rules requiring the prosecution to specify the number of alleged offences, and to present evidence directly relevant to those allegations.

(g) Evidence of sexual history

203. Section 40 of the Evidence Act 1958 requires a court to:

> forbid or disallow any question which appears to it to be intended to insult or annoy, or which though proper in itself appears to the court needlessly offensive in form.

Additional restrictions apply in relation to cases involving a charge of rape, attempted rape, or assault with intent to rape. Section 37A of the Evidence Act provides that:

- a court must forbid any questions or evidence of the complainant's general reputation as to chastity
- evidence about the sexual history of the complainant with people other than the accused is admissible only with the leave of the court
- the court cannot give permission unless the evidence is substantially relevant to the issues in the case or is proper matter for cross-examination as to credit

204. In its report on procedure and evidence in relation to rape and allied offences, the Commission recommended that the restrictions should apply to all the sexual

60. *R v Trotter* Full Court of the Supreme Court of Victoria, unreported 10.5.82, discussed in I. Heath and J. Hassett, Indictable Offences in Victoria, Director of Public Prosecutions, Victoria, 1983, 22.

offences it had reviewed. It left open the possibility that the restrictions should not apply to the child sexual offences, pending the present review of those offences. The Commission had particularly in mind the fact that a child's prior sexual experience may be a defence to a charge in relation to section 49 (sexual penetration with a child aged 16-17). That defence is examined in chapter 3, and the Commission proposes that it be repealed. It sees no other grounds for not applying the cross-examination restrictions that apply to rape and the allied offences. They should not create unfairness to an accused's defence to a charge, as they do not prevent relevant evidence being introduced. The rules simply impose a requirement on the accused to satisfy a court that the evidence is relevant before it can be admitted.

Proposal 36

The restrictions on admissibility of sexual history evidence which apply to cases of rape and allied offences should apply to the child sexual offences.

7. DIVERSION SYSTEMS AND SENTENCING OPTIONS

205. The conventional criminal justice system is widely regarded as having severe limitations in dealing with child sexual abuse offenders. Some of the major limitations, a number of which have been described elsewhere in this paper, are:

- offences are difficult to prosecute successfully because of the problems children have in giving evidence.
- the criminal justice process is very stressful for children, with the result that cases are frequently unreported or not prosecuted.
- imprisonment and other conventional forms of punishment are ineffective means of rehabilitating offenders.
- the impact of a trial and punishment of an offender may irreparably damage a family that might otherwise be rehabilitated.
- the prospect of a harsh sentence for the offender makes families reluctant to report intrafamilial sexual abuse, and all offenders reluctant to plead guilty.

206. These issues may be addressed in part by the types of reforms proposed in the other chapters of this report. However the extent of concern in other jurisdictions about the shortcomings of the conventional system has also led to the development of new approaches, particularly in the United States of America.[1] Essentially, they comprise programs which offer psychiatric or counselling 'treatment' to eligible offenders within the criminal justice framework, that is, by court order. The South Australian Child Sexual Abuse Task Force regarded the term treatment as inappropriate, because it suggests that sexual abuse is an illness which can be cured. The Task Force rejected this view, citing the following comments as a more appropriate perspective:

> It would be erroneous to believe that an incest offender can be cured. Instead it is perhaps more realistic to regard this problem in the same fashion as a drinking problem — rather than hoping to be cured, the offender must accept

1. For a description of a number of new schemes see J. Bulkley ed., Innovations in the Prosecution of Child Sexual Abuse Cases, a Report of the American Bar Association National Legal Resource Center for Child Advocacy and Protection, 3rd edition, 1983.

his own responsibility for maintaining a conscientious and life-long effort to keep sexually abusive behaviour under control. There is always the risk of recidivism. What treatment can do is reduce the risk.

1. by helping him to become in closer touch with the major current needs underlying his behaviour and to find more adaptive ways of satisfying these needs
2. by helping him to define those life demands he cannot successfully cope with and to find ways of avoiding stress related to those demands and
3. by helping him become more sensitive to the life conditions and his characteristic behaviour patters that are antecedents to his incestuous activity so that he can detect early warning signals and interrupt the evolution of an incestuous offence.

A treatment programme encompassing reeducation, resocialization and counselling involving individual, marital and family therapy supplemented by peer or self-help support groups is generally necessary, especially when the decision of the family is to remain intact or to reunite. Improving parenting skills, increasing social skills, enhancing communication skills, assertiveness training, sex therapy and stress therapy may all be important components of the treatment.[2]

207. The treatment programs differ in the type of offender they accept, the form of treatment they offer, in the stage in the criminal justice system at which they operate, and the formal consequences they impose on the offender. Some programs also assist offenders outside the criminal justice system, that is, without a charge being laid and heard, and on a voluntary basis. The Commission does not favour this approach as a means of dealing with alleged offenders known to the police. There should certainly be services available to assist offenders who have not been detected, and want treatment of their own volition. However, if an offender is reported to the police, or detected by them, then prosecution should not be stopped simply because the person is willing to enter a treatment program. As a matter of principle, child sexual abuse should not be, or appear to be, decriminalised. As a matter of practice, overseas treatment programs dealing with detected offenders are strongly of the view that their effectiveness depends on participation in treatment being backed by the sanctions of the criminal law.

Types of offenders and treatment

208. The majority of programs formally linked to the criminal justice system which have been established over the past decade appear to be concerned solely, or mainly, with offenders who sexually abuse a child within their own household. Because of their family focus a number of programs offer services to all members of the family, as well as treating the offender. Other programs, both those dealing with intra-family and other offenders, offer treatment services only for offenders. Assistance for victims and their families may be available through independently provided services. The forms of treatment of offenders vary, and can be described as of three main types—'behavioural' (re-training deviant sexual arousal),

2. A. Groth, 'The Incest Offender', in S.M. Sgroi (ed), Handbook of Clinical Intervention in Child Sexual Abuse, Lexington Books, Lexington, Mass 1982 cited in Final Report of the Task Force on Child Sexual Abuse, 158. 1. For a description of a number of new schemes see J. Bulkley ed., Innovations in the Prosecution of Child Sexual Abuse Cases, a Report of the American Bar Association National Legal Resource Center for Child Advocacy and Protection, 3rd edition, 1983.

psychotherapeutic, and family therapy (aims to change behaviour of different family members, not only the offender). There is a considerable body of literature on the different forms of treatment and their outcomes, the detail of which is not directly pertinent to this paper.[3] Of greater significance here is the general issue whether a program should be established and, if so, at what stage of the criminal justice process.

Stages of operation

209. A key variation between programs is the stage at which offenders can participate in them. There are three major approaches: after a charge has been laid but before the trial (pre-trial); after the hearing of the charge has begun but before its conclusion (delayed prosecution); after the trial and a verdict of guilty (sentencing). The different stages have significantly different formal consequences.[4] A brief outline of the three types of approach follows.

(1) Pre-trial diversion program

210. Under this approach, a person charged with an offence who meets specified criteria is offered a program of treatment and counselling before the trial is held. To be accepted, accused persons have to formally admit that they committed the offence. Among the criteria which would generally render offenders ineligible for a program are that they have used violence, they have previously been convicted of a sexual offence, or they have previously been accepted into a program and been discharged from it. If the offender completes the program the charge is withdrawn. The advantages of a pre-trial diversion program are said to be:

- it encourages increased reporting of offences because it does not carry the stigma associated with criminal prosecution.
- by being offered the possibility of complete avoidance of prosecution, offenders have a strong incentive to accept treatment.
- children do not have to appear in court—even if the offender does not complete the treatment program and is prosecuted, the admission of the offence can obviate the requirement for the victim to give evidence.

211. Disadvantages of a pre-trial program are said to include:

- it may coerce admissions of guilt from innocent accused persons.
- offenders may enter the program to avoid trial and imprisonment rather than because they are committed to being treated, making it difficult to assess whether treatment has been effective.
- it denies the need of victims—and perhaps of offenders, too—to feel that adequate punishment has occurred.

3. See, for example, H. Giaretto, 'A Comprehensive Child Sexual Abuse Treatment Program', Child Abuse and Neglect, 6, 1982, 263-278; V. L. Quinsey, 'The Assessment and Treatment of Child Molesters; A Review', Canadian Psychological Review, 18, 1977, 204-220; G. Abel, J. Becker, J. Cunningham-Rathner, J. Rouleau, M. Kaplan and J. Reich, Treatment Manual: The Treatment of Child Molesters, Atlanta, Georgia, Emory University Clinic, Department of Psychiatry, 1984.
4. The different types of program and their advantages and disadvantages are outlined in L. Hewitt, Child Sexual Assault Discussion Paper, 183ff.

(2) Delayed prosecution program

212. Under a delayed prosecution program, the trial of an eligible accused who admits guilt is adjourned while the person participates in a program. If the program is successfully completed, the accused is convicted of a less serious offence and sentenced accordingly. If the program is not completed, the trial is resumed and the accused is tried on the original charge. Compared with a pre-trial diversion program, a delayed prosecution program might offer less incentive to participate because the accused is convicted of a criminal offence, albeit a less serious one than the original charge. It does, however, provide the element of punishment not present in pre-trial diversion, and the admission of guilt which eliminates the involvement of the child at trial.

(3) Sentencing option

213. The sentencing approach involves the accused being charged and tried in the conventional manner. If the accused pleads guilty and is willing to participate in a program, the court imposes a lighter sentence than would normally be appropriate. If the sentence includes imprisonment, this is usually suspended while the offender participates in the program, and may not be imposed at all if treatment is seen as successful.

214. A major advantage of this type of scheme is said to be the maintenance of a system of clearly defined responsibility by the offender for the behaviour. This is also seen by some as its major disadvantage, because the fact that a criminal conviction and sentence are involved may reduce an offender's incentive to plead guilty or to participate in a program.

Evaluation of the effectiveness of the programs

215. The effectiveness of the programs can be considered in terms of a number of criteria. Two of particular importance are their impact on the participants, and their impact on child sexual abuse generally. There is little information about either of these, and the research which has been undertaken does not provide a basis upon which unequivocal claims about the programs can be made. For example, there are no studies comparing the improvement made by offenders participating in programs with similar offenders not in programs. That being said, the literature is generally favourable.

216. One of the first programs, the Santa Clara Child Sexual Abuse Treatment Program (CSATP), was the subject of a major evaluation in 1978, approximately six years after it was established.[5] The evaluator assessed its effectiveness in cases of intra-familial abuse by a variety of measures, including impact on the offender (e.g. recidivism), spouse and victim, and overall found very 'positive results'. CSATP is a family therapy program in which offenders participate as part of their sentence.

217. Even with such a positive outcome for participants, the evaluator of the CSATP program felt that its most significant impact was in increasing the number of sexual abuse cases coming to notice. That is, the program was not only assisting the cases which might in any event have been detected, but was encouraging reporting, and thereby reducing the incidence of abuse.

5. J. Kroth, Child Sexual Abuse, Charles C Thomas, Springfield Illinois, 1979.

> With or without therapy, it appears that 98 percent of incest offenders will not repeat the offence once coming to the attention of the criminal justice system. The basic question of whether or not an incest treatment approach is effective is not at the output side of the service therefore, i.e. in recidivism statistics, but in how many offenders reach the input side of the service, i.e. referral rates into the facility. In effect, the single most important statistic that reflects upon the efficacy of treatment is not recidivism or anxiety level or the grade point averages of victims in treatment, but the rate at which victims, offenders, and families come forward!
>
> In this regard the CSATP referral record is superb. From 1973 to 1974, the referrals increased over the previous year 335 percent. From 1974 to 1975, referrals increased over the previous year 25 percent; from 1975 to 1976, the rate of increase was 60 percent, and from 1976 to 1977, the rate was projected to increase 40 percent. This means, essentially, that since 1974 there has been an average increase of about 40 percent in the number of clients coming forward each year, and it is likely 98 percent of these new clients will not repeat the offence merely on the basis of the fact that the molestation has been reported and the family secret broken![6]

Other jurisdictions with programs have also experienced an increase in rates of reporting, though there is no research which establishes a causal link simply between programs and reporting.[7]

Diversion systems in Australia

218. Three Australian inquiries considered the establishment of treatment programs. They agreed that action of this type must be initiated, and that it must be undertaken within the criminal justice system, but disagreed as to the most appropriate approach. The New South Wales Child Sexual Assault Task Force preferred the pre-trial diversion approach, arguing that it offered the greatest promise to actually reduce the incidence of child sexual assault:

> . . . the inducement to acknowledge responsibility and thus be diverted is so strong a wider population of offenders may be encouraged to enter the scheme.[8]

219. The New South Wales Government accepted its recommendation and a pre-trial diversion program is being established.[9] The legislation establishing the program does not restrict it to intra-familial offenders. The Act provides that:

- a person charged with a specified child sexual assault offence must be given information as soon as practicable about the program
- the Solicitor for Public Prosecutions (or a person authorized by the Solicitor) decides whether a person is to be referred for assessment of his or her suitability to participate in the program
- a person assessed as suitable then appears before a Justice and is asked to plead to the charge before any evidence is led. If the person pleads not guilty or refuses to plead, he or she becomes ineligible for the program

6. Kroth, 125.
7. Report of the New South Wales Child Sexual Assault Task Force, 227.
8. See reports on individual programs in Bulkley, Innovations in the Prosecution of Child Sexual Abuse Cases.
9. Pre-Trial Diversion of Offenders Act 1985.

- a person who has pleaded guilty before a Justice then appears before a higher court and is again asked to plead. If the person pleads not guilty he or she becomes ineligible for the program
- if the person pleads guilty, the Court requests the person to give an undertaking to participate in a program for up to two years, and to comply with directions given by the program director (eg. this could include a direction to keep away from the victim)
- if the person gives an undertaking the Court cannot impose a conviction or sentence.
- if the person seriously breaches the undertaking, a court may convict and sentence on the charge, or direct an extension of the undertaking for up to 12 months.
- if the person complies with the undertaking, no further proceedings can be taken in relation to the offence.

220. A sub committee of the South Australian Child Sexual Abuse Task Force proposed that a pre-trial diversion program should be established in that state. The proposed model differs from the New South Wales program in key respects, particularly:

- The person charged with the offence would be formally advised about the program and the eligibility criteria at his or her first appearance before a Magistrate.
- The case would then be adjourned to allow the person to seek legal advice and to decide whether or not to seek diversion. During this period the accused would be shown a video-recorded interview involving the complainant, a step which American experience indicates is very powerful in securing admissions.
- At the end of the adjournment period the magistrate would assess the eligibility of the person for the program (in New South Wales the legislation does not specify who undertakes the assessment).
- If the magistrate determined that the person is eligible, he or she would be asked to admit the substance of the allegation. If he or she admitted, the magistrate would then offer the person the opportunity to participate in the program. If the person agreed the magistrate would make an order requiring the accused to enter the program.
- If the accused entered the program that would be the end of the charge. The admission could not be admitted as evidence in future proceedings. If the person breached the diversion order, he or she could be charged with a criminal offence for the breach, with a penalty of up to 7 years imprisonment, not for the original offence.

221. The sub-committee which proposed the model believed that asking for an admission and disposing of the charge would offer a far greater incentive to offenders to admit the offence than the New South Wales approach. As well as the sub-committee's model, the South Australian Task Force also considered the adoption of the New South Wales approach with the breach of conditions making the offender liable to conviction on the original charge. At the conclusion of its deliber-

ations the Task Force was unable to reach consensus on an appropriate pre-trial diversion model. In any event, it decided that it was premature to propose establishment of a program when there were no treatment programs available.

> The Task Force advocates the use of rehabilitative programmes at the sentencing stage when the court, having received a full assessment of the offender, thinks it appropriate, either as an alternative to a custodial sentence or in addition to other sanctions.
>
> The Task Force does not reject the option of pre-trial diversion. It does, however, recommend that a decision on its adoption be deferred until treatment programmes have been established and evaluated and until the range of other reforms recommended by the Task Force and which are designed to minimise the detrimental effects of the legal process on children, have been evaluated.[10]

222. Hewitt recommended the establishment in Victoria of a treatment program for convicted offenders in intra-familial child sexual abuse cases at the sentencing stage, along the lines of CSATP in Santa Clara, in preference to a pre-trial diversion program:

> The advantages of this procedure are manifold. The due processes of justice occur, and treatment is offered when the commission of the offence has been established and the offender duly convicted. Criticisms of the potentially coercive aspects of the pre-trial programmes are met.[11]

Should Victoria establish a program?

223. The Commission believes that a program of some type should be established in Victoria, as an integral part of the package of proposed reforms of the criminal justice system. The existence of such a program would give the criminal justice system additional flexibility in responding to cases. That in turn should encourage offenders to admit to their conduct, and an increase in reporting by victims, their families, and other people.

224. The establishment of a program, particularly at pre-trial stage, might be seen in the community as offering offenders insufficiently punitive treatment. The New South Wales and South Australian Task Forces were also very sensitive to the possibility of this criticism and responded in the same manner:

> The extent of intervention in the offender's life made by a treatment programme and the conditions imposed by being admitted to such a programme would in most cases be perceived as a harsher penalty than those resulting from at least some conventional sentences.[12]

The view is supported by the sentencing patterns in Victoria.[13] A more difficult issue is which program approach Victoria should adopt.

225. The Commission's tentative majority view is that a pre-trial diversion program should be established in Victoria. The primary concern of the Commission is to increase the number of offenders who are detected and can be effectively dealt with, and to do so without subjecting children to the stresses of contested trials.

10. Final Report of the Task Force on Child Sexual Abuse, 235.
11. Child Sexual Assault Discussion Paper, 198.
12. Final Report of the (South Australian) Task Force on Child Sexual Abuse, 227.
13. See Heath, Incest: A Crime Against Children, Chapter 9.

226. As the New South Wales Task Force argued:

> We believe that a diversion scheme such as proposed here holds greater promise of actually reducing the amount of child sexual assault and this benefit outweighs the disadvantages that the system might be seen by some as "soft". Our concern has been more with the protection of children than with the punishment of offenders for its own sake.[14]

227. The Commission has not had the opportunity to examine in detail which kind of pre-trial diversion model should be established. If the proposal is acceptable in principle, an expert panel should be established by the Government to examine the American, New South Wales, South Australian and other models, and recommend the best model/program for Victoria. There are certain aspects however, which must be integral aspects of the program:

- the prosecution, or a court, must have power to determine whether an accused is eligible to participate, whether or not there is a further form of assessment, for example by a psychiatrist.
- the program must have a diversity of treatment approaches; for example, it should not be based simply on a family rehabilitation approach, which could put unfair pressure on an unwilling family to participate for the sake of the offender.
- those in charge of the program must have power to impose appropriate conditions on a participant, such as an order to leave the family home and keep away from the victim.
- the program must be monitored and evaluated.

228. The services constituting the program could also be available for convicted offenders, and thereby also provide the sentencing option favoured by Hewitt. The prosecutor or court having authority to decide whether to prosecute or divert a case would thereby have even greater flexibility. It might in some cases be seen to be in the complainant's interest for the offender to be convicted, but sent for treatment rather than imprisoned.

229. The statutory establishment of a diversion program need not be delayed until the whole range of treatment services are well in place, though obviously the program cannot become operational without services being available. It is not possible at this stage to calculate the cost of establishing a program. Some services which might form part of it already exist, for example there are health professionals in Victoria already working with child sexual abusers, occasionally as a result of a condition of sentence imposed by a court. Other components of a comprehensive program, such as a family therapy service, would have to be established. They will not require elaborate and expensive facilities, or large numbers of staff, so the overall cost of a program is likely to be very small. It should certainly be significantly cheaper to treat an offender in a program than to put him or her in prison, and offer no treatment. Costs are important, but so are benefits. Child sexual abuse is a serious and widespread problem. Any program which offers the prospect of effectively combatting it must be given a high priority in claims on public expenditure.

Proposal 37

A pre-trial diversion program should be established for child sexual abuse offenders.

14. Page 230.

SUMMARY OF TENTATIVE PROPOSALS

Proposal 1

Offences against children should continue to distinguish between conduct involving sexual penetration and other behaviour.

Proposal 2

The definition of an act of sexual penetration should include penetration of a person's vagina or anus by any part of another person's body.

Proposal 3

Intrafamilial sexual abuse of children involving sexual penetration should be included in the general offences, not as incest.

Proposal 4

The age of consent should be reduced from 18 to 17. A child aged 16 should be able to give effective consent to another person of any age. However, it should be an offence for a person to take part in an act of sexual penetration with a child aged 16 if that person occupies a position of care, supervision or authority over the child.

Proposal 5

Consent of a child below the general age of consent should continue to be a defence where there is only a small age difference between the child and the other person.

Proposal 6

Consent of a child aged between 10 and 16 should continue to be a defence if there is two years or less in age difference between the child and the other person.

Proposal 7

It should be a defence for the accused to have honestly believed that the child was

of an age which made the child's consent effective, as a defence, even if that belief was not reasonably based. If the accused has a position of authority in relation to the child, the accused's belief should be reasonably based.

Proposal 8

If the accused wishes to raise the defence of belief as to the child's age, he or she should be required to introduce evidence supporting the existence of the belief, but should not be required to prove its existence. The prosecution should have the onus of proof that the defence does not apply.

Proposal 9

The defence that a person had previously taken part in an act of sexual penetration with a person other than the accused should be abolished.

Proposal 10

The time-limits on prosecuting offences against sections 48 and 49 should be repealed.

Proposal 11

The offence of indecent assault should be restricted to non-consensual acts.

Proposal 12

A broad offence covering indecent behaviour with or in the presence of children should be retained.

Proposal 13

The term 'gross' should be repealed from the offence of 'gross indecency'.

Proposal 14

It should be an offence for a person to commit an indecent act with another person aged 16 who is in the person's care, supervision or authority.

Proposal 15

The defences to a charge of indecency should be the same as those applying to a charge of sexual penetration with a child of the same age.

Proposal 16

The maximum penalty for the offence of indecency with children should be five years.

Proposal 17

Sections 57, 58 and 60 of the Crimes Act, and section 18 of the Summary Offences Act, should be repealed.

Proposal 18

The provisions in the Crimes Act containing the offences of attempts to commit

sexual offences against children and the offence of incest, and the provisions containing the offences of assault with intent to commit these offences, should be repealed.

Proposal 19

The alternative verdict provisions in section 425 of the Crimes Act should be repealed.

Proposal 20

There should be a statutory duty on doctors, maternal and child health nurses, professional child care workers and school teachers to notify Community Services or the police if they have grounds to suspect on a reasonable basis that a child under 16 years of age who is in their care or under their supervision has been sexually abused. The penalty for failure to notify should be a maximum of $5000.

Proposal 21

There should be no change to the laws requiring a parent's or guardian's consent for a child to be medically examined in relation to suspected or alleged sexual abuse.

Proposal 22

Proceedings to remove a sexually abused child from his or her home should not be undertaken unless it is not possible or inappropriate to require an alleged offender to leave the home.

Proposal 23

The prosecution case should be presented by legally qualified practitioners or specially trained police prosecutors.

Proposal 24

The restrictions on who can be present in court at a preliminary examination when the evidence of a rape complainant is presented should apply to all sexual offences, including those against children.

Proposal 25

The rules requiring the use of hand-up briefs and imposing special time-limits for rape cases should not apply in relation to offences under the present section 49 of the Crimes Act. The rules should apply if the offence is amended, to cover sexual abuse of authority, as proposed in this paper.

Proposal 26

It should be possible for a child's statement in a hand-up brief to be presented in the form of a written statement by a police officer who interviewed the child, or a transcript of a video-recorded interview.

Proposal 27

The restrictions on the right to cross-examine child complainants in cases of sexual offences should not be extended.

Proposal 28

(a) A child should be competent to give evidence if he or she understands that he or she is under an obligation to tell the truth, and can give a rational reply to questions about the facts in issue.

(b) Competence should be assessed by the court, as it thinks fit.

(c) The category of unsworn evidence, as an alternative to evidence on oath or affirmation, should be abolished.

(d) The rules that a child's testimony must be corroborated, and that a judge must warn a jury about relying on the uncorroborated testimony of a child, should be repealed. A judge should retain the discretion to comment upon the reliability of the evidence of a child witness in each case where the circumstances of the case make comment appropriate.

Proposal 29

(a) A new rule should be established to permit the admission of evidence of out-of-court statements by children about sexual abuse. The evidence should be admitted to prove the truth of what is alleged.

(b) The legislation establishing the rule should indicate the considerations which a court should take into account in determining whether the circumstances of the statement justify its admission.

(c) Evidence of a statement should not be admitted unless the child is available to testify or, if the child is not available, there is evidence to corroborate that the alleged offence occurred.

(d) Grounds for unavailability should include substantial likelihood that the child will be severely emotionally or mentally harmed.

Proposal 30

Exclusion of members of the public from the court while a child testifies should remain a matter for the court's discretion.

Proposal 31

In cases involving sexual offences all complainants aged under 16 should be permitted to give evidence and be cross-examined by closed-circuit television.

Proposal 32

A child's testimony should not be presented to a court via a 'surrogate witness'.

Proposal 33

At the discretion of the court, a video-recording of an interview of a child complainant should be admissible as evidence if the child is available for cross-examination at the trial.

Proposal 34

The proposal that a child should not be cross-examined at the trial if the defence had an opportunity to cross-examine at a prior, recorded interview, should not be adopted.

Proposal 35

There should be no change to the rules requiring the prosecution to specify the number of alleged offences, and to present evidence directly relevant to those allegations.

Proposal 36

The restrictions on admissibility of sexual history evidence which apply to cases of rape and allied offences should apply to the child sexual offences.

Proposal 37

A pre-trial diversion program should be established for child sexual abuse offenders.

APPENDIX A: INCIDENCE OF CHILD SEXUAL ABUSE

There are no reliable statistics on the extent of child sexual abuse in Victoria. This is partly due to the nature of the problem—many cases are unreported, or if reported, are not able to be substantiated. There is a lack of research. The most substantial Victorian study was undertaken in 1985, and surveyed 991 students in Victorian tertiary institutions. It concluded:

> On the criterion of age discrepancy there is considerable sexual abuse of children and teenagers by older partners, that is 1 in 11 boys, and between 1 in 4 and 1 in 3 girls. These figures are judged to be an underestimate.[1]

There is also no single comprehensive data base on reported incidents. Victoria Police statistics[2] for recent years show:

SEX OFFENCES ON FEMALES

	1984/5	1985/6	1986/7
• sexual penetration under 10 years	6	29	127
• sexual penetration 10–16 years	269	245	147
• sexual penetration 16–17 years	23	29	74
• gross indecency	32	77	26

SEXUAL OFFENCES ON MALES

	1984/5	1985/6	1986/7
• sexual penetration under 10 years	14	8	38
• sexual penetration 10–16 years	184	93	155
• sexual penetration 16–17 years	2	12	3
• gross indecency	67	101	151

1. R. and J. Goldman, 'Family and Relations Survey; A Report to the Participating Institutions in the Survey', School of Education, La Trobe University, n.d. 17.
2. Victoria Police, Statistical Review of Crime 1985/86 and 1986/87.

INCEST

[Not disaggregated by gender or age—it is likely that few, if any, incest offences involved two adults]

1985/5	1985/6	1986/7
150	264	177

There is no age disaggregation of the offences of rape and indecent assault, so it cannot be determined how many of these are committed against children.

Hewitt described a range of data sources in Victoria and concluded that the intrinsic difficulty of gathering data about child sexual child abuse:

> is compounded in Victoria by the lack of a universally accepted definition of the problem, the use of different recording methods across agencies, and the limited funding available in agencies for data collection and evaluation purposes.[3]

Hewitt therefore recommended that the Government should investigate the establishment of 'a statewide consistent data base on the incidence of child sexual assault in Victoria'.[4] Relevant to this recommendation is the Commission's recommendation in its report on procedure and evidence in relation to sexual offence prosecutions that the Attorney-General's Department should investigate the possibility of establishing a Bureau of Crime Statistics and Research.

3. Child Sexual Assault Discussion Paper, 47.
4. Hewitt, 48.