Is There a Case for the Legal Representation of Children in Sexual Assault Trials?

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Introduction

Various arguments have been made over the years in favour of legal representation for both adult and child witnesses in sexual assault trials. The idea of representation for complainants comes from civil jurisdictions in Western Europe in which some or all victims of crime have a right to legal representation at the time of complaint and trial. One of the main reasons for proposing representation for children in an adversarial context is to protect them, particularly during the cross-examination stage of the trial (ALRC & HREOC 1997:352; see also Ambikapathy 2001; Eastwood & Patton 2002:132). In other words, courts represent 'a legally sanctioned' forum (Eastwood & Patton 2002:4) in which children can be emotionally traumatised by the unregulated behaviour of defence counsel and by questions children do not understand or cannot answer (ALRC & HREOC 1997:343). In addition, children, as a group, are considered to be disadvantaged by a criminal justice process that 'does not allow their full and equal participation' (Scottish Executive Central Research Unit 2002:i) even though their evidence will be central to the prosecution's case.

The last decade has seen major changes to the conduct of the child sexual assault trial in most jurisdictions in Australia in the form of technological improvements to the way children give evidence. At the same time, little attention has been paid to the need to better regulate the time-honoured strategies that defence counsel often use to discredit and confuse child witnesses, all of which are justified on the grounds of the defendant's right to a fair trial. Commentators are, however, rarely able to articulate how that right would be affected if cross-examination were more tightly regulated (Eastwood & Patton 2002:127; Standing Committee on Law and Justice 2002:69). It is arguable that what is sought to be protected is an open-slather approach to intimidating and discrediting child witnesses. However, from the point of view of child complainants, the conduct of the adversarial trial could only be improved by better regulation of cross-examination. For example, the Scottish Executive Central Research Unit (2002:15) has identified a number of themes that affect vulnerable witnesses (including children) in terms of their capacity to give evidence within the adversarial trial:

- fear of the attacker because of the nature of the attack or the crime;
- the importance of their testimony to the process;

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- imbalance of power between witness and defendant;
- the nature of the questioning/procedure of the court and specific barriers to participation;
- the impact of witnesses' specific requirements on their ability to testify and the quality of their evidence.

Improvements to the cross-examination process are likely to have flow-on effects in terms of the child's emotional and mental health,[1] the child's and the community's perceptions of the fairness of the trial, the ability of the child to give their best evidence and the child's overall participation in the trial process. In particular, the focus of the adversarial trial on two parties locked in verbal battle where one party wins and the other loses is likely to have a considerable impact on the role of a prosecution witness. That role 'becomes one of helping to "win" a conviction, with the role of the defence being to undermine the evidence to "win" an acquittal. Central to this style is the concept of cross-examination which is designed to elicit evidence favourable to the cross-examiner and to discredit the other party's witness' (Scottish Executive Central Research Unit 2002:16). That role is even more critical where there is no eyewitness or earwitness evidence and where other forms of corroborative evidence (such as forensic evidence) may not be available such that the child's evidence is the main plank of the prosecution's case. In this context, his or her evidence is likely to be the focus of specific strategies by the defence which means 'the contest between a child ... and a defence advocate [will be] far from equal' (Scottish Executive Central Research Unit 2002:16).

Views reported by Eastwood and Patton (2002) indicate that there is a gap between the attitudes of defence counsel and those who seek to protect children from abuse. Indeed, this tension is evident at many levels within the adversarial system, such that the preservation of the system appears to be more important than the welfare of children. For example, the following opinion is an instructive insight into the adversarial model of justice:

> You've got to get around the idea that the criminal justice [system] is about the child. It shouldn't be about the child and hopefully will never be about the child. ... [I]f I am defending a bloke I want to make life difficult for [Prosecution] witnesses. ... I'm not there to find the truth ... no-one's there to find the truth (Eastwood & Patton 2002:76; quoting an unnamed defence lawyer).

Cashmore has also noted that in some interviews she has conducted, 'defence lawyers will admit that if it is necessary to break a child down, they are willing to do that in the interests of their client' (Standing Committee on Law and Justice 2002:63; evidence given 19 April 2002). Even so, there is a commonly held view that cross-examination is easily controlled by judicial intervention or Crown objections (ALRC & HREOC 1997:352; Standing Committee on Law and Justice 2002:69–70; quoting the evidence of Humphreys). It has been recognised, however, that judicial officers are very often reluctant to intervene (Cashmore & Bussey 1995; ALRC & HREOC 1997:346; Standing Committee on Law and Justice 2002:70–75) and may 'tolerate, or even perpetuate, child abuse by the legal system' (ALRC & HREOC 1997:346).[2] Although some judicial officers may be 'more willing to intervene ... [to] prevent intimidatory, hostile, badgering tactics', they are 'less likely to

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1 Research shows that the whole legal process has a detrimental effect on a significant proportion of child complainants (Scottish Executive Central Research Unit 2002:6–7). For example, 6 out of 9 complainants in NSW, 12 out of 18 complainants in Queensland and 12 out of 36 complainants interviewed in WA reported detrimental effects on their education as a result of being involved in the legal process (Eastwood & Patton 2002:68).

intervene in confusing cross-examination tactics' (Standing Committee on Law and Justice 2002:71; quoting the evidence of Cashmore, 19 April 2002). It should also be noted that the expected neutrality of judicial officers hinders the extent to which they are *capable* of intervening in cross-examination. For example, where judges ask questions of witnesses, defence counsel have been known to:

> stand up immediately and make it known to the judge that they do not appreciate it, and start making noises about appeal, and the judge will immediately pull back, because the Director of Public Prosecutions, the defence, the judge and everyone seems to have an eye on the appeal court (Standing Committee on Law and Justice 2002:72; quoting the evidence of Carney, 2 May 2002).

As one study in NSW on adult sexual assault trials has shown, complainants can be asked questions on the same issue between 20 and 173 times, indicating that some trial judges permit the defence to have extremely wide latitude during cross-examination (Department for Women 1996:99). Even with intervention, defence counsel can and do refuse to be controlled which leads to the conclusion that existing legislation that allows judges to control cross-examination has not worked (Eastwood & Patton 2002:126). Some commentators consider that it will be difficult to increase the intervention of trial judges in the cross-examination process without appropriate legislative changes (Standing Committee on Law and Justice 2002:74–75).[3] Indeed, even with the advent of CCTV and remote rooms for giving evidence in some jurisdictions, there is evidence that cross-examination is still the most traumatising aspect of giving evidence for children. For example, Eastwood and Patton (2002:59) reported that in Queensland, NSW and WA, the overwhelming area of concern for child complainants of sexual assault was cross-examination, a finding that replicates the comments and conclusions reported in many other reports and studies about both adult and child complainants of sexual assault (Parliament of Victoria, Crime Prevention Committee 1995; Cashmore & Bussey 1995; Department for Women 1996; ALRC & HREOC 1997; Royal Commission into the NSW Police Service 1997; Queensland Law Reform Commission 2000; Standing Committee on Law and Justice 2002). In relation to the complainants' experiences of cross-examination, Eastwood and Patton reported that:

> (i) in Queensland, all 18 complainants 'commented negatively on their interaction with the defence who they said made them feel bad about themselves and intimated that the children were either stupid or lying. The use of confusing questioning was frequently cited. ... Without exception, the children found the defence lawyers to be intimidating' (2002:59). In addition, all parents 'commented negatively about the defence lawyers their children encountered' (2002:59).

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2 See, for example, s 41 of the *Evidence Act* 1995 (NSW) in which a trial judge may disallow a cross-examination question if it is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. The wording of this section indicates that questions can be annoying, harassing, intimidating, offensive, oppressive or repetitive as long as they are not *unduly* so.

3 The Standing Committee on Law and Justice (2002:79) recommended the following provision: 'With a witness under the age of 18, the court shall take special care to protect him or her from harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to ensure that questions are stated in a form which is appropriate to the age of the witness. The court may in the interests of justice forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age of the witness'. This provision is based on s 765(b) of the *Californian Evidence Code*.

(ii) In NSW, children reported similar experiences to the complainants in Queensland, although it appears that those who were required to give evidence in court were more distressed during cross-examination (2002:60).

(iii) In WA, '[t]he degree of separation offered by the comprehensive use of CCTV and/ pre-recording clearly reduced the trauma of cross-examination' for a child complainants (2002:61). Nonetheless, the WA complainants also reported that cross-examination was the most distressing part of the court process (2002:62).[4]

This data suggests that if the use of CCTV and other innovations are not sufficient to prevent trauma to children, then it may be necessary to consider 'the drastic measure of providing all child witnesses with legal representatives who can protect their interests during the trial' (ALRC & HREOC 1997:352). In making such a statement, it is necessary to ask and to be able to answer how exactly legal representation for child witness would achieve this. In doing so, it is also necessary to recognise that the nature of adversarial proceedings, the principles underpinning such proceedings and the strict rules of evidence, exacerbate the vulnerability of children as witnesses (Scottish Executive Central Research Unit 2002:15). For example, the adversarial system has a range of exclusionary rules that restrict the admissibility of all relevant evidence. This means that in child sexual assault trials, unlike most other criminal trials, there is a clear tension between adducing sufficient relevant evidence, testing that evidence and protecting vulnerable witnesses. Unless there are significant changes to the rules of evidence (such as the hearsay, tendency and coincidence rules) this tension is likely to remain.

If the protection of children within the criminal justice system through the use of special measures and witness support is to be justified on the grounds of protecting children as vulnerable witnesses, there is a need to investigate whether legal representation would be able to achieve:

- improvements in child complainants' participation in the trial process by enabling them to give their best evidence during examination-in-chief and cross-examination;
- a decrease in re-traumatisation of child complainants, including during the cross-examination process by protecting the child from irrelevant, intimidating, oppressive, repetitive and confusing questioning;
- improvements in complainant satisfaction and perceptions of fairness.

In undertaking such an investigation, this paper proceeds by examining:

(i) the role of legal representation in inquisitorial jurisdictions;

(ii) evaluation of legal representation in inquisitorial jurisdictions;

(iii) the lessons from inquisitorial jurisdictions;

(iv) the case for legal representation in the adversarial system;

(v) a model of child advocacy in the Australian context; and

(vi) whether there is a role for a best interests advocate in the criminal context.

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4 Eastwood and Patton (2002) interviewed 18 child complainants in Queensland, 9 in NSW and 36 in WA. The non-representative sample size in each jurisdiction means that no definitive conclusions can be made about the experiences of child complainants, generally speaking. The conclusions drawn from the study are suggestive of trends only. All child complainants were provided with court support from some kind of witness assistance service.

The role of legal representation in inquisitorial jurisdictions

In thirteen of the member states of the European Union, rape victims have a right to some form of legal representation. The right is well-established in eleven jurisdictions and applies to all victims of crimes (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:37), although the nature of the right varies. There are also differences in terms of the scope of the legal representative's role in the trial such as full rights of audience, the calling of witnesses, addressing the court on verdict or sentence, cross-examining the defendant, or merely being able to apply for procedures to protect the victim.

In many countries these roles overlap in significant respects. In France, for example, all victims of crime are entitled to become a *partie civile* for the purposes of a civil compensation claim and to have legal representation which is state-funded and means tested (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:218). Legal representation in France can be said to be a reflection of the different role that the victim plays in criminal proceedings. If the victim becomes a *partie civile*, not only will her or his lawyer keep the victim informed of the progress of the case, the victim's lawyer will have a right:

- of access to the dossier prepared by the juge d'instruction;[5]
- of appearance at trial;
- to speak on behalf of the victim and to call witnesses;
- to cross-examine the defendant (through the President of the Court);
- to make submissions to the court on questions of law;
- to address the court on the guilt or innocence of the defendant;
- to address the court on the amount of compensation;
- to request that the Court adjourn to carry out further investigation if s/he considers the investigation has been inadequate (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:218).

These rights arise because the civil claim for compensation is heard at the same time as the criminal proceedings. Because the facts in issue in a rape trial must be proved in order for the complainant to be able to claim compensation, the complainant's lawyer is involved throughout the trial even though the main focus for the complainant's lawyer is the compensation claim.

Similarly, in Germany, if the complainant is a partie civile, the complainant's lawyer generally has the same rights of participation at the trial as the prosecutor and defence lawyer as listed above, and in addition, may object to questions put to the complainant by the defence and the prosecution (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:237–238).

By way of contrast with France and Germany, Denmark possesses a hybrid legal system with a trial process that has features of the adversarial model, although its adversarial system differs from that of common law systems. A complainant of rape in Denmark is entitled to 'state-funded legal advice at the reporting stage' and the police must inform the

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5 The juge d'instruction is an examining magistrate who has no counterpart in the adversarial system. S/he possesses wide powers of investigation in her or his preparation of the pre-trial book of evidence (or dossier). In conducting a search for the truth at the pre-trial investigative stage of proceedings, the juge d'instruction 'must investigate facts favourable both to the prosecution and the accused' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:164).

complainant that s/he has a right to a lawyer before being questioned (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:188). This right for rape victims has existed since 1980 and it is 'possible for the state to impose a legal representative on the victim even if she does not ask for it' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:198).

In Denmark, it is clear that the complainant's lawyer does not have the same rights as the prosecution and defence which means that, in practice, he or she can only address the court on compensation and in other ways assist the complainant, although the complainant's lawyer has access to police files once a suspect is charged. Technically, the complainant's lawyer only has a right of appearance at the trial during the complainant's testimony and cross-examination. However, the complainant's lawyer has a right to object to questions put to the complainant by either the defence or the prosecution (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:199). Unlike the situation in Germany and France, a complainant's lawyer cannot cross-examine the defendant or question other witnesses, make submissions to the court on questions of law, nor address the court on the guilt or innocence of the defendant or sentence. Only in relation to the issue of compensation and the effect of the offence on the complainant, can the complainant's lawyer call witnesses and question the complainant. The complainant's lawyer also has a role in asking for protective measures in relation to the complainant when he or she gives evidence (such as asking for the defendant's absence during the cross-examination of the complainant) (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:200). In summary, the role of the complainant's lawyer in Denmark is 'seen as providing an effective means of support for victims which does not encroach unduly on the rights of the accused' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:205), at the same time as having a distinctly separate role from that of the prosecutor.

Recently, the Irish Parliament passed legislation to give adult complainants the right to legal representation in limited circumstances in very serious sexual assault cases. Under s4A, *Criminal Law (Rape) Act* 1981 (Ire),[6] where a defendant makes an application to the court to adduce evidence or cross-examine the complainant about her or his sexual history (called a notice of intention: s4A(2)), the complainant has a right to participate as a party to the application and to be represented by a lawyer. Section 4A(3) states:

> The prosecution shall, as soon as practicable after the receipt by it of such a notice, notify the complainant of his or her entitlement to be heard in relation to the said application and to be legally represented, for that purpose, during the course of the application.

Not surprisingly, in the adversarial context of Ireland's criminal justice system, the idea of legal representation for rape complainants has been controversial. Criticisms have included the belief that legal representation would result in the coaching of complainants, tilt the trial process in favour of the prosecution, lead to conflicts between the prosecution and the complainant's lawyer, and would complicate the trial and alienate the jury leading to 'unjustified acquittals' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:259). In considering the reforms in Ireland, the Victorian Law Reform Commission (VLRC) (2001) discussed the advantages and disadvantages of legal representation for sexual assault complainants and was also of the view that such representation could complicate the trial, confuse juries, undermine the prosecution case, cause longer trials and jeopardise the fairness of the trial for the defendant (2001:168). In addition, the VLRC observed that 'the cost of legal advice would be a real obstacle to complainants exercising a right to legal representation' (2001:171).

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6 Inserted by the *Sex Offenders Act* 2000 (Ire).

The main objection to legal representation appears to be that even though it works in an inquisitorial context, it cannot be 'transplanted so easily into the common law adversarial system, with its strict rules of evidence' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:260). One of the key issues is that if the complainant has access, through her lawyer, to the prosecution file, her knowledge of other witness statements and the results of forensic tests or medical examinations might taint her evidence. However, apart from the issue of cost, many criticisms appear to be mere speculation and may be difficult to substantiate since legal representation does not deprive an accused of any of his or her rights under the fair trial principle, nor do the criticisms specify how or why complications to the trial, confusion on the part of the jury and prejudice (or advantage) to the prosecution would occur.

Evaluation of legal representation in inquisitorial jurisdictions

In evaluating the appropriateness of introducing legal representation for child complainants into adversarial trials, it is instructive to consider the role and usefulness of legal representation in a qualitative and quantitative study conducted by The Dublin Rape Crisis Centre and the School of Law, Trinity College Dublin (1998).[7] These two bodies carried out a comparative study in five jurisdictions[8] to examine rape complainants' experiences and perceptions of the legal process from reporting through to sentencing. One of the main issues identified by the study was the level of dissatisfaction experienced by complainants:

> participants typically stated that the reason for their dissatisfaction was that since they did not have the opportunity to meet with the prosecutor prior to the trial, that meant the prosecutor had no personal knowledge of the participant, of the participant's character, her feelings or her experience (1998:108).

Notably, however, complainants who had had legal representation indicated a much higher level of satisfaction with the legal process due to the amount of contact time with their lawyer (1998:109). In fact, of all the personnel associated with the legal process, 'participants were by far the most satisfied with the treatment they received from their own legal representative' (1998:129, 133). Satisfaction with the treatment received from the state prosecutor was rated the second highest, whilst participants were least satisfied with the treatment received from the defendant's lawyer (1998:135). On a sympathy scale, participants in the study, on average, rated their legal representative as very sympathetic, an outcome that appears to be a result of the representative nature of the relationship between complainant and lawyer.

In relation to participants' perceptions of the fairness of the legal process and whether justice had been achieved in their case, the Dublin Study reported that perceived fairness was '*significantly* associated with participants' satisfaction with the contact time that they had with the state prosecutor, and with their satisfaction with treatment they received from their legal representative' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:142–143).[9] The more contact time participants had with the state

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7 Hereinafter referred to as the 'Dublin Study'. The study carried out detailed statistical analyses of the complainants' psychological interviews and reported significance ratings (see Appendix Two of the Dublin Study).

8 Twenty rape complainants participated in the study from five European Union countries: Ireland, Germany, France, Belgium and Denmark. Seventeen of the total sample of cases went to trial.

9 Nonetheless, a 'majority of participants whose cases had proceeded to trial did not believe justice was achieved in their case' either because of the outcome of the trial, the sentence or the treatment they received during the trial process (The Dublin Rape Crisis Centre and the School of Law, Trinity College Dublin 1998:142).

prosecutor, the fairer they perceived the legal process to be. The amount of contact time with the prosecutor was also directly related to participants' understanding of their role in the proceedings and their perceptions of the fairness of, and satisfaction with, the legal process as a whole.

Secondly, the study reported that '[w]here participants had their own legal representative and where they reported being satisfied with the treatment they received from this lawyer, the fairer they perceived the legal process to be' (1998:143). In addition, the participants who expressed the greatest levels of satisfaction with the legal process had legal representatives and 'strong support teams either in the form of their own personal network or of professional support services' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:148).

Nonetheless, the Dublin Study reported that a majority of participants felt they had been denied participation in the trial process and that they would have 'preferred to have had a greater participatory role in the legal proceedings' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:144–145). Although the Dublin Study identified a number of reasons for the levels of dissatisfaction expressed by participants, two reasons stood out: lack of information about developments in the case and inordinate delays from the time of reporting to trial (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:150). Interestingly, Irish participants, who at the time of the study did not have access to any legal representation, reported 'being significantly less satisfied with the legal process when compared to participants from the other four selected member states' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:146).

In summary, participants' satisfaction with the legal process was found to be associated with a number of factors (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:146–148):

(i) their experience of contact with the police;

(ii) the amount of contact time they had with the prosecutor;

(iii) the treatment they received from the prosecutor;

(iv) the treatment received from their legal representative;

(v) the treatment received from the trial judge;

(vi) their understanding of their own role in the trial process; and

(vii) how fair they perceived the legal process to be.

In relation to the impact of legal representation on the participants' experiences of the pre-trial and trial process, the study documented the following effects (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:151):

(i) significantly fewer difficulties in obtaining information about case developments;

(ii) significantly clearer understanding of their role at trial;

(iii) higher levels of confidence and articulateness when testifying;

(iv) rating of the attitude of the defendant's lawyer as significantly less hostile;

(v) more dissatisfaction with the treatment they received from the state prosecutor;

(vi) a significantly lower negative effect of the trial process on the complainant's family; and

(vii) significantly more satisfaction with the legal process for those who had legal representation compared to those who did not.

Indeed, for those participants who had *no* legal representation, the study reported that they felt 'significantly less confident when testifying', 'less articulate when testifying', 'significantly more negative about having been involved in the legal process' and 'significantly less satisfied overall with the legal process'. They also 'rated the defence lawyer as more hostile', perceived the legal process as 'significantly less fair' and reported that involvement in the legal process 'had a significantly more negative effect on their family life' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:159).

Some participants offered the following comments about legal representation and inclusion in the legal process (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:156):

> [T]here is a great need for victims to have a lawyer or legal adviser representing them when they are making their statement.
>
> [There should be] something such as a victim's lawyer who can mediate on the victim's behalf in relation to law enforcement agencies and prosecuting authorities.
>
> A lawyer to represent you, someone that you could contact, would go a long way in ensuring that you feel involved in the case.
>
> I would have liked to have someone to represent me, someone who knew me as a person. Then I wouldn't have been as afraid as I was.
>
> Victims need to be included from the beginning to the end. It is not an event outside your life. It is your life and you are consumed by it.
>
> [V]ictims should have more of a decision-making role in the whole process.
>
> There should be more contact with the prosecution especially, so that at least they would understand who I am and what has happened to me.

The lessons from inquisitorial jurisdictions: issues identified by the Dublin Study

Whilst the Dublin Study only sampled a non-representative group of adult complainants, the issues of complainant dissatisfaction and lack of participation in the legal process appear to be common to both adult and child sexual assault trials, since such issues have also been identified in Australian, British and South African studies (see, for example, Edwards 1996; Department for Women 1996; ALRC & HREOC 1997; Home Office 1998; Sadan, Dikweni, & Cassiem 2001; Eastwood & Patton 2002; Moult 2002). In fact, it can be expected that the Dublin Study is of particular relevance to child complainants since they are less likely to be able to participate in, and less likely to understand, the legal process and their role in it because of their age, compared to adult complainants.

Indeed, the Dublin Study is very useful for considering changes and improvements to the prosecution of sex offences in other jurisdictions for a number of reasons. Firstly, it compares levels of satisfaction and participation of complainants in *both* adversarial and inquisitorial systems. Secondly, as a result of its statistical analyses, the study was able to identify *specific* factors that were associated with higher levels of satisfaction, participation and perceptions of fairness. Thirdly, the study identified the specific roles that a legal

representative could have in the pre-trial and trial process to ensure greater involvement and participation of complainants. In particular, this information must be considered in light of the 'growing recognition that the willingness or ability of [vulnerable] witnesses to participate in the criminal justice process affects the level of reporting of crime and the level of prosecution of some crimes, as well as the likelihood of securing a conviction' given the historical under-reporting of sexual assault offences and the 'case attrition' in sexual assault cases (Scottish Executive Central Research Unit 2002:17).[10] At the same time as there is a need to reduce secondary trauma and improve the overall experiences of child complainants within the criminal justice system, there is also a need to increase the quality of evidence given by the complainant, as well as their ability to give evidence such that the best available evidence is presented to the court[11] in a context in which:

> [t]he lack of training [of judges and lawyers] is seen to undermine the effectiveness of measures to protect children generally. There are arguments (from a range of jurisdictions) that prosecution teams and the judiciary are not yet sufficiently knowledgeable about issues facing 'vulnerable' witnesses to provide proper protection to them (Scottish Executive Research Unit 2002:68).

Further, it is necessary to address the issue of complainants' perceptions of justice and fairness. This concept of fairness appears to encapsulate not only a complainant's understanding of the legal process but also their ability to participate in that process. The Dublin Study showed that providing the complainant with information at every stage of the legal process enhances understanding and, hence, a complainant's sense of being a participant in the process, rather than being an uninformed bystander.

From the point of view of law reform, the first question the study raises, however, is whether it is possible that greater contact with prosecutors before trial would go some way to increasing complainants' experiences of participation, fairness and satisfaction. The question is relevant in the Australian context given the findings of Eastwood and Patton (2002:66) in relation to child complainants' experiences in Queensland, NSW and WA with prosecutors. In Queensland, only 25 per cent of 18 complainants had met with the prosecutor prior to committal. Most (88 per cent) had met with the prosecutor 'on only one occasion prior to trial with 12 per cent meeting the prosecutor on the day of trial'. These findings can be compared with the experiences of complainants in WA, where nearly half of the 36 complainants interviewed had met with the prosecutor on more than two occasions prior to trial (Eastwood & Patton 2002:67). As a result, most children interviewed in WA 'indicated that being able to spend more time with the prosecutor helped them to be more comfortable about the process of giving evidence. [In fact,] [c]hildren frequently referred to the prosecutor as "my lawyer"' (Eastwood & Patton 2002:67). There are, however, limitations associated with placing the burden of complainant satisfaction and participation on the shoulders of the prosecutor as the NSW Director of Public Prosecutions has observed:

> the Crown Prosecutor is not the witness's representative. That is a misconception which is commonly expressed by victims and witnesses .... They constantly refer to 'their barrister' or 'their lawyer' meaning the Crown Prosecutor. The fact of the matter is that the Crown Prosecutor represents the community at large, and not the individual interests of the victims or the witness. That is the way our system is structured ... unless there is some fundamental

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10 For example, the Home Office (1998) reported that in relation to 53 discontinued cases of child abuse, the most common reason for discontinuance was the desire of the child not to give evidence. High attrition rates have been reported in Australia (see Queensland Crime and Misconduct Commission 2003:58–59).

11 Arguably, these are the two main objectives of vulnerable witness legislation. This issue is discussed further, below.

> change. But it means that the victim has an expectation which is not realised, an expectation of support, assistance, and perhaps protection, which ... is dashed (Standing Committee on Law and Justice 2002:69).

As a result of the positive experiences that complainants reported in relation to the role and assistance provided by their legal representatives, the Dublin Study recommended that a right to legal representation for victims of rape should be introduced in adversarial systems. The role of the legal representative, they recommended, would be to keep the complainant informed of the progress of the investigation and pre-trial procedures, to make applications for the trial to be heard in camera, to request that certain protective measures be adopted for the complainant, to object to unduly hostile cross-examination of the complainant and to prevent the admissibility of evidence as to the complainant's prior sexual experience (the Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:36–38).

The case for legal representation in the adversarial system

Based on the Dublin Study it is possible to make out the case for legal representation on the following grounds:

- that representation could lead to an increase in the reporting and prosecution of sexual assault;
- the prosecutor represents the interests of the state (such as, deterrence, punishment, rehabilitation), not the interests of the complainant;
- the interests of the state and the complainant (and his or her family) do not necessarily coincide;
- the relationship between the prosecutor and the complainant does not amount to a client/lawyer relationship, such that the prosecutor does not owe the duties of a legal representative to the complainant;
- being a victim of sexual abuse and being required to give evidence in a criminal trial may be life-changing events for the complainant — for the prosecutor the case is one of many to be dealt with;
- prosecutors' offices may not be sufficiently funded to enable all prosecutors to meet with, and explain the trial process, to the complainant;
- where legal representation is not available, the complainant will be dependent on other sources for information about the trial process, such as bail, bail conditions, pleas, plea bargaining, adjournments and sentencing;
- even if a prosecutor has met with a complainant prior to trial, a different prosecutor may conduct the trial;
- due to funding constraints, a prosecutor may not meet with the complainant until the day of the trial;
- as discussed above, there is evidence to suggest that complainants have high expectations of the prosecutor which prosecutors are unable to meet, resulting in unrealised expectations and dissatisfaction with the process (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:129; see also Eastwood & Patton 2002:66–67);
- even if there is sufficient contact time between complainant and prosecutor, this may not necessarily translate into a perception of fairness of the legal process or participation in the legal process.

This argument is made in light of the fact that, in a sexual assault trial, the complainant is, for all practical purposes, at the centre of the trial, yet her or his interests or rights, in a legal sense, are no greater than those of any other victim. What the complainant said or did not say, did or did not do *before* the alleged assault, at the time of the alleged assault and *after* the alleged assault are matters that are central to both the prosecution's case and the accused's defence. Despite the centrality of the complainant to proceedings in a sexual assault trial, 'the provision of information to the victim is not formalised at any stage, despite the length of time it may take between the initial report of rape and the trial itself' (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:252). Legal representation would formalise the provision of information to the complainant, both pre-trial and during the trial, which is likely to have a flow-on effect in terms of improvements to complainant participation and satisfaction, the quality of the complainant's evidence and, hence, the case presented by the prosecution.

The remaining sections of this paper look at the possible models of advocacy in a criminal context and the various roles that a child complainant's legal representative could play in an adversarial trial.

A model of child advocacy in the Australian context

One model for legal representation for children in the Australian context has been developed in the context of the *Family Law Act* 1975 (Cth) which stipulates that the best interests of the child is the paramount consideration in relation to certain determinations under the Act (ALRC & HREOC, 1997:388; *T v L* (2000) 27 Fam LR 40 at 48, per Chisholm J).[12]

Section 68L of the *Family Law Act* empowers the Family Court, on its own initiative or upon the application of the child, an organisation concerned with the welfare of children or any other person, to make an order that the child be separately represented. The child's representative[13] may be appointed in relation to guardianship, custody and access matters, as well as matters concerning property proceedings and non-therapeutic medical procedures. The Family Court is empowered under s68L(2) to make 'such other orders as it considers necessary to secure that separate representation' which means that the Court can request that 'representation be arranged through or under the auspices of various Legal Aid bodies' (Lindenmayer & Doolan 1994:1; see, further, *Re JJT; ex parte Victoria Legal Aid* [1998] HCA 44). The appointment of a child's representative under s68L has the effect of making the child a party to proceedings and giving the child a right of appeal (*Separate Representative v JHE and GAW* (1993) 16 Fam LR 485). Whilst the Family Law Act does not spell out the role, rights and responsibilities of the child's representative, the Family Court has done so in various cases over the years.

In Family Court proceedings, the role of the child's representative is to:

- cross-examine the witnesses;
- call evidence that affects the child's welfare;

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12 Whether civil or criminal proceedings are being considered, the ALRC and HREOC (1997) reminds us that the Convention on the Rights of the Child states: 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' (Article 3).

13 Children's representatives were previously known as 'separate representatives' up until 1995 whilst the ALRC and HREOC (1997) refers to them as 'best interests representatives'.

- inform the court of the child's wishes; and
- address and make submissions to the court about the child's welfare based on the law and the evidence adduced.

This summary of the representative's role was set out in *Waghorne and Dempster* (1979) FLC 90–700 at 78,735 by Treyvaud J and later approved by the Full Court in *Bennett and Bennett* (1990) 102 FLR 370; 14 Fam LR 397. The Full Court was of the view that the role of the representative is 'broadly analogous to that of counsel assisting a Royal Commission in the sense that his or her duty is to act impartially but, if thought appropriate, to make submissions suggesting the adoption by the court of a particular course of action, if he or she considers that the adoption of such a course is in the best interests of the child' (*Bennett and Bennett* (1990) 102 FLR 370 at 380; 14 Fam LR 397 at 398, per Nicholson CJ).[14] The representative is not 'bound to make submissions on the instructions of a child as to its wishes or otherwise' although the Family Court has said it would be bound to inform the court of those wishes (*Bennett and Bennett* (1990) 102 FLR 370 at 380; 14 Fam LR 397 at 398, per Nicholson CJ). The expected impartiality of the child's representative means that it is not her or his role 'to investigate and present the case for one of the parties' since to do so would compromise the representative's neutrality (*T v S* (2001) 28 Fam LR 342 at 372, per Nicholson CJ, Ellis and Mullane JJ). Such a model of representation also means that 'it is frequently part of the child representative's role to advance propositions which will be seen by one party as contrary to that party's interests and/or contrary to the child's interests' (*T v L* (2000) 27 Fam LR 40 at 49, per Chisholm J), although this model has been defended within the family law context on the grounds that it is not desirable for children to be able to instruct lawyers (Chisholm 1998:10).

The obligations of the child's representative were summarised by the Full Court in *P and P and Legal Aid Commission of NSW* (1995) 19 Fam LR 1 at 32–33 as follows:[15]

> (1) Act in an independent and unfettered way in the best interests of the child;
>
> (2) Act impartially, but if it is thought appropriate, make submissions suggesting the adoption by the Court of a particular course of action, if he or she considers that the adoption of such course is in the best interests of the child;
>
> (3) Inform the Court by proper means of the children's wishes in relation to any matter in the proceedings. ...;
>
> (4) Arrange for the collation of expert evidence, and otherwise ensure that all evidence relevant to the welfare of the child is before the Court,[16]

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14 The child's representative has a right to apply for orders under the *Family Law Act* that are consistent with the welfare of the child (*In the Marriage of F and R (No.2)* (1992) 15 Fam LR 662; see also *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485 at 495, per Nicholson CJ and Fogarty J).

15 The role of the child's representative as set out in *P v P* has been affirmed in subsequent cases; see, for example, *In the Marriage of B and R* (195) 19 Fam LR 594; *T v L* (2000) 27 Fam LR 40, *DS & DS* [2003] FMCAfam 365.

16 The collation of evidence may involve interviewing the child, family members, school teachers and counsellors and analysing relevant departmental and court files (ALRC & HREOC 1997:255). In particular, the child's representative, once appointed, must make contact with the State Welfare Authority and seek information about: 'the extent of any child protection involvement with the child or family, in particular, any abuse or neglect notifications and investigations; and if there has been any such involvement, whether the Authority intends to become involved in the family law proceedings or is considering the initiation of other legal proceedings' (Family Court of Australia, 13 August 2003; <www.familycourt.gov.au/brochures/guidelines01.pdf>).

(5) Test by cross examination, where appropriate, the evidence of the parties and their witnesses,[17]

(6) Ensure that the views and attitudes brought to bear on the issues before the Court are drawn from the evidence and not from a personal view or opinion of the case;

(7) Minimise the trauma to the child associated with the proceedings;

(8) Facilitate an agreed resolution to the proceedings.

Thus, the representative undertakes multiple functions as the child's advocate and as an officer of the court, as well as having the duty to 'investigate issues of fact or divergent expert opinion' (*Re S (A Minor) (Independent Representation)* [1993] 3 All ER; cited in *Re K* (1994) FLC 92–461) and to address the court as to the best interests of the child (ALRC & HREOC 1997:262–263). At times, it has been recognised that it is not possible to reconcile all these functions. In its inquiry into children and the legal process, the ALRC and HREOC (1997:262) noted that the best interests model can:

> present the representative with a confusion of roles ... [because] [t]he representative is asked to conduct investigations and make assessments that are properly within the area of expertise of social scientists. The representative advocates the case on the basis of his or her assessment, in effect making '... legal decisions that are properly in the province of the judiciary'.

Indeed, the ALRC and HREOC received submissions that confirmed that advocates are, at times, confused about the exact role of the child representative (1997:263). Other submissions advocated direct legal representation in the family law context which would create a lawyer-client relationship between the representative and the child, allowing the representative to take instructions from the child (ALRC & HREOC 1997:267–269). In its recommendations, the ALRC and HREOC favoured the standard lawyer-client model on the grounds that it 'addresses the problems of best interests advocacy ... and ensures proper representation of children' (1997:271). Under this model, the first duty of the representative would be to represent the child and, after taking instructions, to 'allow the child to direct the litigation as an adult client would' (ALRC & HREOC 1997:274). However, if a child is too young or not willing to present a view to the representative, the lawyer would need to resort to the best interests model in order to properly represent the child (ALRC & HREOC 1997:271).[18]

In considering the efficacy of a legal representative for child complainants in criminal trials, it would be necessary to make a choice between the lawyer-client model which is a feature of legal representation in inquisitorial jurisdictions and the best interests model which envisages a different model of advocacy and representation, as described above. In the family law context, Chisholm (1998:10) has observed that in order to clarify the role of those who represent children, it is necessary to recognise the limits in which the role can be realistically defined. To this end, Chisholm (1998:11) noted that '[i]n considering whether a child should participate, one important factor is the kind of participation. Thoughtful

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17 The child's representative is 'entitled to ask questions which [are] relevant to the welfare of the child ..., irrespective of whether the effect is to adduce evidence which could have been led by a party' and 'is entitled to the same rights and is subject to the same obligations as an advocate for a party both at general law and under the *Evidence Act* 1995 (Cth), including the right to ask leading questions of a witness' in 'pursuing the goal of assisting the court in deciding what is in the best interests of the child' (*In the Marriage of B and R* (1995) 19 Fam LR 594 at 630–631, per Fogarty, Kay and O'Ryan JJ).

18 Whatever the model of representation that is chosen, the roles, functions and objectives of the representative need to be clearly spelt out with 'clear ethical and practical standards' (ALRC & HREOC 1997:269). Examples of such standards are available from the Family Court website and are also set out in the report by the ALRC and HREOC (1997:272–275).

commentators often make the point that whether participation is a good idea for children depends on what kind of participation it is'. In the criminal context, this would involve an assessment of the child complainant's role as a witness for the prosecution and his or her interests as a witness, compared with a child's role and interests in a family law case.

Such a comparison was undertaken in a recent Queensland Supreme Court case, *R v D* [2002] QCA 445, in which Jerrard JA considered the differences between criminal proceedings in which a child is the complainant and family law proceedings in which decisions are made that directly affect a child's living arrangements and contact with parents. In considering the problem of adducing sufficient relevant evidence in a child sexual assault trial, Jerrard JA made the following observations in circumstances in which there was no forensic or other corroborative evidence, based on his experiences as a judge in the Family Court of Australia:[19]

> The usual procedures and practices of ... [the Family] [C]ourt would have resulted in the child being separately represented, and a careful assessment being made by an experienced social worker or psychologist ... of the ... family members, and their interrelationships. ...
>
> A careful examination would have been made of the records held by all bodies such as the Department of Families, the Police, the child's General Practitioner, and the like, which recorded any statements made by either parent, ... or the child, relevant to the fact or probability of the occurrence ... of ... sexual abuse .... All relevant adults would have been cross examined, and no children would be. The video taped interview [of the child] would be admitted into evidence .... The result of all that would be that the court would have a considerable body of evidence upon which to draw when [assessing the reliability of the child's evidence]. Others may share my view that it is an unacceptable oddity in this 21st Century that the criminal processes in the State place the entire evidentiary burden of proof ... upon the evidence of a child ... whereas other courts making equally important determinations on the same topic of the sexual abuse of children by family ... routinely ... gain information from many other sources, and positively discourage the concept that the truth can be ascertained by the cross examination of a child. ... [T]he practices and procedures of the [Family Court] ... provide a sound and satisfactory basis for judgment [compared to criminal courts], and ... are far more a search for the truth .... [T]he focus of the inquiry ought to be upon what has happened in the child's life rather than upon proof of a criminal charge, although the enquiry into what has happened may well establish that a criminal offence has been committed; and the procedures routinely used in the criminal jurisdiction should be radically reconsidered. This would require a paradigm shift (*R v D* [2002] QCA 445 at [44]–[46]).

The above description of the processes involved in Family Court proceedings has much in common with the 'search for truth' in inquisitorial trials, a search that is not an overt feature of adversarial trials. The key distinction between the inquisitorial approach of civil jurisdictions compared to the adversarial approach of common law systems is that '[a]n inquisitorial system assumes that the truth can be, and must be, discovered ... and, because it may be in the interests of the parties to conceal it, ... the state is best equipped to carry out such investigations' (Jörg, Field & Brants 1995:43; cited in Ellison 2001:142). If the type of inquiry as suggested by Jerrard JA were to be undertaken, and evidence gathered for a subsequent risk assessment analysis, at the same time as criminal charges were being prosecuted, then it is arguable that a court-appointed legal representative for the child would be needed to ensure that all relevant evidence from government agencies as well as from all family members, the child's teacher and other relevant adults was made available to the court. However, such an approach involves an inquiry into the welfare of the child and

19 *R v D* [2002] QCA 445 was a case in which there was little evidence upon which 'the jury was asked to form views about the reliability of the complainant's evidence and her father's, and upon the issue of the occurrence of sexual abuse beyond reasonable doubt' ([2002] QCA 445 at [44], per Jarrad JA).

would require a complete re-think about the way in which child sex offences are presently prosecuted, such as the establishment of a jurisdiction based on inquisitorial methods which combined child protection and welfare concerns, as well as the punishment of criminal conduct.

In the absence of such a 'paradigm shift', the question remains whether legal representation is appropriate in an entirely different context, that is, the adversarial criminal trial, particularly in light of the fair trial principle, and in terms of the various responsibilities that could be undertaken by that representative.

Is there a role for a best interests advocate in the criminal context?

In the introduction to this paper, the following key issues were identified in relation to child complainants in sexual assault trials:

(i) the need to improve children's participation in the trial process by enabling them to give their best evidence during examination-in-chief and cross-examination;

(ii) the need to decrease the possibility of re-traumatisation of child complainants, including during cross-examination by protecting the child from irrelevant, intimidating, oppressive, repetitive and confusing questioning; and

(iii) the need to improve complainant satisfaction and perceptions of fairness.

Whether these objectives could be achieved through the introduction of legal representation (at the same time as ensuring the accused receives a fair trial) depends on the model of advocacy envisaged and the scope of the representative's powers, obligations and responsibilities both pre-trial and at trial. In relation to the standard lawyer-client model discussed above, there are limits to a representative acting according to a child complainant's wishes and instructions, since, unlike the situation in some inquisitorial jurisdictions, sexual assault complainants do not become a party to proceedings. Thus, the kind of participation envisaged within the criminal context is necessarily constrained by the limited role that the child plays as a witness, rather than as a party to the proceedings. Similarly, when considering the applicability of the best interests model in the criminal context, there is limited scope for the best interests of a child witness to be taken into account. In other words, criminal proceedings are not conducted to advance the interests of Crown witnesses, nor is the fact-finder required to come to a decision based on the interests of any of the witnesses in the trial, let alone those of the child complainant. This may be compared to decision-making by the Family Court in relation to decisions concerning children 'which requires decision makers to prefer the interests of children over any other competing interests' (ALRC & HREOC 1997:258).

Clearly, the concept of the best interests of the child in Australia has developed within a family law context and within State and Territory care and protection legislation which, in most jurisdictions, also requires the best interests of the child to be taken into account (ALRC & HREOC 1997:389). What amounts to the best interests of the child in these contexts will differ to the criminal context since the best interests of the child complainant cannot be preferred over those of the accused and his/her right to a fair trial. Nonetheless, the best interests principle could be usefully employed to guide the conduct and roles of a child's legal representative rather than guiding the conduct of the trial or, indeed, the decision-making process (as is the case under the *Family Law Act*).

The best interests model is based on impartiality and independence which would allow a child's legal representative to make submissions to a court based on an objective

assessment of what s/he considers is in the best interests of the child (even if that does not accord with the child's wishes). That impartiality and independence in the family law context is maintained in three ways:

(i) the legal representative is not appointed by the child s/he represents;

(ii) s/he cannot be removed by the party who is represented;

(iii) s/he does not necessarily advance the child's wishes but exercises independent judgement to advance the best interests of the child (*In the Marriage of Harris* (1977) FLC 90–276 at 76,476, per Fogarty J; cited with approval in *Separate Representative v JHE and GAW* (1993) 16 Fam LR 485, per Strauss J).

To this end, the role of a legal representative in the criminal trial would need to focus on, first, promoting the participation of the child complainant through the provision of information and ongoing consultation pre-trial and, secondly, (as discussed below) meeting a range of obligations both pre-trial and at trial, taking into account the child's age, developmental maturity, sex and ethnic/cultural background, as well as the need to protect the child from psychological trauma as a result of the child being involved as a witness in criminal proceedings.

It is worth noting that if the role and obligations of a child's legal representative were to be based on the primary objective that s/he acts in order to promote the best interests of the child, this principle is consistent with the fact that vulnerable witness legislation in Australia has been enacted for the broad purpose of protecting the welfare of such witnesses.[20] For example, in NSW, the Attorney-General's Department has stated that, whilst the *Evidence (Children) Act* 1997:

> does not contain an explicit statement of its objectives, it may be inferred that the main objectives of the Act are:
>
> •to ensure that in proceedings involving child witnesses, the best evidence is made available to the court to decide the guilt or otherwise of the accused; and
>
> •to alleviate some of the trauma children face in having to give evidence in court proceedings through the use of alternative measures.[21]

More explicitly, the recent *Evidence (Protection of Children) Amendment Act* 2003 (Qld) states, under s 21AA, that the purposes of a special scheme for the giving of evidence by child witnesses are:

- to preserve, to the greatest extent possible, the integrity of an affected child's evidence; and
- to require, wherever practicable, that an affected child's evidence be taken in an environment that limits, to the greatest extent practicable, the distress and trauma that might otherwise be experienced by the child when giving evidence.

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20 It may be inferred that judicial officers are required to strike a balance between protecting the accused's right to a fair trial (including his/her interest in challenging the prosecution's evidence) and protecting the welfare of child witnesses. A similar responsibility has been inferred in the corresponding legislation in the UK such that judicial officers' responsibilities extend to protect the interests of vulnerable witnesses through the making of a Special Measures direction under the *Youth Justice and Criminal Evidence Act* 1999, as well as to prevent the use 'of improper or inappropriate questioning by legal representatives (or the defendant, if he or she is conducting his own defence)' (Home Office 2002:108).

21 Personal communication to the author 29 September 2003.

With the above objectives in mind and based on the best interests model, the roles, obligations and powers of the child complainant's representative *could* include any of the following:[22]

- provision of information to the child about the investigative, pre-trial and trial processes;
- a right of appearance at trial, any pre-trial hearings and bail hearings;
- a right to make submissions at bail hearings in relation to the impact on the child if bail is/is not granted;
- the obligation to inform police of any bail conditions not met by the accused;
- the obligation to put all relevant evidence before the court;
- the right to make submissions in relation to rulings on vulnerable witness legislation, rape shield provisions and sexual assault communications provisions;
- the obligation to object to questions put by both the prosecution and the defence;
- the obligation to act as an intermediary between the child and the defence during cross-examination;
- the obligation to request breaks for the child;
- the right to make submissions on sentencing.

However, since a number of these tasks are undertaken by other professionals, it is important to be able to discern what specific tasks, if any, are best suited to be undertaken by a child's legal representative by comparing the roles of other professionals involved in the criminal trial process. See Table 1 which seeks to do this by setting out current roles of other professionals and suggesting the possible roles which a child's legal representative might play.[23] O'Sullivan has suggested that what is at stake are the 'respective roles of the legal representative; support person from [the] Child Witness Service; intermediaries; Crown Prosecutor; DPP clerks, including specialist team members and child psychologists'.[24] In considering these roles, it would also be necessary to consider the ways in which legal representation is compatible with many other law reform measures that have been introduced to protect vulnerable witnesses.

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22 Appropriate training would need to be provided to funded legal representatives for child complainants, including issues relating to interviewing skills, children's memory, the development and use of language, age-appropriate language, effective communication and how children see and understand their world (to name but a few issues). Training programs are already in existence for child representatives under the National Training Scheme for Child Representatives conducted by the Family Law Section of the Law Council in conjunction with Legal Aid Commissions and the Family Court.

23 The construction of such a table was suggested to the author by Judge Helen O'Sullivan, District Court, Queensland.

24 Judge Helen O'Sullivan, District Court of Queensland, personal communication to the author, May 2003.

Table 1

TASKS	PROFESSIONAL
Ensure the complainant is informed about each stage of the investigation, including the charges laid against the accused, the granting of bail and bail conditions, accused's plea and plea bargaining, trial dates.	• **Legal representative** who is appointed at the time of the first police interview • Specially trained prosecutor and/or other trained member of the DPP's office
Submissions on bail application regarding the impact on the child if bail is granted; conditions to be attached.	• Prosecutor • Legal representative
Educating the complainant about what to expect in court, court layout, role of those present in court.	• Staff of Witness Assistance Service* • Trained DPP staff • Legal representative
Assessment of the child's needs in relation to trial dates.	• Witness Assistance Service • Trained DPP staff • Legal representative
Organisation of support person for child	• Witness Assistance Service
Application for alternative methods for giving evidence where those facilities are not mandatory.	• Prosecutor • Legal representative
Assessment of the evidence	• Prosecutor
Make submissions on the law including the admissibility of evidence under rape shield provisions and the sexual assault communications privilege	• Prosecutor • Legal representative
Cross-examination of the accused	• Prosecutor
Cross-examination of the complainant	• Court-appointed intermediary • Legal representative
Objections to hostile, confusing or intimidating cross-examination by the accused's counsel	• Prosecutor • Legal representative
Assessment of competency	• Trial judge
Collection of evidence from family members and other relevant adults and any records kept by government agencies (as suggested by Jerrard JA in *R v D*).	• Legal representative
Inform police of any bail conditions not met by the accused.	• Witness Assistance Service • Legal representative
Tender of victim impact statement and addressing the court on sentencing	• Prosecutor • Legal representative

*This is based on the Western Australian Witness Assistance Service model, which constitutes a best practice model for the provision of assistance to complainants of child sexual abuse

The first criticism that can be made of the above roles for a legal representative is that representation will duplicate the role of the prosecution (The Dublin Rape Crisis Centre & the School of Law, Trinity College Dublin 1998:237) and that a properly funded witness assistance service and prosecutors' office could fulfil most of the above tasks and functions. However, in an adversarial trial there is no duty on the prosecutor (or, indeed, the trial judge) to protect the interests of the child complainant, other than perhaps to object to unreasonable cross-examination. In other words, although a number of the tasks set out in Table 1 could be met by other personnel, no one professional is under a duty to act in the best interests of the child, nor is there any person in a position to meet the comprehensive obligations and duties set out in the ten dot points above. The problems faced by child complainants in relation to information, participation, giving evidence and hostile cross-examination, remain a problem since prosecutors cannot always be counted upon to make applications for CCTV or screens, to provide on-going information, to intervene to prevent objectionable cross-examination or to exhibit appropriate sensitivity in their own examination of a child complainant (ALRC & HREOC 1997:352). On the other hand, legal representation would provide a comprehensive addition to the other protections available for child witnesses by filling in the gaps that still exist in relation to improving the experiences and participation of children in a system which makes them peculiarly vulnerable as witnesses.

Conclusion

This paper has identified that there are a number of barriers that may prevent children from fully participating in a criminal trial as a complainant of a sexual assault, particularly during the cross-examination process. In particular, the discussion has focused on whether or not legal representation for children could achieve the following objectives:

(i) improvement in child complainants' participation in the trial process by enabling them to give their best evidence during examination-in-chief and cross-examination;

(ii) decreasing the possibility of re-traumatisation of child complainants, including during the cross-examination by protecting the child from irrelevant, intimidating, oppressive, repetitive and confusing cross-examination;

(iii) improvement in complainant satisfaction and perceptions of fairness.

In analysing the role of legal representation for witnesses in inquisitorial jurisdictions, the Dublin Study showed that adult complainants' participation and perceptions of fairness were significantly enhanced by legal representation, thus suggesting that similar outcomes might be likely in the adversarial context. To this end, two possible models of advocacy in the Australian context were analysed, with the conclusion that the best interests model would be the most appropriate in an adversarial trial, with the best interests principle guiding the role, obligations and conduct of the child's legal representative, rather than the conduct of the trial or the decision-making process. Finally, a comprehensive list of possible tasks on the part of the child's legal representative was considered, with the recognition that, although many of those tasks would overlap with the roles of the prosecutor and witness assistance personnel, no one professional associated with the criminal justice system is in a position to fulfil all such tasks.

Whether legal representation would be capable of meeting the three objectives set out above is a matter that would need to be the subject of further study. Such a study would be necessary to determine whether legal representatives for children should be a permanent feature of child sexual assault trials and, if so, the exact roles and obligations they should

be permitted to carry out. To this end, it would be useful to conduct a pilot program of approximately 100 cases in a selected jurisdiction, depending upon approval by the relevant government agency in that jurisdiction. Legal representatives (based on the best interests model) would need to be appointed in each case to represent the child complainant and to undertake a range of specific tasks (such as all or some of those set out above in Table 1)[25] in order to determine the impact of legal representation on complainants' experiences and their ability to give evidence, the impact on personnel associated with the criminal justice system (judges, police, prosecutors and defence counsel) and whether those outcomes justified the resources required to fund legal representation.

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25 It would be necessary to establish guidelines setting out the roles of child representatives, similar to those produced by the Family Court of Australia. Appropriate training would need to be undertaken by representatives.

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