

Evidence of Children and Other Vulnerable Witnesses

Terms of Reference

In February 1989 the Commission was given a reference to review the law and practice governing the giving of evidence by children and other vulnerable witnesses in legal proceedings.

Background of Reference

The reference resulted from a suggestion made by the Commission to the Attorney-General. It was prompted by prevailing controversy in many jurisdictions about whether there should be special procedures or rules allowing children and other vulnerable witnesses to give evidence without the necessity of physically appearing in court or confronting the accused. This was perceived to be of particular importance in cases of child sexual abuse, where the sight of the accused often had a powerful negative effect on the witness. Incentive for this review arose out of the growth in public awareness of, and concern about, the sexual abuse of children. In August 1990 a petition was tabled in the Western Australian Parliament bearing 79,567 signatures and urging the government to pass legislation to deal with sexual and other crimes against children.¹ These issues were also dealt with in 1987 in a report by the Government Task Force on Child Sexual Abuse.² The Commission's terms of reference, however, extended beyond children to include other vulnerable witnesses, such as the elderly, witnesses with particular disabilities and some victims of adult sexual offences.

The Commission conducted research into the law and practice in Western Australia and in other jurisdictions both in Australia and overseas. A Commissioner, while on leave in England, attended an international conference on the subject held at Selwyn College, Cambridge, in June 1989. Experts from many different countries addressed this conference and shared information about the approaches taken to address this problem in each jurisdiction.

The Commission appointed Marion Dixon, formerly an officer of the Crown Law Department and a Lecturer in law at the University of Western Australia, to draft a discussion paper. The aim of the paper was to explore what changes could be made to the law and practice to both alleviate the trauma suffered by children and other vulnerable witnesses in giving evidence in legal proceedings and to improve the quality of their evidence. The paper was issued for public comment in April 1990. A number of proposals were put forward for public discussion including proposals to make it easier for children to give evidence in court. The paper also raised the question whether the proposed reforms would be appropriate in the case of other vulnerable witnesses.

Nature and Extent of Consultation

The reference was carried out amid widespread public debate. The issue was the subject of considerable media attention. Representatives of the Commission were interviewed by the press, radio and television and addressed a number of public meetings on the subject.

The Commission received submissions from a wide range of individuals and groups including government departments, academics from universities across Australia, Princess Margaret Hospital, the Law Society of Western Australia, the Australian Association of Social Workers, the College of General Practitioners and the Council for Civil Liberties in Western Australia. In addition, members and officers of the Commission had ongoing discussions and correspondence with a number of people including the Chief Justice of

¹ Western Australia, *Parliamentary Debates*, Legislative Council, Petition No 50 tabled in the Legislative Council, 23 August 1990.

² Child Sexual Abuse Task Force, *Report of the Western Australian Government Task Force on Child Sexual Abuse*, 1987.

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Western Australia, the Chief Justice's Criminal Practice and Procedure Review Committee, members of the Child Abuse Unit and a number of other people with specialist knowledge or interest in the issues involved.

At the time of the reference many other jurisdictions in Australia and overseas were in the process of making amendments to their own laws in this area. The Commission therefore had the advantage of being able to learn from the experiences of those jurisdictions and to consider the merits of changes either proposed or implemented elsewhere. The Commission had the benefit of consultation with many individuals and agencies in Australia, the United Kingdom, New Zealand and Canada including a number of academics and law reform agencies in these other jurisdictions.

The final report was prepared in light of these consultations and discussions, of the comments received in response to the discussion paper and of the research carried out by the Commission. The Commission submitted the final report containing its recommendations in April 1991.³

Recommendations

The Commission made 28 recommendations for reform to the law and practice regarding the giving of evidence by children and other vulnerable witnesses. The principal recommendations may be summarised as follows:

- A child of any age should be able to give evidence on oath so long as the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath.
- Children under 12 should be able to give unsworn evidence if they are able to give an intelligible account of events which they have observed or experienced.
- The requirement that the unsworn evidence of a child under 12 must be corroborated by other evidence should be abolished. Judges should not be able to issue a warning to the jury to the effect that the witness is a child and is therefore less reliable than an adult witness.
- At a preliminary hearing, the court should be permitted to allow the child's evidence to be given in the form of a previously made statement.
- In certain cases of sexual assault or abuse on a child under 16:
 - (a) statements made by children outside the courtroom, whether oral, written or electronically recorded, should be admitted in evidence provided that the child is available to be called as a witness and notice is given to the defence;
 - (b) the court should have the power to permit the presentation of the child's evidence on videotape at trial, in lieu of the child presenting oral evidence-in-chief, though the child would be available for cross-examination and re-examination by counsel; and
 - (c) courts should be given the power to order the use of closed-circuit television to facilitate the giving of evidence by the child; this should be a matter of routine rather than a matter to be left to the discretion of the judge.
- Programmes for the preparation of child witnesses should be established. Children should be permitted to have an adult support person with them while giving evidence. The court should have the power to appoint court interpreters to facilitate the giving of evidence by children. In any case where the accused is unrepresented, child witnesses should be asked questions through an intermediary.

³ Law Reform Commission of Western Australia, *Evidence of Children and Other Vulnerable Witnesses*, Project No 87 (1991).

- A court should be empowered to declare a witness a “special witness” in certain cases where the court is satisfied that the person would be unable to give effective evidence. Where a witness has been declared a “special witness”, the court should be able to order the use of certain procedures recommended for child witnesses.

A comprehensive outline of all the recommendations may be found in chapter 12 of the Commission's final report.

Legislative or Other Action Undertaken

In 1992, Parliament passed the *Acts Amendment (Sexual Offences) Act 1992 (WA)* which implemented some of the Commission's recommendations. Later that year, Parliament passed the *Acts Amendment (Evidence of Children and Others) Act 1992 (WA)* which implemented the remaining recommendations in the Commission's final report.

In 1999 the Commission reviewed the legislative regime governing evidence for their comprehensive review of the criminal and civil justice system (“Project No 92”).⁴ As part of this project the Commission examined the Commonwealth *Evidence Act 1995 (Cth)*, which was implemented as a result of the Australian Law Reform Commission's review of the law of evidence. The Commission pointed to the advantages of codification and jurisdictional uniformity in matters of evidence. The Commission particularly addressed the benefits of the Commonwealth Act in contrast to the *Evidence Act 1906 (WA)*. The Western Australian legislation had been the subject of several piece-meal amendments but had not been systematically reviewed since its inception. The Commission did, however, acknowledge a number of specific advantages to the Western Australian legislation. In particular, the provisions relating to the evidence of children and other special witnesses which were implemented as a result of this reference. One of the principal recommendations made by the Commission in their final report for Project No 92 was that the *Evidence Act 1906 (WA)* and related legislation should be redrafted in uniformity with the Commonwealth Act, but ensuring that the specific advantages concerning the evidence of children and special witnesses are included.

⁴ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* Project No 92 (1999).