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# CHILDREN AS WITNESSES

PAPER DELIVERED AT CHILD WITNESS SUPPORT CONFERENCE
BRISBANE 7 JUNE 2007 BY JUDGE JM ROBERTSON

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It gives me great pleasure to present the keynote speech at the start of your annual conference. I think I speak for all judicial officers when I say that we regard our wonderful PACT volunteers as a essential part of the process of ensuring that children are treated with dignity in the criminal justice system.

Because I am so old, and because I have been professionally involved in the criminal law in the courts now for 37 years I can say from personal experience that there has been a paradigm shift in the way we treat children as witnesses in the criminal courts. In many ways, the paradigm shift mirrors societal change from times when children had no rights, “were seen not heard”, to the present time where, at least in our democracy, children are seen as human beings with human rights. I have also had my own children and now an ever expanding horde of grandchildren and I speak with utter conviction when I say that I have never found one, especially under the age of 6, of whom I can confidentially assert that I am smarter.

In many respects the institution of the law, which is after all part of society, has failed to understand children. There has been a cultural tendency to regard them as being less competent and less aware than adults. We are changing slowly but there are still problems in

communicating with children. Indeed I think it is the main remaining difficulty in our criminal justice system.

In earlier times, competency hearings were held before a Judge to decide if the child witness had sufficient intelligence to comprehend the duty of telling the truth. I discovered this gem from a paper on this issue delivered in 1999 which referred to a wonderful exchange between a 19th century Judge and a child witness during one of these competency hearings:

| | |
|---|---|
| Judge | And if you do always tell the truth, where will you go when you die? |
| Child | Up to heaven Sir. |
| Judge | And what will become of you if you tell lies? |
| Child | I shall go down to the naughty place, Sir. |
| Judge | Are you quite sure of that? |
| Child | Yes, Sir. |
| Judge | Let her be sworn; it is quite clear she knows more than I do. |

The legal culture in the context of the adversarial system is geared to produce forms of questions and language that is difficult to understand, even for many adults.

I thought you may be interested in a very brief history of how the law has changed in my time and changed for the better.

It is often forgotten that when I first entered the criminal courts in 1970, an accused person could not be convicted on the

uncorroborated testimony of a child complainant. Corroboration is one of those wonderful legal words that people even in the ‘60s did not use in ordinary conversation but there it was – pregnant with mysterious meaning and legally necessary to secure a conviction. Corroboration did not just mean support – it meant material support, other evidence independent of the child’s evidence that supported his or her evidence that the accused had done what was alleged.

What this meant was that, unlike today, a person accused of sexual misconduct with a child could not have been convicted on the word of the child alone. Unless there was corroboration, for example a confession, an eye witness or DNA, then there was no case. People like Mr D’Arcy the Qld M.P., convicted some years ago of sexual crimes committed in the 1960’s against his students when he was a teacher in remote Queensland schools, could not have been convicted at the time he committed the offences because the evidence of the children was not corroborated.

In the late 70s this changed, and people could be convicted on the word of a child alone. Children were not given special treatments as witnesses. The prosecution had to prove they were competent, and they had to sit in a witness box in imposing court rooms designed by adults for adults and face the accused. This idea that an accuser should have to face the person accused in court is deeply ingrained in the common law tradition, and so it remained until 1989 when the Evidence Act was changed, so that even in such emotional situations as a child alleging sexual crimes by his

or her father, the child had to face the parent in an adversarial situation if the accused disputed the allegations.

In 1989, section 21A of the Evidence Act was introduced. It gave power to a trial judge to do a number of things to protect special witnesses. Children under 12 were deemed to be special witnesses but children under 16 were not. The Judge could order that the child's evidence and cross examination be recorded using closed circuit television from remote rooms. The problem was that initially there was only one court in Brisbane with the technology to do this; so it was rarely done. The Judge could order that the child witness be screened from the accused while he or she gave evidence. Because of the practical realities, that is, there were no facilities initially for recording evidence other than in Brisbane, in most cases the child gave evidence during the trial from the same imposing witness box in front of a room full of complete strangers, some of whom were dressed in 19th Century gowns and wigs, about matters of extraordinary intimacy, with only the protection of a screen. Often the Court's budget did not extend to the provision of a purpose built screen, so that in many courts a screen would be put together from what was available.

This was the situation when I became the first resident Judge in Ipswich in 1994. My first trial involved an 8 year old who had to come into court and face her uncle who she accused of sexually abusing her. It was my first experience and a very unpleasant one for the little girl. In this case she was cross examined quite fairly by a very experience barrister for over an hour and it became quite clear the she had been put in the middle of a very nasty family

dispute and that she was the innocent agent of others in bringing the charges. She held up well until the barrister asked her if she was telling the truth and she said she wasn't and burst into tears. Her mother who had been sitting in the back of the court then flew over the public rail and attempted to attack the accused while screaming obscenities and the support lady tried to comfort the child who was by then wailing. I told the bailiff to take the jury out and he was so flustered he jammed his thumb in the door. It was a nightmare.

It became apparent to me that it was an extraordinarily difficult situation for all concerned, the child in particular, to pretend that a child could be treated in the criminal justice system more or less in the same way as an adult.

The common law still required trial Judges to warn juries about convicting on the uncorroborated evidence of a child, so if it was a word against word case the judge had to say to the jury:

> "The evidence of the complainant child is not supported by any other evidence. (Allegations of a sexual nature are easy to make and difficult to disprove) I therefore warn you that it would be dangerous to convict on the uncorroborated evidence of the child."

These warnings were given in all cases involving allegations of a sexual nature.

In 1997, these warnings were abolished by an amendment to the Criminal Code so that complainants in cases of a sexual nature were treated in the same way as complainants in other cases, for example cases of violence.

The media became interested in the topic. People often point their finger at the law makers and accuse them of not protecting children in the criminal justice system by creating appropriate laws but, in fact, as I observed before the courts and the legislature tend to reflect the social mores of the day and in truth the whole of society held these attitudes about children, including the media.

In 1999, the iconic Four Corners on the ABC broadcast a programme about the way in which children had been treated in the criminal justice system. The programme focussed on an actual court audio transcript of a committal proceedings before a Magistrate involving a little boy who had made allegations against a family member. The audience were able to hear not only the confusing words but also the hectoring and aggressive tone of the defence barrister in cross-examination. It was a deeply disturbing experience even for people experienced in the law. The presiding Magistrate was an experienced and decent man but the fact that he did not intervene to stop what was clearly unfair and oppressive questioning demonstrated how deeply ingrained was the legal culture based on the right of the accused to a fair trial.

By this time I had become President of the Children's Court and I agreed, with the support of the Chief Judge of the day, to

participate in the programme and to comment on the cross-examination.

I emphasised that every accused person is presumed innocent and is entitled to test the prosecution evidence vigorously if necessary subject always to fairness, not only to the accused, but also to others involved and in particular, vulnerable witnesses such as children. I was criticised by the Bar Association for what it alleged was an improper comment on another judicial officer without all the facts, a criticism that I repudiated. I took the opportunity to suggest that Queensland adopt the Western Australian model which had been in operation since 1992.

The following year, the new Chief to the District Court decided to have the topic as the central theme of the Court's annual conference, and a Judge from the Western Australian District Court was invited to deliver a paper about how the Western Australian system operates. The session was designed as a public forum and members of the profession were invited and to say there was an animated debate would be an understatement.

The Queensland Law Reform Commission had since 1998 undertaken research in relation to this very topic and had, just prior to our conference, published Part 1 of their report, so the Director of the QLRC delivered a paper which recommended substantial changes to the law in Queensland.

Defence lawyers were adamant that any move similar to Western Australia to remove children from the courtroom and to have their

evidence including cross-examination pre-recorded prior to the trial would be a fundamental breach of the right of an accused person to a fair trial. Interestingly, although not stated publicly, a number of prosecutors were against the idea because they regarded the presence of the child in the court room for the jury to see as an advantage from a forensic point of view. There was also a strong view expressed by many eminent lawyers and associations of lawyers that any move to restrict the right of an accused to cross-examine the child complainant at least twice, that is, at the committal and again at the trial, would be extremely unfair.

It was argued that in the word against word cases, the advantage in cross-examining twice was that the defence lawyer could make much of the inconsistencies between the various accounts which were inevitable given that the child was likely to be giving evidence, at the committal, up to a year after making the initial complaint, and at the trial, up to two years later. A two year delay in the life of anyone let alone a child is very significant.

All these moves lead eventually to the changes which commenced in early 2004, and which control proceedings now. Essentially, without becoming too technical these are:

**1.** A child (defined in part as a person who was under 16 when the defendant is arrested) will in almost every case give evidence from a remote room away from the courtroom which will be pre-recorded.

**2.** A child will rarely if ever be cross-examined at a committal proceeding. If the defence do wish to cross-examine the child, the Magistrate has to be convinced by reference to very strict legal test. I am not aware of it happening in a sexual abuse case.

**3.** The child's evidence and cross-examination for the trial will be pre-recorded before the trial, including cross-examination, and the child will never have to enter the courtroom or see the accused. The evidence is recorded by use of closed circuit television from a remote room in the courthouse. The child will always have a support person if he or she wishes.

**4.** A child is now presumed to be competent to give evidence on oath or otherwise. This eliminates the mandatory requirement for the Judge to explain the duty of telling the truth if, under the provisions of law, the child was held to not understand the nature of an oath. A party to a proceeding still has the right to challenge competency but instead of focussing on the child's intelligence, such an inquiry will instead focus on the child's ability to give an intelligible account of events.

I have conducted probably 50 pre-recordings since January 2004; and only once was competency raised and that was by the DPP in relation to a four year old who alleged that her father had digitally raped her. The prosecutor produced a psychologist's report which said she was able to give an intelligible account if questioned appropriately and the defence made no challenge to her competency. Her evidence-in-chief, that is, her evidence in support of the charge was presented in the form of a section 93A video

taped interview with a trained female police officer the day after the alleged offence, in which she gave a quite detailed account of what had occurred. By the time of the pre-recording, which was 12 months later, she was almost six. She would not answer a single question asked of her by the prosecution.

The defence barrister who is a father of three young children and a particularly skilful cross-examiner, established a rapport by a series of questions formulated in a way that such a young child could respond, and she did respond initially only by nods and shakes of her head. You have probably heard of the old aphorism much loved by barristers: “Never ask a question unless you know the answer”. In any event, this skilled barrister who is in fact a thoroughly decent man obviously got to a point where he thought he had gained her confidence and he said:

> “Dad didn’t do anything to you at McDonalds did he?”
>
> For the first time the child spoke. She said:
>
> “He did. He put his hand in my wee”.

**5.** The ability of the presiding Judge to control and disallow unfair questioning has been strengthened. Judges and Magistrates have always had power to control unfair questioning and the very fact that at a trial a jury was present tended to control most barristers. Any competent lawyer knows that to bully and hector a child in front of a jury is tantamount to forensic suicide. It followed that it was quite rare for these abuses to occur in the trial courts. Where it

did occur more frequently was in the Magistrates Court where there was no jury.

**Communication**

Before I conclude by talking a little about the effects of these new measures, I want to return briefly to this issue of communication because I think that it remains the major obstacle to treating children fairly in the criminal justice system.

All of you who have had children will know the miraculous process by which a child from about 15-18 months learns to use language. Words like “No” and “Mine” are among the first to be mastered.

The language of the law as in all special disciplines or professions, is laced with jargon and language not used in ordinary social interaction. When did you last hear the phrase “onus of proof” or use the words “beyond reasonable doubt” when dealing with your spouse or partner?

There has been a significant move towards the use of plain English both in statutes and in the language of judgment writing, and many have had specialist training in communicating in Court with the diverse audience interested in the outcome of the case.

Very little of the training is addressed towards communicating with children. Is that because we assume that because most of us have

children and all of us have been children, therefore we intuitively know how to communicate with them? My experience is that we have a long way to go in this area.

Can I demonstrate my point by reference to just a few examples? When a barrister is cross-examining a witness adverse to his or her case, the barrister is obliged to question the witness about the version of events which is contrary to the witness's evidence and which is based on the client's instructions. The way that is done in the criminal courts is that the barrister "puts" propositions to the witness in the form of a question and invites a response. For example:

> "I put to you that A did not hit B in your presence?"

Many adults find that form of questioning confusing so it is not surprising that children find it incomprehensible. I recall an eight year old responding to a question in that form with a question:

> "What did you put?"

Another way that barristers do this is to ask a question in this form:

> "I suggest that A did not hit B?"

Many adult witnesses think that the barrister is only putting his or her own opinion forward, so they do not respond. Many say "is that a question?" so again it is not surprising that children have even more difficulty.

Most barristers are trained now in my techniques and it is usually unnecessary for me to intervene, but if I have to I suggest that this part of the cross-examination proceed along these lines:
"(Name of accused or Dad etc) tells me that he did not touch your bottom. Is he right or is he wrong?"

Words commonly used in the language of the law and which have a technical meaning will mean something entirely different to a child, for example the word "party". To ask a child if they will "swear" that something is true; will likely confuse the witness. There are many like examples.

Some lawyers (and Judges) delight in speech patterns and syntax that are guaranteed to leave most people, and all children, thoroughly confused; double negatives, for example, to suggest that something was "not unreasonable". As an aside, in preparing for a lecture some years ago to an audience of Judges on communicating with juries, I came across this gem which was actually said to a jury by a Judge:

"You might think, and as to what you think is a matter for you, that to act in the way contended for by the accused is not unreasonable or at least not unintentionally unreasonable, but as I have said, and I repeat it again because it is so important and fundamental that the defence don't have to prove anything. The prosecution have to negative any defence beyond a reasonable doubt, that is fundamental, and it is a matter for you as the judges of the facts, and as to that anything you think I think or may think or if indeed

you think I have formed an opinion the said opinion is irrelevant unless you also think….I think".

As I told my judicial audience, I decided to add the last "I think" just to make the whole statement more intelligible!

To ask a child a long question full of abstract concepts is to invite confusion and lead to injustice. A few examples from the literature will demonstrate the point: A question asked of a three year old to test whether she understood the difference between the truth and a lie:

> Q. "if you crossed the street after your mummy told you not to, do you think you'd get in trouble?"
>
> A. (with a shake of the head) "I did not"

There is a great deal of research particularly in America about the use of language and communicating with children in court rooms. All people involved in the process should have training from specialist linguists, social scientists and psychologists in this area. Not only can misunderstanding lead to unfairness to the child it can also lead to unfairness to a person accused. An example I came across in the literature was of a 4 year old who refused to sit down at kindy and when asked why she said:

> "My bottom hurts. My Daddy put his hand in my bottom."

The father was charged with a sexual offence which immediately brings public opprobrium. When questioned later by a specialist

psychologist it became obvious that the little girl was mixing up her prepositions and what she meant to say was:

"My Daddy put his hand <u>on</u> my bottom."

Indeed the father was a smacker, but the difference is obvious.

Along with confusion as a result of using language which is not child friendly goes the problem of courtroom traditions which may truly flummox or worse intimidate a child. The Chief Judge has requested that when children are being questioned, robes and wigs be dispensed with, however she cannot compel any individual judge to follow this practice and some may still follow the old traditions. I can recall a child of around 10 being asked who she thought the barristers were and she said "they look like penguins". One little boy thought that the Judge's robe meant that he was a karate expert, and there are many examples where children have thought that the Judge was a witch or a priest. One of my female colleagues had the ego boosting experience of being mistaken for the Queen by a little girl.

Taking the child out of the courtroom has reduced the impact of courtroom dress and traditions on the child witness, but the issue of communication difficulties both verbal and non-verbal remains a problem.

Apart from professional development for lawyers and Judges including instruction from linguists and psychologists with experience in this area, there may be room for the development of a professionally prepared DVD involving actors which could be shown to children who are to be witnesses in court proceedings. A

DVD for the information of juries which was designed to help jury panellists understand the complexity of the criminal court trial procedures, has been in use in all Courts for years, and it has proved to be very successful. Your organisation is probably best placed to run such a project, if the Government is prepared to fund it.

**The Present System**

Earlier in my paper, I summarised the essential features of the present system. I want to conclude by highlighting a few difficulties which we have encountered in practice.

One is technology failure particularly in regional courts. In Maroochydore, we are regularly conducting pre-recordings of children's evidence from Maryborough, Gympie and Kingaroy because of system failure. It will hardly reduce the stress on a child who is compelled to travel quite long distances away from her or his home base to give evidence which may sometimes mean having to stay overnight in a motel.

One of the very good features of the present system is that once a child's evidence has been pre-recorded, that remains the evidence for all trials held thereafter and the child will not ever be required to give evidence again. In the word against word cases there is a higher than average possibility of jury disagreement. If this occurs, and there is a re-trial, the child does not have to give evidence again. If some additional evidence comes to light after the pre-

record, leave can be granted in very special circumstances for another pre-recording to be done. I have never done one of these, and these occasions are likely to be very rare.

When the legislation was introduced, the department was advised to install digital technology. It did not, and this has lead to another common area of difficulty. Because of the sensitive nature of a child's pre-recorded evidence, and because of it's vital importance as evidence in the trial that will follow in some months time, it was decided that all original tapes (not DVD's) would be stored centrally under the control of the principal registrar in Brisbane. Therefore tapes from all over Queensland must be forwarded to Brisbane. It frequently occurs that after the pre-recording and before the trial, the tape has to be edited to delete inadmissible material. This can only be done by an order of a Judge. The editing order is then transmitted to Brisbane, and the actual editing occurs there. No doubt, because of the sheer volume of these tapes, mistakes occur which could have been largely avoided if digital recording had been installed at the outset. On a number of occasions, I have had to adjourn a trial for 24 hours, with all the consequent financial loss, while an edited tape is returned to Brisbane to be correctly edited in accordance with the order.

Other problems have arisen because of the approach taken by the Court of Appeal in relation to a number of decisions concerning the procedural effects of these changes. The first statement made by the child (usually to the police in the form of a video recording) after the complaint, although admitted into evidence as an exhibit is not allowed to be taken into the jury room, in case the jury spend

too much time on it. If the jury want to hear it again, the whole court has to be reconvened and the tape played. The pre-recorded evidence can, if the jury ask for it, be replayed by them in the jury room because it also includes cross-examination.

**Conclusion:**

In my time as a Judge, now over 13 years, we have made considerable progress in making the experience of a child as a witness in the criminal courts less oppressive and unfair. Despite all the dire predictions that the conviction rate would soar as a result of these allegedly unfair law changes; this has not come to pass. As yet there are no really viable statistics, but my perception is shared by many of my colleagues and that is that the conviction rate has remained largely unaffected. I vividly recall that when Judge Kennedy reported this as the trend in W.A. when she spoke in 2000, her words were treated by many with some scepticism. She said that the eight year experiment at that stage in W.A. had resulted in a marginal reduction in the conviction rate and that the scheme's previously fiercest critics, the defence lawyers, were now strongly in support of the system. The same has occurred in Queensland. The sky has not fallen and, in many respects, the present system enhances the fairness of the trial, not only to the children involved, but also to the accused.