

**THE CHILD WITNESS AND THE CRIMINAL JUSTICE  
PROCESS: A CASE STUDY IN LAW REFORM**

**Amanda Elizabeth Wade**

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University of Leeds: Department of Law, Centre for Criminal Justice Studies; and  
Research School of Medicine, Division of Psychiatry and Behavioural Sciences in  
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The candidate confirms that the work submitted is her own and that appropriate credit  
has been given where reference has been made to the work of others.

## Abstract

The 1988 and 1991 Criminal Justice Acts transformed the position of the child witness within the criminal justice system. Rules of evidence which had discriminated against children's testimony were progressively abolished, and new procedures were introduced to accommodate children's needs within the trial process. This thesis offers a socio-legal critique of the reforms, analysing the way in which their development and implementation have been ideologically structured.

Part Two provides an historical overview of the way in which the legal system has regarded children's testimony. Contrasts are drawn between the relative failure of the 1925 Inter-Departmental Committee on Sexual Offences against Young People to secure changes in the treatment of child witnesses, and the comparative success, some sixty years later, of the Pigot Committee. The links between child witness reform and dominant conceptions of child sexual abuse are investigated.

Part Three turns to the implementation of the reforms and reports the findings of a qualitative and ethnographic study conducted for this thesis at one Crown Court Centre. Sixteen contested prosecutions, between them involving evidence from 53 child witnesses, were identified. The final hearing of each case was observed in full, and the attitudes towards the reforms of the barristers and child witnesses concerned were sought by way of interviews and questionnaires.

Part Four notes the mixed effects of the reforms, and the categorical distinctions observable at the study Crown Court in the treatment of child complainants and child by-stander witnesses. It is suggested that the reconceptualisation of child sexual abuse as a criminal justice, rather than a welfare, problem, played a significant role in achieving child witness reform, but that the moral rhetoric involved silenced alternative perspectives and has led to the marginalisation of some child witnesses. What these conclusions suggest about the law reform process more generally is briefly discussed.

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## **PART ONE**

## CHAPTER ONE

### INTRODUCTION

Between 1988 and 1991 the position of the child witness within the criminal justice process underwent a profound transformation. Rules of evidence which had placed barriers in the way of children's testimony being put before the courts were abolished, and new procedures were developed which allowed some of the more stressful features of a court appearance to be circumvented when children give evidence in criminal cases involving violent or sexual offences. The Criminal Justice Act 1988 introduced the 'live-link' system, which enables child witnesses to testify by closed circuit television from a 'remote witness room', thus freeing them from the necessity of appearing in the courtroom where they are obliged to face the defendant and offer their testimony in his immediate presence. Three years later the Criminal Justice Act 1991 permitted a video-recording of an investigative interview conducted with a child witness to be substituted for the child's evidence-in-chief. This partially absolves children from the onerous task of speaking publicly of distressing or frightening experiences, and provides a means of responding to the problem of children's detailed recall of the offences fading before the date of the trial.

Together, the two Acts turned on its head a paradox which had been at the heart of the perception of the child witness by the criminal justice system. In one respect children were perceived as different from adults, in that their developmental immaturity was thought to result in their evidence being less reliable. They therefore had to satisfy the court that they understood the nature of the oath (or failing this the duty of telling the truth), before being permitted to testify, and juries were warned that they should look for independent corroboration before basing a conviction on the evidence of a minor. Yet in all other respects children were treated no differently to adults, and were expected to cope with the demands of a court appearance, with its adult-oriented procedures, with no special support or preparation. This situation has been significantly altered by the reforms of 1988 and 1991. Children's evidence is now treated like that of adults; all children with adequate language skills are assumed to be competent to testify, and there is no longer a requirement that children's

testimony should be corroborated simply because the witness is a minor. However, in developing trial procedures specifically for use by child witnesses, the criminal justice system has acknowledged that children are unlike adults by virtue of their developmental immaturity, and has taken steps to accommodate their particular needs.

This may seem like a straightforward reversal of the pre-existing polarity, and also as involving an analogous paradox of similarity and difference. However, the dichotomy in the present treatment of child witnesses and their evidence has important implications both for children's rights and for prosecution practice. The fact that children are now presumed to be competent to act as witnesses in much the same way as adults does not mean that their evidence is accepted at face value; simply that barriers to it being put before a jury have been removed. The process by which children's evidence is scrutinised and tested has become the public one of the criminal trial, rather than the private one of pre-trial assessment by legal practitioners. A significant feature of the discrimination which children faced as witnesses should therefore have been removed. The procedural reforms can similarly be seen as advancing children's rights by acknowledging that children have special needs deriving from their youth and immaturity. The video-link and video-recorded evidence-in-chief provide concrete recognition of the possibility that children may have difficulty testifying orally in the courtroom, whether through shyness, awe induced by their surroundings, embarrassment associated with the nature of the testimony, or fear of the defendant. At the same time, in taking steps to circumvent these problems, the new provisions may also benefit the trial process by helping to ensure that the quality of children's testimony is not negatively affected by the circumstances in which it is given.

The reforms introduced in 1988 and 1991 were not an outcome of a sudden recognition of anomalies in the treatment of child witnesses. The difficulties in enabling children's evidence to be heard, and the distress which could be experienced by children facing the rigours of conventional trial procedure, had been recognised earlier in the century, and there had been periodic (albeit largely unsuccessful) demands for reform. It is therefore pertinent to ask why the reforms came when they

did, and in what ways the circumstances of their production may have influenced their focus and objectives. Equally, it is needful to investigate their effects. Sadly, much well-intentioned, emancipatory, or democratic, legislation has been found to have unexpected, ambiguous, or even contradictory, outcomes.<sup>1</sup> The extent to which the child witness reforms can be said in practice to be achieving their objectives, and to work in children's interests, therefore needs to be determined.

Both of these sets of issues are addressed in this thesis. The history of the reforms is traced, and significant influences on the reform process identified. The way in which the reforms have been implemented in one Crown Court Centre is then described. The approach which is adopted is that of the case study, and the thesis offers a broad synthesis of legal, historical, psychological, and sociological material. In so doing, it stands in marked contrast to much recent research in the field of criminal justice.

Jefferson and Shapland have recently argued that there has been a decline in critical research on the criminal justice system and a growth of 'safe', narrowly-focused, policy-relevant research.<sup>2</sup> This they attribute primarily to the government's sustained attack on the social sciences during the 1980's and the economic constraints on the research funding councils, both of which pressures have resulted in an increase of 'top-down' policy initiatives, and a growth in pragmatic research directed towards the needs of policy-makers. However, policy-centred evaluative research is often de-contextualised. While it can show how a specific policy or piece of legislation is working, it tends to neglect their production, treating this as unproblematic. As a result it may be unable to offer a full explanation for some of the outcomes which are identified.

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<sup>1</sup> See, for example, Smart, C. (1995) 'Feminism and Law: Some Problems of Analysis and Strategy.' In: Smart, C. *Law, Crime and Sexuality: Essays in Feminism*. Sage: London, pp. 146-147; Edwards, S. (1990) 'Violence against women: feminism and the law.' In: Gelsthorpe, L. and Morris, A. (eds) *Feminist Perspectives in Criminology*. Open University Press: Milton Keynes, p. 147; Olsen, F. E. (1983) 'The Family and the Market: A Study of Ideology and Legal Reform.' *Harvard Law Review* Vol. 96 No. 7, p. 1498.

<sup>2</sup> Jefferson, T. and Shapland, J. (1994) 'Criminal Justice and the Production of Order and Control.' *The British Journal of Criminology* Vol. 34, No. 3, p. 268.

A central problem when considering the law is that while it claims impartiality, it is deeply enmeshed in the social structure, which is far from non-partisan. The legitimacy of the law derives in large part from the principles which it undertakes to represent. Thus its rhetoric emphasises the democratic ideal that the rights and interests of all, whether powerful or non-powerful, should be upheld. Yet the law cannot be regarded as straightforwardly disinterested. Legislation, one of the means by which law is produced, is an outcome of the political process, which is highly contested and imbued with ideology. The resulting legal statutes can themselves invariably be viewed as articulating particular ways of understanding the world, in that they identify problems, provide a perspective on these, and propose certain solutions. In some cases it is the limitations imposed by the underlying ideological complexion of the legislation concerned which have been shown to be a primary cause of any unanticipated outcomes. Olsen, for example, has attributed the disappointing results of legislation designed to improve the lives of American women to an ideology which emphasises a construction of social life as divided between the separate but interdependent spheres of the market and the family.<sup>3</sup> The complexity of the legislative process, however, is such that legislation may be found to reflect more than one ideological perspective. Fox-Harding has shown that while the Children Act 1989 has an apparent conceptual unity, it involves four contrasting, and perhaps contradictory, perspectives.<sup>4</sup> There is a possibility that in practice tensions between these perspectives will give rise to differing interpretations, and hence contradictory or otherwise problematic outcomes.

Just as the processes by which the law is produced can be seen as having a bearing on legislative outcomes, informal factors such as professional practice may also be implicated. Practitioners are knowing actors, and have the ability to analyse, recreate, and make choices about the way in which they carry out their professional responsibilities.<sup>5</sup> Smart has argued that this was a central factor in the failure of the domestic violence legislation introduced in England and Wales in 1976 and 1978. She

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<sup>3</sup> Olsen, F. E. (1983) *Op. cit.* pp. 1497-1578.

<sup>4</sup> Fox-Harding, L. M. (1991) 'The Children Act 1989 in Context: Four Perspectives in Child Care Law and Policy.' *The Journal of Social Welfare and Family Law* Vol. 2, pp. 179-193.

<sup>5</sup> Smith, M. J. (1993) *Pressure, Power, and Policy: State Autonomy and Policy Networks in Britain and the United States.* Harvester Wheatsheaf: Hemel Hempstead, p. 50.

suggests that the legislation was rendered largely ineffective by the resistance of the police, who had not supported its introduction and failed to use the powers it gave them, and by the hostility of the judiciary who interpreted the legislation increasingly restrictively. These problems were then further compounded by changes in housing legislation and a crisis in housing generally.<sup>6</sup> McBarnet likewise affirms that the attitudes, values and motivations of practitioners can influence the way in which they operationalise the law. However, she emphasises the two-way nature of the process, demonstrating that in defining both what is allowed and what is expected, legal statutes may incorporate pressures or inducements which constrain or facilitate the decisions of practitioners in specific directions.<sup>7</sup>

It would therefore seem that in order to understand the effects of any particular piece of law reform, ideally both macro and micro factors should be considered. Problems in predicting how these factors will interact in any given set of circumstances suggest that there is value in their mutual, rather than exclusive, analysis.

### **The aims of the present study**

As the above will suggest, one aim of this study is to examine the processes by which the 1988 and 1991 child witness reforms were achieved and to locate their development in its social and historical context. In so doing, the thesis seeks to identify the beliefs which underpin the reforms, and factors which may have a bearing on their objectives and outcomes.

A second aim is to investigate the implementation of the reforms, in order to assess their effects on child witnesses' experiences of the criminal justice system; their implications for the trial process; and the way in which they have been received by legal practitioners. The relationship between the production of the reforms and their outcomes is then examined.

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<sup>6</sup> Smart, C. (1995) *Op. cit.*, p. 156.

<sup>7</sup> McBarnet, D. J. (1981) *Conviction: The State and the Construction of Justice*. Macmillan: London, pp. 6-8.

In carrying out the above aims, two specific strategies are adopted. The development of the reforms is assessed through an analysis of documentary sources, while their implementation is investigated in an empirical study of practice in one Crown Court Centre.

Children are the defined subjects of the reforms, and the question at the centre of the study concerns the extent to which the reforms can be said to reflect children's interests. The criminal justice system is highly complex, and faces a range of competing demands, whether from politicians, the public, professionals, defendants, witnesses, or its own internal arrangements or principles. The way in which these are negotiated will invariably involve a degree of compromise. However, children are particularly vulnerable as they have little power to influence such processes. It is therefore especially important to examine whether initiatives which concern them offer an adequate response to the issues addressed.

#### **The place of this thesis in the overall body of knowledge in this area**

Studies of the child witness carried out to date have been conducted from either a legal or a psychological perspective. Legal interest has centred on the explication of the relevant statutes or providing an account of their historical development, while psychologists have principally been concerned with the empirical investigation of the reliability of children's testimony or, more recently, of the sources of stress experienced by children when giving evidence in court. Spencer and Flin have brought together much of this work in their comprehensive cross-disciplinary analysis of the treatment of child witnesses within the criminal justice system.<sup>8</sup> However, there has so far been no sociological examination of child witness issues nor any deconstruction of the attitudes and beliefs embedded in current legislation or court practice. The present thesis partially fills this gap.

Insofar as the 1988 and 1991 Criminal Justice Acts are concerned, evaluations of the video-link and video-recorded evidence have been carried out for the Home Office by

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<sup>8</sup> Spencer J.R. and Flin R (1990) *The Evidence of Children: The Law and the Psychology*. Blackstone Press: London.

Davies and his colleagues.<sup>9</sup> However, there is no discussion of the background to the legislation in either study. Moreover, the researchers were not permitted to speak to child witnesses, and are therefore unable to present their views on the measures which have been taken to assist them. By contrast, this thesis draws on in-depth interviews with child witnesses and offers the most extensive investigation of their views so far carried out in England and Wales.

### **The structure of the thesis**

**Part One** of the thesis provides an introduction to the subject in Chapter One and, in Chapter Two, outlines the research methods which have been used. The ethics of research with children are discussed.

**Part Two** comprises three chapters, and locates the recent reforms in the context of historical attitudes towards child witnesses, and towards child sexual abuse. Chapter Three briefly outlines the development of the competency and corroboration rules (which were abolished by the 1988 and 1991 Criminal Justice Acts) and describes changes in the treatment of child witnesses which occurred between the mid-seventeenth and mid-twentieth centuries. In Chapter Four an account is given of efforts to introduce child witness reform in the earlier part of this century. The chapter focuses on the 1925 Committee on Sexual Offences against Young Persons,<sup>10</sup> which, in addition to addressing the prevalence of child sexual abuse at this time, made a number of recommendations for changes in the treatment of child witnesses appearing in abuse prosecutions. It is suggested that the development of a construction of incest and sexual abuse as problems requiring a welfare rather than a criminal justice response contributed to the government's failure to act on these proposals.

Chapter Five moves on to the 1988 and 1991 Criminal Justice Acts. A chronological account of the parliamentary passage of the two Acts is given, and legal and

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<sup>9</sup> Davies, G. M. and Noon, E. (1991) *An Evaluation of the Live Link for Child Witnesses*. Home Office: London; Davies, G., Wilson, C., Mitchell, R. and Milsom, J. (1995) *Videotaping Children's Evidence: An Evaluation*. Home Office Publications Unit: London.

<sup>10</sup> Committee on Sexual Offences against Young Persons (1925) *Report*. (Cmd 2561). *Parliamentary Papers 1924-1925*, vol. 15: London.

psychological contributions to the debate on reform are outlined. It is argued that principal factors in the reform process included the development during the mid-1980's of intense public and professional concern about child sexual abuse, and challenges from child protection groups to the welfare ethos which had dominated prosecution practice in this area. Suggestions are made about the way in which these issues shaped the objectives of the reforms.

**Part Three** presents empirical data, collected for this thesis, on the implementation of the reforms. During seven months of fieldwork at one Crown Court Centre 16 cases involving evidence from children were fixed for trial, five of which were eventually resolved by other means. In all, 53 children aged between five and eighteen years were listed as witnesses, 40 of whom actually testified. The final hearing of each case was observed in full, and information on the attitudes of barristers and child witnesses towards the new provisions for children's evidence were systematically collected.

Chapter Six reports on the views of the barristers. While they almost unanimously saw the video-link and video-recorded evidence as reducing the stress of a court appearance for children, a majority nevertheless believed that the technology these involve reduces the impact of children's testimony on jurors, and so increases the rate of acquittals. A number therefore questioned the extent to which the procedural reforms are working in children's longer-term interests.

Chapter Seven analyses the effects of the procedural reforms on child witnesses and on the trial process, presenting data drawn from the observation of trials. It is noted that while all sexual abuse complainants testified over the video-link, children giving eye-witness or supporting testimony all gave evidence in the conventional way. Comparisons are drawn between the two groups of children, focusing in particular on indicators of stress shown in their demeanour, and on the impact of their testimony.

Chapter Eight draws on interviews with 26 child witnesses and 21 parents or carers. A majority of the children who testified over the video-link and whose evidence-in-chief was given by way of a video-recording, welcomed these innovations. However,

a minority had found it difficult to adjust to the video-link and three would have preferred to have given evidence in the courtroom. Children who testified conventionally in the majority found this less of an ordeal than they had expected. A number of children in both groups expressed concern that they had been given no choice about the way in which their evidence was given. While appreciative of the support they had received from ancillary staff at the courthouse, many described a lack of information and support in the months before their court appearance, and had found this a particularly stressful time.

**Part Four** draws together the two aspects of the study. Chapter Nine summarises the empirical findings reported in Part Three and evaluates the child witness reforms in terms of their effects in reducing the stress of a court appearance for child witnesses; enabling more, and younger, children to become witnesses; and achieving a higher rate of prosecutions in cases of child sexual abuse. Some recommendations are made for future development.

Chapter Ten then relates the findings of Part Three to those of Part Two and discusses the extent to which the child witness reforms and their outcomes can be said to have been shaped by the processes through which the reforms were achieved. It is suggested that the reconceptualisation of child sexual abuse as a criminal justice, rather than a welfare, problem established the parameters of the problems the legislation was designed to address, and consequently the solutions which were identified. In focusing exclusively on the needs of victimised children this reconceptualisation obscured the needs of the wider population of child witnesses. Furthermore, it failed to recognise the diversity of the experiences and preferences of victimised children, especially with regard to any court appearance. In practice, this has resulted in routinised distinctions being made between children who are complainants and those providing eye-witness or other supporting testimony.

The thesis concludes with some observations on what this study suggests about the law reform process more generally.

**A note on language**

Child witnesses are termed children throughout this thesis, although adolescents (or young persons) are also being referred to. The designation 'children' is used principally to make the linguistic style of the thesis a little less laborious, but also because this is the term used in the child witness literature.

Child witnesses in the empirical study included boys and girls; when reference is being made to a specific individual their correct gender designation is used, and otherwise (if a singular grammatical construction is involved) the term 's/he' or 'his/her' is adopted.

By contrast, defendants are referred to in the masculine gender. Although a female defendant was listed to appear in one of the study cases, the case against her was severed and then discontinued. All defendants in the empirical study who appeared in court were therefore male.

The term 'parent(s)/carer(s)' is used for those adults responsible for the children in the empirical study, but occasionally, for simplicity or to designate a particular individual, only one of these forms is used. The generic term 'family' is frequently employed, although the home circumstances of the children varied widely.

The Appendices provide brief, anonymous, details of study cases, barristers, and child witnesses. Where, in the text, an individual is referred to by name, this is a pseudonym.

## **CHAPTER TWO**

### **METHODS OF RESEARCH**

In this thesis the legislation on child witnesses introduced in the 1988 and 1991 Criminal Justice Acts is considered as a case study in law reform. The thesis has two broad aims; firstly to determine how the child witness reforms were produced, and secondly to evaluate their effectiveness in practice. The intention is to examine both of these issues in context rather than to take a more narrowly defined perspective. The introduction of the reforms is therefore considered in relation to the social and historical conditions from which they emerged. The processes involved in the achievement of the reforms are investigated by means of a review of documentary source material; the social, legal, political and professional influences on the reform process being identified, and the bearing which these same factors may have on the outcomes of the reforms being examined.

The effectiveness of changes in law or policy is most often assessed in terms of overall outcomes. However, this can mask much of what occurs in practice. A qualitative empirical study of the way in which the child witness reforms have been implemented at one Crown Court Centre has therefore been conducted for this thesis. The study findings are analysed in terms of the effects which the reforms have had on the trial process, and their costs and benefits when considered from the perspectives of the child witnesses themselves and the legal professionals who put them into practice.

The case-study approach facilitates an analysis of whether, and in what ways, the reforms can be said to have advanced children's interests. Furthermore, by focusing on the contexts in which law is developed and practised, it raises a number of more general questions about the relationship between the development and implementation of the law.

#### **Library-based research**

In order to examine the processes involved in the production of law reform, an historical perspective is adopted. The way in which child witnesses have been

regarded over time and the legal rules to which they have been subjected are briefly explored, and two campaigns to reform the law - one conducted in the first quarter of the century and the second conducted in the 1980's - are examined. Where primary historical documents relating to the treatment of child witnesses and to the campaign for reform in the 1920's are available, these have been consulted. However, practical constraints led to a decision to also rely on some secondary sources, particularly in relation to material held in individual archives. In part this was because the historical overview is not itself the central focus of the research but rather a strategy to assist in the identification and analysis of factors making a significant contribution to the achievement of the child witness reforms which are the subjects of this study.<sup>1</sup>

The discussion of the 1988 and 1991 Criminal Justice Acts relies solely on primary documentary sources, as no sociological or historical account of the child witness measures which they introduced was available when this research was conducted.<sup>2</sup> The materials consulted include government reports, transcripts of parliamentary debates, newspaper reports, research studies, and articles published in contemporary academic and professional journals. An issue arising in the course of the research concerns the extent to which inferences can be drawn about social processes from such published sources. For example, a search of law journals which address legal practitioners revealed that almost all of the articles on the child witness reforms published before the Report of the Advisory Group on Video Evidence,<sup>3</sup> (hereinafter referred to as the report of the Pigot Committee) were written by two academic

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<sup>1</sup> Prioritisation of the time available for the different aspects of this study was one of the constraints on the search for primary historical sources, but access also sometimes proved a problem. The Fawcett Library, for example, which holds the National Vigilance Association archives, was closed as a result of flooding when the library research was undertaken.

<sup>2</sup> In the second edition of their book on child witnesses Spencer and Flin added new sections on the Criminal Justice Act 1991, and on the use of video-tape in legal proceedings. The book is the standard work on children's evidence, and provides a wealth of historical, legal, and psychological material. However, it does not address the social and political processes which structured the 1988 and 1991 reforms, and which are dealt with in this thesis: Spencer, J. R. and Flin, R. (1993) *The Evidence of Children: The Law and the Psychology*. (2nd edn). Blackstone Press: London. (See especially Chapter Seven, pp. 165- 207). Likewise, Wasik and Taylor's guide to the Criminal Justice Act 1991 provides details of, and guidance on, the Act, but does not offer a sociological analysis, nor does it discuss in any detail the child witness provisions: Wasik, M. and Taylor, R. D. (1991) *Blackstone's Guide to the Criminal Justice Act 1991*. Blackstone: London.

<sup>3</sup> Home Office (1989) *Report of the Advisory Group on Video Evidence*. Home Office: London.  
Note: The Advisory Group was chaired by His Honour Judge Thomas Pigot QC, and the report is frequently referred to as the Pigot Report.

lawyers, Granville Williams and John Spencer. It was not possible to determine from the journals how representative of the views of the legal profession the opinions expressed by Williams and Spencer were, although the lack of a wider debate on the issues could be thought to indicate that the subject was not one generating active interest among practitioners. Newspaper reports, however, suggested that legal practitioners had a number of concerns about the proposed reforms. An attempt was therefore made to supplement the information available from published sources with unpublished material, although little additional documentation was identified. A representative at the Home Office who volunteered to search for the submissions made to the Pigot Committee by the Criminal Bar Association and the Law Society was unable to trace these documents. Likewise, the Law Society and the Criminal Bar Association discovered they no longer had copies of the documents concerned, a problem exacerbated by the fact that the individuals who had prepared the original submissions were no longer in post. The Law Society was however able to supply a copy of the Society's response to the recommendations of the Pigot Committee, and this paper is referred to. The relative failure of this search, in particular the discovery that organisations do not appear to retain complete sets of records, raises interesting issues for the aspiring historian of law reform. An account based on documentary sources, whether published or unpublished, will inevitably be at best an interpretation of partial evidence, but the speed with which potential source material could become unavailable proved both a fascinating and a frustrating revelation.

## **Empirical research**

Data for the empirical study is drawn from four sources:-

Crown Prosecution Service files;

Observation of trials involving child witnesses;

Questionnaires completed by prosecution and defence barristers;

Interviews with child witnesses and/or their carers.

The study investigates the implementation of the child witness reforms in one Crown Court Centre, the choice of a single site reflecting both the organisational benefits this conferred and the particular methodological perspective adopted by the researcher.

The researcher spent seven months in a Crown Court during which time all contested prosecutions which involved child witnesses and which were scheduled to be heard during the fieldwork period were identified with the assistance of the Crown Court Child Liason Officer. Sixteen relevant cases were identified.<sup>4</sup> Background details of these cases were obtained from Crown Prosecution Service files and each final hearing was observed in full. Fifty-three children were listed as witnesses in the full case sample. Eleven of the sixteen prosecutions resulted in a trial, and in these, forty children gave evidence. Child witnesses who expressed willingness to participate in the study were interviewed a minimum of six weeks after the final hearing. Prosecution and defence counsel acting in the eleven trials were invited, at the conclusion of each case, to complete a questionnaire addressing their views on the reforms.

Specific details of the questionnaire completed by barristers, and the focus of interviews with child witnesses and of court-based observation, are given at the beginning of Chapters 7, 8 and 9. What follows is an account of the methodology informing this study, and the way in which this influenced the research procedures which were adopted.

### **Methodological perspective**

#### **Ethnography**

In this study Crown Court practice is investigated from an ethnographic perspective. Although ethnography has traditionally been associated with anthropology its strategies can be applied to the study of any group or society<sup>5</sup> and it has become a standard method of social research. As a method it differs markedly from positivist

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<sup>4</sup> Bar one case, which was dealt with concurrently with another which the researcher was observing, this represents a one hundred percent sample of the child witness cases dealt with during the fieldwork period. See Chapter Seven.

<sup>5</sup> Okely, J. (1994) 'Thinking through fieldwork.' In: Bryman, A. and Burgess, R. G. (eds.) *Analysing Qualitative Data*. Routledge: London, p.19.

research, regarding the subject under investigation as a substantially unknown phenomenon whose particular characteristics will only become known to the researcher over time through detailed observation and inquiry. Okely has described it in the following terms:

The anthropologist rarely commences fieldwork with an hypothesis to test. There are few pre-set, neatly-honed questions, although there are multiple questions in the fieldworker's head. There are theories, themes, ideas and ethnographic details to discover, examine or dismiss. [...] The ethnographer must, like a surrealist, be *disponible* (cf. Breton 1937), and open to *objets trouves*, after arriving in the field. This approach inevitably affects the subsequent interpretation and analysis. [...] Both during fieldwork and after, themes gradually emerge. Patterns and priorities impose themselves upon the ethnographer. Voices and ideas are neither muffled nor dismissed. To the professional positivist this seems like chaos. [...] The fieldworker cannot separate the act of gathering material from that of its continuing interpretation. [...] Writing up involves a similar experience. The ensuing analysis is creative, demanding and all consuming.<sup>6</sup>

Although expressed in general terms which do not make it clear precisely what an ethnographer *does*, Okely nevertheless articulates here the guiding principles of ethnography. Emphasis is placed on reflexivity (a search for 'grounded theory'<sup>7</sup> in which the empirical evidence is 'viewed as a mediator in a constant mutual interrogation between self and theory');<sup>8</sup> on subjectivity (whether that of the researcher, or the subjects of the research); and on interpretation (the research yields patterns of behaviours and meanings which are held to be valid on the basis of the evidence amassed while not presuming to exhaust all the possible patterns or meanings which could be drawn, nor to make claims to universal validity).

The characteristic method of data collection employed by ethnographers is the taking of fieldnotes, whereby observations are recorded in detail together with the researcher's subjective impressions and developing theories and concepts. This method was thought to offer a number of advantages for the present study. The

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<sup>6</sup> Okely, J. (1994) *Op. cit.* note 5, pp. 19-21.

<sup>7</sup> Glaser, B. and Strauss, A. (1967) *The Discovery of Grounded Theory*. Aldine Publishing: Chicago.

<sup>8</sup> Lather, P. (1986) 'Research as Praxis.' *Harvard Educational Review* 56 (3), p.267.

researcher studied behavioural rating sheets which had been used by colleagues who had conducted psychological research on children's testimony. These had the advantage of specificity, defining the behaviours which were to be noted when observing children giving evidence (for example, nervous or distracting movements by the child, such as twitching, playing with an object, covering the mouth with the hand, playing with hair or clothing, biting nails, or placing fingers in the mouth), and indicating how these should be rated, ('A lot'; 'Sometimes/occasionally'; 'Seldom or not at all'). However, a disadvantage of this method was thought to be the way in which it decontextualised the child's behaviour. Behaviours were recorded separately for the different stages of testimony (examination-in-chief, cross-examination; re-examination), but the rating sheets did not enable these to be related in any way to the *content* of the child's evidence, presumably a factor of some importance. It was therefore decided to make a transcript of each trial, recording observations of each child's demeanour together with the responses they were uttering. Similarly, interventions by the judge, the questions put by counsel, and the manner in which these were asked, were noted. The behaviour of jury members, the defendant(s), and members of the public were also recorded, as were the researcher's subjective responses to what was occurring.

Furthermore, a wealth of additional information was catalogued. It is not possible to spend many weeks in a court without interacting with those who work there; these informal contacts provided valuable opportunities to learn about the working practices and culture of the court. Notes were taken of conversations which the researcher had during adjournments with barristers, ushers, stenographers, solicitors, clerks, police officers, security guards, social workers, volunteers, and members of the public. Interactions observed in the coffee bar, on the corridors, or in the courtroom during adjournments, were noted, and a diary was kept of the researcher's reflections and emerging ideas. This informal material provided valuable information against which to test the conclusions drawn from the more formal data collected for the study.

### **Feminist social research**

The research method employed in this study draws upon feminist principles although the thesis is not overtly feminist in orientation.

Feminist social researchers employ many of the strategies associated with ethnography, but the theoretical framework which they bring to their work influences the way in which the methods are practised. In both feminist and ethnographic research there is an emphasis on understanding the perspectives of research subjects in their own terms, feminists being concerned to give voice to women's experiences, and ethnographers seeking to discover and make sense of the meanings which things have for those whom they study. Interviewing plays a central role in both methodologies. Both favour the use of the in-depth, non-standardised interview as a means of avoiding the imposition of the researcher's priorities on the subjects of the research. However, their accounts of this method differ. Ethnographers have described their interview method as naturalistic or, as Burgess has termed it (following Beatrice and Stanley Webb), a 'conversation with a purpose'.<sup>9</sup> Its aim is primarily to enable research participants both to reveal and to reflect on the meanings their experiences have for them. Feminists also emphasise naturalism in interviewing, but bring to their accounts a critique of the way in which power relations structure the interview process. It is in the insights offered on this aspect of interview practice that feminist research has been particularly helpful to the present study, given that it is children who are the primary interview subjects. Two concepts have been of particular assistance; reciprocity, and double subjectivity.

The concept of reciprocity was famously outlined by Oakley in an essay in which she challenged the hierarchical beliefs embedded in many descriptions of in-depth interviewing. In particular she argued that the objective stance interviewers are traditionally recommended to adopt, and the advice they are given on strategies for avoiding making personal disclosures to interviewees, work to the detriment of

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<sup>9</sup> Burgess, R. G. (1988) 'Conversations with a Purpose: the Ethnographic Interview in Educational Research.' In: Burgess, R.G. (ed.) *Studies in Qualitative Methodology. Volume 1: Conducting Qualitative Research*. Jai Press: London, p.138.

obtaining access to the latter's lives and opinions. There could, she suggested, be 'no intimacy without reciprocity.'<sup>10</sup> Oakley further maintained that focusing solely on the interview as a technique (a means of obtaining data) could result in interviewees being manipulated or exploited. She therefore recommended that interviewers should be willing to engage directly with interviewees, answering their questions and offering personal information and feedback. Furthermore, the interviewer should regard her role as being that of 'a data-collecting instrument for those whose lives are being researched' rather than 'a data-collecting instrument for researchers'.<sup>11</sup>

The concept of reciprocity has become a characterising feature of feminist research. However, the assumption that women researchers share a commonality of experience with their interviewees, implicit in feminist accounts of reciprocity in the 1980's,<sup>12</sup> has subsequently been reviewed. Edwards, for example, has argued that a cultural affinity between women cannot be assumed since structural divisions, whether of race or class, may lead to them having different interests or priorities. The interviewer, and the way in which she is perceived by the interviewee, is a significant variable in the interview process; she therefore has to be 'sensitive and able to take cues from the person being interviewed: suiting the interview style to the individual concerned.'<sup>13</sup> This process is termed double subjectivity, recognising the interactive nature of the responses of both parties. In practice, it supports considerable variation in interview content, and suggests validity should be seen as inherent in the authenticity of the representation of interviewees' experiences and subjective understandings.<sup>14</sup> The influence which these ideas have had on the interview method adopted in the present study will become apparent below.

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<sup>10</sup> Oakley, A. (1981) 'Interviewing women: a contradiction in terms.' In: Roberts, H. (ed.) *Doing Feminist Research*. Routledge: London, p.49.

<sup>11</sup> *Ibid.* p.49.

<sup>12</sup> See for example, Finch, J. (1984) "'It's great to have someone to talk to": The ethics and politics of interviewing women.' In: Bell, C. and Roberts, H. (eds.) *Social Researching*. Routledge and Kegan Paul: London, p. 76.

<sup>13</sup> Edwards, R. (1993) 'An Education in Interviewing: Placing the Researcher and the Researched.' In: Renzetti, R. M. and Lee, C. M. (eds.) *Researching Sensitive Topics*. Sage: London, p. 194.

<sup>14</sup> *Ibid.* p. 194.

### **Undertaking research with children**

Children have more frequently been the objects rather than the subjects of social research.<sup>15</sup> However, it cannot be assumed that their interests will be coterminous with the interests of those responsible for their care,<sup>16</sup> nor that adult proxies can give an accurate and valid account of children's experiences or opinions.<sup>17</sup> It is therefore important that efforts are made to try to understand children's lives from their own perspectives. This study therefore includes the views of child witnesses themselves, regarding their perceptions as central to any assessment of the effectiveness of the procedural reforms.

As a research population children nevertheless present a number of problems, most notably perhaps that of vulnerability. Thompson has suggested that because of their age and immaturity, young children are less capable of benefiting from the research experience, and less able to defend their interests during the research process,<sup>18</sup> so presenting special challenges. While he is thinking in particular of behavioural research, his comments are clearly applicable to the present study in which many of the children interviewed are known to have been sexually abused, or a party to violent and distressing events. Details therefore follow on the way in which access to the children was sought, consents were obtained, and interviews carried out.

### **Access**

Researchers have reported that they have found themselves positioned at the end of a long chain of negotiation when seeking to interview children,<sup>19</sup> being obliged to negotiate first with organisations in a position to identify potential research participants (such as schools or health centres), then parents, and eventually the

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<sup>15</sup> Morrow, V. and Richards, R. (1996) 'The Ethics of Social Research with Children: An Overview.' *Children and Society* 10(2), p. 91.

<sup>16</sup> Hood, S., Kelley, P. and Mayall, B. (1996) 'Children as Research Subjects: a Risky Enterprise.' *Children and Society* 10(2), p. 118.

<sup>17</sup> Mahon, A., Glendinning, C., Clarke, K. and Craig, G. (1996) 'Researching Children: Methods and Ethics.' *Children and Society* 10(2), p. 148.

<sup>18</sup> Thompson, R. A. (1992) 'Developmental Changes in Research Risk and Benefit: A Changing Calculus of Concerns.' In: Stanley, B. and Sieber, J. E. (eds.) *Social Research on Children and Adolescents: Ethical Issues*. Sage: London, p. 32.

<sup>19</sup> Hood, S., Kelley, P. and Mayall, B. (1996) *Op. cit.* note 16, p. 120.

children themselves. The organisation which was the initial source of information is described in one account as acting as a filter, providing contacts on the basis of its own assessment of the risks and benefits of the research to the children concerned.<sup>20</sup> In the case of the present study a similar sequence of negotiations occurred, although the organisation concerned, the Crown Prosecution Service, (hereinafter the CPS) acted as a neutral source of referral, and made no attempt to act as a gatekeeper between the researcher and child witnesses. In this respect, the working practices of the CPS, which restrict its contact with witnesses and complainants, were to the advantage of the research.

The study was negotiated in the first instance with the CPS Headquarters Policy Department, and subsequently with the Chief Crown Prosecutor responsible for the region in which fieldwork was undertaken. The timing of the research coincided with a major internal reorganisation of the CPS. Nevertheless, the researcher was offered access to case files, from which it was thought that she would obtain the required background data, including the names and addresses of witnesses and their carers. The CPS requested that the researcher should make no contact with witnesses until six weeks had elapsed after the final hearing, in case there was an appeal, and to avoid any suggestions that evidence had been contaminated. However, it was agreed that the clerk representing the CPS at the Crown Court when the case was heard would inform witnesses and their carers of the research. An information sheet was drawn up which briefly outlined the purpose of the study, and invited carers to indicate whether they would agree to their child's participation.<sup>21</sup>

In practice, a number of CPS clerks expressed reluctance to take on a liaison role in view of their lack of previous direct contact with the children concerned and their carers, and the pressures on witnesses in the immediate context of the trial. In some of these cases a police officer known to the family, or Witness Service volunteer, offered to liaise on the researcher's behalf. In the remaining cases a letter was sent after the court case, explaining the research and asking for permission to contact the

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<sup>20</sup> *Ibid.* p. 120.

<sup>21</sup> The information sheet is included at Appendix D.

family in six weeks time.<sup>22</sup> Again, this was not an ideal way to make contact with hoped-for participants, particularly in view of the sensitivity of the study. The letter therefore invited respondents to opt out of the study rather than to opt in. This decision sat uneasily with the emancipatory aims of the project, but was thought to offer an increased likelihood of the researcher later being able to discuss possible involvement in more detail directly with children and carers.

The ages of the witnesses contacted by these various means ranged from 7 to 18 years when the contact was made. In the case of children aged under 14 information about the study was initially supplied only to the parent/carer. However, adolescents aged between 14 and 16 were provided with the information simultaneously with their carer, and in the case of young people aged 17 and above, it was the young person who was contacted rather than the parent. This pragmatic attempt to accommodate parents' responsibilities for their children, and young people's expectation of having a say in their own lives, worked reasonably well. There were instances, particularly in the case of younger children, where it became clear that carers had chosen not to discuss the research with their child before volunteering to be interviewed on the child's behalf, or declining any involvement. However, there were also instances where parents who believed the research would prove distressing to their child nevertheless discussed it with them and found that they responded enthusiastically.

The overall level of participation, both of children and parents/carers, was high; what quickly became apparent was the immense goodwill children (and carers) were prepared to show to a project which placed a high value on their experiences and opinions.

### **Consent**

The issue of consent in research in which children are the subjects is a complex one, and Tymchuk has suggested that what is involved is a process in which a parent or carer agrees to a child participating in a research project and the child gives their

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<sup>22</sup> See Appendix E for a copy of this letter.

assent, rather than the more usual one of obtaining informed consent.<sup>23</sup> While such a distinction may reflect the realities of what happens in practice, it is nevertheless important to consider both the extent to which children have a genuine choice regarding their involvement, and their level of understanding of what this will involve.

The researcher discussed participation in detail with all children to ensure that they knew that in permitting access their parent had not committed them to involvement. In one case a child indicated that she would prefer her mother to speak on her behalf, choosing to be present during the interview but taking no part herself. In another, a child whose initial decision was similar, began to volunteer information as the interview progressed, indicating that consent is a dynamic process, which can be offered or withdrawn at any stage.

Discussion of what research participation would involve elicited several worries and concerns, notably about confidentiality, but also demonstrated that many children saw this as an opportunity to obtain recognition of their competence, and a means of helping other children.

### **Interviewing**

A single interview was carried out with each participating child, and was conducted in the child's home or that of a relative. In view of the potential sensitivity of the subject area, and the lack of time during which to develop a relationship of trust with the child, the establishment of rapport with interviewees was critical, and it was here that the concept of reciprocity was particularly helpful. Mindful of the mismatch in terms of age and status between an adult interviewer and a child interviewee, efforts were made to ensure that interviews were task-centred but, insofar as possible, informal; moreover, that children had some control over the process. Their views about who should be present during the interview were respected, and while a number chose to speak to the researcher alone, others preferred to have a parent present, or to be interviewed with a sibling. It was made clear that children did not have to answer

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<sup>23</sup> Tymchuk, A. J. (1992) 'Assent Processes.' In: Stanley, B. and Sieber, J. E. (eds.) *Social Research on Children and Adolescents: Ethical Issues*. Sage: London, p. 128.

questions when they did not want to, and declining to answer a question was practised with younger children. Although most interviews were tape-recorded, the wishes of children who did not want to be taped were accepted. In the latter case, a detailed record of the interview was written immediately upon its conclusion.

Some significant variations were therefore established before the interviews proper began. The interviews also varied in their structure. The researcher had been given access to standardised interview protocols used with child witnesses by Murray,<sup>24</sup> and by Sas,<sup>25</sup> and these were helpful in considering how specific issues might be addressed. However, the children to be interviewed varied widely in age, and it was known that their experiences of the criminal justice process differed; for example, some had been involved in retrials, and one had taken part in an old-style committal. The use of a structured interview could have involved the loss of valuable information arising from some of these individual differences; moreover it might be thought contrary to the emphasis this study places on the children's own perspectives and priorities. A non-standardised method of interviewing was therefore adopted. This approach freed the researcher to respond individually to each child; interviews covered similar themes and issues but the way in which these were addressed, and the importance they assumed, varied according to the child's response to the interview/er and the priority they had for the child.

Children and carers had been reassured that the interview would address children's experiences of the criminal justice system and not the issues involved in the case in which they had appeared. They knew, however, that the researcher had been present in court when the case was heard, and was therefore aware of what it had involved. This raised several issues, notably that of the researcher having acquired sometimes

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<sup>24</sup> Murray's research has subsequently been published, although the interview schedule is not included in the report. See: Murray K (1995) *Live Television Link: An evaluation of its use by child witnesses in Scottish criminal trials*. The Scottish Office Central Research Unit HMSO: Edinburgh. Note: the interview schedule which Murray used drew on that used by Cashmore in her study for the Australian Law Reform Commission. (Personal communication, January 1993).

<sup>25</sup> For an account of the research concerned (but not including a copy of the interview schedule) see: Dezwirek Sas, L., Hurley, P., Hatch, M. A., Malla, S. and Dick, T. (1993) *Three Years After the Verdict: A Longitudinal Study of the Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project*. London Family Court Clinic Inc.: London, Ontario.

highly personal information about interviewees without their knowledge or agreement. It was anticipated that interviewees may be sensitive to this, and one adolescent indicated that she had been apprehensive about meeting the researcher for this reason. However, a surprising number of children and carers appeared to see it as evidence of the researcher's commitment to a subject which had made a significant impact on their lives, and spoke during interviews in a way which assumed a shared familiarity with what had occurred at court.

### **Analysis and presentation of data**

#### **Reliability**

In ethnographic and feminist research the tasks of developing, carrying out, interpreting, and writing-up the study are frequently undertaken by a single individual.<sup>26</sup> The extent to which such research can become highly subjective is indicated in Okely's account of theory development:

Ideas and themes [...] have gestated in dreams and the subconscious in both sleep and in waking hours, away from the field, at the [researcher]'s desk, in libraries and in dialogue with the people on return visits. [...] The act of interpretation and writing from past fieldwork may be as evocative and sensory as Proust's description of the tasting of the madeleine cake in *A la recherche du temps perdu* (1954).<sup>27</sup>

This raises the issue of the trustworthiness of the account offered and the theories proposed. As previously indicated, validity is sometimes held to be implicit in the authenticity with which the experiences of research subjects are recreated, or, as this has been termed, face validity - the 'yes, of course' rather than 'yes, but ...' response to the research argument.<sup>28</sup> In itself, however, this is widely regarded as being insufficient.

The strategy most often advocated to ensure the reliability of qualitative studies has become that of triangulation, a concept loosely derived from navigation and surveying, whereby an exact position is identified by means of taking two separate

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<sup>26</sup> Okely, J. (1994) *Op. cit.* note 5, p. 20; Oakley, A. (1981) *Op. cit.* note 10, p. 41.

<sup>27</sup> Okely, J. (1994) *Op. cit.* note 5, p. 21.

<sup>28</sup> Lather, P. (1986) *O. cit.* note 8, p. 271.

bearings.<sup>29</sup> In research terms this has come to mean the utilisation of more than one method for examining the subject addressed, and thus the collection of more than one type of data.<sup>30</sup> Hammersley and Atkinson have cautioned, however, that aggregating data from different sources will not unproblematically add up to the production of a more complete picture.<sup>31</sup> Data collected by different means may point to differing or even contradictory interpretations.<sup>32</sup> However, it is by *not* taking individual sets of data at face value, and rather exploring the contradictions and tensions between them, that the validity of inferences can more reliably be assumed.<sup>33</sup> In this sense qualitative research differs markedly from the positivist method in which reliability is associated with the consistency of the results.

In the present study, the data collected is complementary, in that different aspects of the child witness reforms are investigated. Yet the data also interacts; for example, information gathered from observation of trials can be used to explore the accounts of their experiences offered by child witnesses, and vice-versa. In the case of barristers, data on their opinions of the child witness reforms were primarily sought by means of a questionnaire, as this method was thought likely to minimise the demands made on them by this study. However, this meant that research questions had to be defined before fieldwork began. In view of this, where opportunities became available to discuss the new provisions with barristers during adjournments or (in a small number of cases) in a formal interview, these were taken. Supplementary information was thus obtained which, while not representative, nevertheless proved of considerable assistance in extending the researcher's understanding of the practitioners' perspective.

### **Reporting the data**

Accounts of qualitative research which present the researcher's concluded views of the subject studied, backed by illustrative examples from the field, can be difficult for

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<sup>29</sup> Hammersley, M. and Atkinson, P. (1983) *Ethnography: Principles in Practice*. Tavistock: London, p. 198.

<sup>30</sup> Morrow, V. and Richards, M. (1996) *Op. cit.* note 15, p. 101.

<sup>31</sup> Hammersley, M. and Atkinson, P. (1983) *Op. cit.* note 29, p. 199.

<sup>32</sup> Sidell, M. (1993) 'Interpreting.' In: Shakespeare, P., Atkinson, D. and French, S. (eds.) *Reflecting on Research Practice*. Open University Press: Buckingham, p. 112.

<sup>33</sup> Hammersley, M. and Atkinson, P. (1983) *Op. cit.* note 29, p. 200.

a reader to assess. The report may appear convincing, but it may be impossible to determine what lies behind it; how representative of the study as a whole the account is. In relation to the issue of selectivity, there have been criticisms that quotations from interviews or fieldnotes may have been chosen to support the author's preconceptions, or simply because they were dramatic or exotic.<sup>34</sup>

The empirical data contained in this thesis is therefore presented in a way more often associated with positivist research, the interpretation of the data being separated from the account of the data itself. A straightforward counting technique (as recommended by Silverman)<sup>35</sup> has been used as a means of surveying the entire body of data, to ensure its representativeness and transparency. As a result, some of the richness and fluidity of a qualitative study may have been lost, although it is hoped that the range and variety of the individual voices which have been heard emerges irrespective of the formality of the account.

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<sup>34</sup> Silverman, D. (1993) *Interpreting Qualitative Data: Methods for Analysing Talk, Text and Interaction*. Sage: London, p. 153.

<sup>35</sup> *Ibid.*, p. 163.

## **PART TWO**

## **PART TWO**

### **INTRODUCTION**

This section briefly outlines, in Chapter Three, the way in which child witnesses have historically been treated within the criminal justice system. Two specific periods of reform are then examined. Chapter Four discusses the Committee on Sexual Offences against Young Persons 1925, which made important recommendations on child witnesses and their evidence. The committee's proposals were not acted upon by the government of the day, although a number of minor reforms were eventually included in the Children and Young Person's Act 1933. Chapter Five then details the passage of the 1988 and 1991 Criminal Justice Acts, which fundamentally transformed the rules of evidence relating to children's testimony and introduced new court procedures for child witnesses. Prevailing attitudes in both periods towards the role of the criminal justice system in responding to the problem of child sexual abuse are discussed. It is suggested that these are linked to the relative failure of the earlier reform process and the comparative success of the later one.

## CHAPTER THREE

### THE DEVELOPMENT OF THE LAW ON CHILD WITNESSES AND THEIR EVIDENCE

Over time there has been considerable variation in the way in which child witnesses and their evidence have been treated within the criminal justice system. Although legal practitioners and the courts have invariably expressed caution about the reliability of children's testimony, rules of evidence designed to address this perceived problem have not been consistently applied; rather, there have been fluctuations between more, or less, liberal or restrictive interpretations of their requirements. Furthermore, the rules themselves were not developed until the late eighteenth century, before which a pragmatic attitude towards child witnesses can be discerned. What follows is a short description of the changes which have taken place.

#### Child witnesses and early criminal court practice

Accounts of children acting as witnesses can be found in some of the earliest English records of 'ordinary criminal prosecutions',<sup>1</sup> dating as far back as the mid-sixteenth century. While it is possible that children's testimony may be required in relation to any category of criminal offence, it would seem that there has been a consistent tendency for their evidence to be heard in cases of sexual or violent offences in which children were the victims. Sir Matthew Hale noted in 1736 that the cases in which child witnesses appeared were usually those involving "rape, buggery, witchcraft, and such crimes, which are practised upon children."<sup>2</sup>

The rules operating in relation to children's evidence in the early 1980's had their origin in the late eighteenth century, prior to which the law of evidence was relatively undeveloped.<sup>3</sup> Langbein has suggested that well into the eighteenth century English common law criminal procedure was essentially inquisitorial in practice, unlike the

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<sup>1</sup> Langbein, J. H. (1978) 'The Criminal Trial before the Lawyers.' *The University of Chicago Law Review*, Vol. 45 No. 2 p. 267.

<sup>2</sup> Hale, Sir Matthew. (1736) *The History of the Pleas of the Crown*. Sollom Emlyn (ed) Nutt and Gosling: London. Quoted in Langbein, J. H. (1978) *Op. cit.* note 1. Footnote 87, p. 294.

<sup>3</sup> Langbein, J.H. (1978) *Op. cit.* note 1, p. 301.

adversarial system which is found today.<sup>4</sup> Trial proceedings in the earlier period were dominated by the judge who examined the witnesses and the accused, and had a variety of means of influencing and controlling jury verdicts. There was no strict body of rules designed to exclude or circumscribe certain categories of evidence, and hearsay and prior conviction evidence appear to have been readily received.<sup>5</sup> This is echoed in Hale's comment that the courts placed a higher value on ensuring that children's evidence was heard than on requiring that it was taken on oath. He states:

... very young people under twelve years old I have not known examined upon oath, but sometimes the court for [its] information have heard their testimony without oath.<sup>6</sup>

Hale personally advocated the practice of allowing young children to give unsworn evidence on the grounds that the courts would otherwise often be denied the evidence most central to the case; sexual offences against children tend to be committed in secret he argued, and while evidence supportive of the child's allegation may be available, there may be no other evidence of the commission of the offence itself.<sup>7</sup> Furthermore, he suggested, since the courts freely accepted hearsay evidence of a child's complaint to her mother or other adult:

... there is much more reason for the court to hear the relation of the child herself, than to receive it at second-hand from those that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first delivered.<sup>8</sup>

The one qualification which Hale made was that a child's unsworn evidence should not:

... singly of itself [...] move the jury to convict the offender, nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable.<sup>9</sup>

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<sup>4</sup> *Ibid.* p. 315.

<sup>5</sup> *Ibid.* pp. 315-316.

<sup>6</sup> Hale, quoted in Langbein, J.H. (1978) *Op. cit.* note 1. Footnote 87, p. 294.

<sup>7</sup> *Ibid.* Footnote 87, p. 294.

<sup>8</sup> *Ibid.* Footnote 87, p. 294.

<sup>9</sup> *Ibid.* Footnote 87, p. 294.

This relatively relaxed approach to evidence, whether that of a child or adult, appears to have been paralleled by the courts' ability to 'correct' jury verdicts viewed as unacceptable. Hale states:

If the jurors by mistake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court go together again and consider better of it, and alter what they have delivered.<sup>10</sup>

A detailed description of this practice is provided by Langbein in his account of the conviction in 1678 of Stephen Arrowsmith on charges of rape of, and intercourse with, an eight year old girl; a case in which the evidence of both the complainant and a nine year old eyewitness were given unsworn.<sup>11</sup> In his defence Arrowsmith had called evidence that the girl had stated that she had not initially complained about the offences because "she took Pleasure in [them]."<sup>12</sup> The record indicates that the judges in the case were of the opinion that the girl had been raped and:

... with great detestation and abhorrence of so Horrid and Vile an offence, told [Arrowsmith] the matter was so plain against him, that he must have as great impudence to deny it, as he had wickedness to Commit it.<sup>13</sup>

When the jury, apparently less convinced by the evidence than the judges in the case, returned a verdict of not guilty:

Mr *Recorder*, not conceiving it to be according to [the] Evidence, would not take [the verdict] from them without further deliberation, and labored to satisfy them of the Manifestness of the Proof.<sup>14</sup>

Some members of the jury expressed concern that neither of the young witnesses had been sworn, and the court tried to persuade them that this was not necessary.

Believing the jury were attempting to re-examine the children themselves when they retired for a second time, the court re-called the children, swore them, and took their evidence again. The jury retired a third time, and returned a guilty verdict.

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<sup>10</sup> Hale, quoted in Langbein, J.H. (1978) *Op. cit.* note 1, p. 294.

<sup>11</sup> Langbein, J.H. (1978) *Op. cit.* note 1, pp. 291-295.

<sup>12</sup> *Old Bailey Sessions Papers, December 1678*. Quoted in Langbein, J.H. (1978) *Op. cit.* note 1, p. 292.

<sup>13</sup> *Ibid.* p. 292.

<sup>14</sup> *Ibid.* p. 293.

### The development of rules of evidence on children's testimony

Such practices as those described above were abandoned during the late eighteenth century when the adversarial system as we know it, developed. Stricter rules were established both for evidence and court procedure, and greater consistency became required of legal practitioners. In relation to child witnesses, the relatively liberal procedures which had been allowed, were no longer permitted. A decision in the case of *Brasier*<sup>15</sup> in 1779 proved particularly influential.<sup>16</sup> *Brasier* was convicted at the Reading Assizes of sexually assaulting a girl aged under seven years. At the trial the girl's account of the assault was reported to the court by her mother and a woman who lodged with the family; no evidence was given by the child. The conviction was subsequently referred to twelve judges in London who stated that:

... an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath [...], for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence.<sup>17</sup>

However, they agreed unanimously that, as the girl herself had not given evidence against *Brasier*, 'the information which the infant had given to her mother and the other witness, ought not to have been received.'<sup>18</sup> *Brasier* was granted a pardon.

This decision underpinned legal practice in relation to children's testimony for the next two centuries. It became the rule that children should always give their own account of events to the court on oath, the practice of allowing children to give unsworn evidence being abandoned, and hearsay evidence becoming inadmissible. Furthermore, the persistence of the belief that children's evidence is inherently less reliable than that of adults, led to a requirement that trial judges should warn jurors of

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<sup>15</sup> *Brasier* (1779) Leach vol. 1, case XCV111, pp. 199-200; re-printed in: English Reports, vol. 168.

<sup>16</sup> See: East, Sir Edward. (1803) *A Treatise of the Pleas of the Crown*. Butterworth: London pp. 443-444; Spencer, J. R. and Flin, R. (1990) *The Evidence of Children: The Law and the Psychology*. Blackstone Press: London, pp. 45-46.

<sup>17</sup> *Brasier* (1779). *Op. cit.*, note 15, p. 200.

<sup>18</sup> *Ibid*, p. 200.

the danger of convicting a defendant on the evidence of a child unless independent evidence capable of corroborating the child's account were available.

These rules placed significant difficulties in the way of children's evidence being heard in cases involving sexual offences. As Hale had noted, the nature of sexual offending against children is such that independent material evidence of the commission of an offence is frequently absent. Although the corroboration warning did not amount to a ban on convicting on a child's sworn evidence alone, it nevertheless had the potential to deter a jury from convicting as the manner of the warning might strongly infer that to do so would be unsafe.<sup>19</sup> In practice, cases of sexual offences against children were not infrequently dismissed or not proceeded with because of a lack of corroboration.<sup>20</sup>

The requirement that children should give their evidence on oath proved especially restrictive. Whereas it was accepted that adult witnesses understood the nature of the oath, the presumption went the other way in the case of children.<sup>21</sup> Before they were allowed to take the oath children were questioned by the trial judge to establish whether they understood what this would involve. Until the late nineteenth century it was not enough, if children were to be permitted to be sworn, for them to show that they understood the difference between good and evil, and believed in God; rather, they had to show that they realised they would be condemning themselves to eternal damnation should they lie. Later, it gradually became accepted that it was sufficient for a child to satisfy the court that they understood that taking the oath involved some kind of divine punishment for lying, whether or not this involved the present life or beyond.<sup>22</sup> Nevertheless the competency test continued to present a serious obstacle to child witnesses since in practice it prohibited many, especially younger children,

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<sup>19</sup> Committee on Sexual Offences against Young Persons (1925) *Report*. (Cmd. 2561). *Parliamentary Papers 1924-1924*, vol. 15: London, para. 69, p. 49.

<sup>20</sup> *Ibid*, para. 68, p. 46.

<sup>21</sup> Spencer, J. R. and Flin, R. (1990) *Op. cit.*, note 16, p. 44.

<sup>22</sup> See for example, Brett M.R. in *Attorney-General v Bradlaugh* (1885): “.. there is no necessity that the person taking the oath should believe that he will be liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for doing wrong, that is enough.” Quoted in: Spencer J.R. and Flin, R. (1990) *Op. cit.*, note 16, p. 50.

from giving evidence, involving as it did concepts beyond their developmental capacity.

### **Liberalisation of the rules of evidence: reform in 1885-1933**

Periodically the rules of evidence were modified, enabling more children to testify in court, but there were also times when the rules were interpreted increasingly restrictively. Reform tended to coincide with periods of concern about the welfare of children. The late nineteenth and early twentieth century, a period notable for the introduction of legislation to improve the conditions in which children lived, saw the enactment of a number of provisions relating to children as witnesses. The Criminal Law (Amendment) Act 1885 which raised the age of consent from twelve to sixteen, contained a provision enabling children to give unsworn evidence in cases of unlawful carnal knowledge of girls under thirteen, although with the provisos that the child should satisfy the court that she was of sufficient intelligence to justify the reception of her evidence, and that the evidence itself was corroborated.<sup>23</sup> Nine years later the Prevention of Cruelty to Children (Amendment) Act 1894 included provisions permitting a sworn deposition to take the place of a child's live evidence in cases of cruelty, if it was established that an appearance in court would involve serious danger to the child's life or health.<sup>24</sup> The opportunity for the courts to hear unsworn evidence from children was gradually extended to include a number of other sexual offences, until eventually it was extended to all criminal offences by Section 38 of the Children and Young Person's Act 1933, (retaining the competency and corroboration conditions established by the earlier Acts). Furthermore, sections 42 and 43 of the Act extended the provisions for evidence by deposition, (previously only available in cases of cruelty), to all offences listed under First Schedule of the Act, (thus including sexual offences) while Section 37 addressed the anxiety children experienced when testifying by providing for courts to be closed to anyone other than the press and those directly concerned in the case, whenever children were giving evidence in cases involving offences against 'decency' or 'morality'.

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<sup>23</sup> Criminal Law (Amendment) Act 1885, Section 4.

<sup>24</sup> Prevention of Cruelty to Children (Amendment) Act 1894, Sections 14 and 15.

These provisions were still in force in the early 1980's, although sections 42 and 43 appear to have been rarely used, and section 37 appears by this time to have fallen into neglect.<sup>25</sup> Nevertheless Spencer and Flin have suggested that the initial effect of this Act was positive and enabled courts to hear children's evidence whatever their age, if they were able to satisfy the test established under Section 38.<sup>26</sup> Claud Mullins, then a magistrate, who had a particular interest in child witnesses and offenders, has described how he was able to obtain evidence from a two year old in the relatively informal atmosphere of the Petty Sessions.<sup>27</sup> Within a relatively short period of time, however, the rules of evidence were being interpreted in an increasingly restrictive manner.

### **Restrictive interpretation of the rules: the influence of *Wallwork***

In 1958 a case was heard in the Court of Criminal Appeal which was to have a decisive influence on the treatment of child witnesses for the next thirty years. The case concerned, *Wallwork*,<sup>28</sup> involved a man convicted of incest with his five year old daughter. The child herself had not given evidence at the original trial as, although the prosecution had called her to testify, they were unable to persuade her to say anything when she was in the witness box. However, the attempt to use the child as a witness was strongly criticised when the case came before the Appeal court. The decision given by Lord Goddard suggests that in condemning the calling of a five year old as a witness he may have been thinking in part of the stress of such an experience for a young child.<sup>29</sup> Nevertheless his judgement includes a robust declaration that children of this age are not competent to act as witnesses and should not be called:

The Court deprecates the calling of a child of this age as a witness. Although the learned judge had the court cleared as far as it can be cleared, it seems to us unfortunate that she was called and, with all respect to the learned judge, I

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<sup>25</sup> Statistics are not available in relation to either issue. There is some inferential evidence of the use of s. 37 (see quotation from Lord Goddard in *Wallwork*, note 27 below) but the author has no direct experience of its use, and research reports on children's experiences as witnesses invariably comment on how stressful children find it to give evidence in the presence of the public - see Chapters 5 and 8.

<sup>26</sup> Spencer, J.R. and Flin, R. (1990) *Op. cit.*, note 16, p. 51.

<sup>27</sup> Mullins, C. (1943) *Crime and Psychology*. Methuen: London, p. 195.

<sup>28</sup> *Wallwork* (1958) Criminal Appeal Reports, vol. 42, pp. 153-165.

<sup>29</sup> *Ibid.*, p. 161. Lord Goddard noted: 'The child had given no evidence because when the poor little thing was put into the witness box, she said nothing and could not remember anything.'

am surprised that he allowed her to be called. The jury could not attach any value to the evidence of a child of five; it is ridiculous to suppose that they could. [...] There must be corroborative evidence if a child of tender years and too young to understand the nature of an oath is called, but in any circumstances to call a little child of the age of five seems to us to be most undesirable, and I hope it will not occur again.<sup>30</sup>

Following this judgement the courts adhered to the principle that children below the age of six are not competent to offer unsworn evidence, and in practice, it became rare for children under the age of eight to be called.<sup>31</sup> The decision in *Wallwork* was confirmed as late as 1987, when the Court of Appeal ruled in the case of *Wright*<sup>32</sup> that a six year old child who had given evidence in that case, should not have been allowed to do so. Citing Lord Goddard's views, quoted above, Mr. Justice Ognall said:

That was nearly 30 years ago. So far as this Court is aware, the validity of, and good sense behind, that proposition has remained untrammelled in the practice of the criminal courts. ... [I]t must require quite exceptional circumstances to justify the reception of this kind of evidence. ... [T]here can be no doubt that many, if not all, of the difficulties [...] which gave rise to this appeal flow directly from the fact that the complainant was [...] a child of extremely tender years. The lesson of this trial lends especial force, in our judgement, to the observations of Lord Goddard CJ in *Wallwork*. It will, in our view, be a bold tribunal hereafter that does not heed that lesson.<sup>33</sup>

Further difficulties were created by the way in which the corroboration rule was applied, the courts adopting the principle that unsworn evidence should only be corroborated by sworn evidence. This effectively meant that in cases involving a number of children whose evidence was mutually supportive, a prosecution could not be brought unless one or more of the children were assessed as competent to take the oath, or there was some other sworn corroborative evidence. The basis for this was the tenacity of the belief, ironically noted by Bentham in the nineteenth century, that children are 'undeserving of confidence, and incapable of discernment'.<sup>34</sup> A more contemporary expression of this view, and apologia for criminal court practice, was given in 1964 by Andrews, who stated:

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<sup>30</sup> *Ibid*, p. 160-161.

<sup>31</sup> Spencer, J.R. and Flin, R. (1990). *Op. cit.*, note 16, p. 51.

<sup>32</sup> *Wright* (1987) Criminal Appeal Reports, vol. 90, pp. 91-98.

<sup>33</sup> *Ibid*, pp. 94-95.

<sup>34</sup> Bentham, J. (1825) *A Treatise on Judicial Evidence*. Ed: Dumont; Baldwin, Cradock and Joy: London. Quoted in Spencer, J. R. and Flin, R. (1991) *Op. cit.*, note 16, p. 38.

[T]he evidence of children is treated with some suspicion because of their imagination and the ease and comparative influence with which their memories may be magnified or distorted or influenced by what is said to them. Although the chances are less that two children may make the same mistake or magnification it is possible that they might. This is particularly true if they have had a chance to exchange influences and impressions with each other after the incident.<sup>35</sup>

Andrews acknowledged that the effect of this argument was that many offences against children went unpunished,<sup>36</sup> but he nevertheless reiterated that the intrinsic unreliability of children's evidence was such that "pointed warnings"<sup>37</sup> should always be given on the dangers of child evidence, whether the evidence were sworn or unsworn, and that no conviction should be based "on the unsworn evidence of two children involved in the same incident."<sup>38</sup> That this was the view of the legal profession generally, was confirmed in 1973 in *DPP v Hester*.<sup>39</sup> Lord Morris, giving his decision in this appeal, noted that children's testimony is of a kind requiring corroboration as children may be unable to appreciate the gulf separating truth and falsehood "owing to immaturity or perhaps to lively imaginative gifts".<sup>40</sup> Considering the question of whether the evidence of two children should be mutually corroborative, he expressed the view that while the sworn evidence of one child and the unsworn evidence of another could act in such a way,<sup>41</sup> the unsworn evidence of one child should not be capable of corroborating that of another.<sup>42</sup>

The difficulties which the competency and corroboration rules created to the prosecution of offences against children was a central factor in demands for reform in the 1980's. However, before describing the process by which these rules were abolished, the chapter which follows returns to the Children and Young Person's Act

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<sup>35</sup> Andrews, J.A. (1964) 'The Evidence of Children.' *Criminal Law Review* p. 770.

<sup>36</sup> *Ibid*, p. 773.

<sup>37</sup> *Ibid*, p. 777.

<sup>38</sup> *Ibid*, p. 777.

<sup>39</sup> *Director of Public Prosecutions v. Hester* (1973) *Law Reports: Appeal Cases* pp. 296-331.

<sup>40</sup> *Ibid*, p. 309.

<sup>41</sup> *Ibid*, p. 316.

<sup>42</sup> *Ibid*, p. 314.

1933 to examine in more detail the circumstances which led to the child witness provisions which it introduced.

## CHAPTER FOUR

### ATTEMPTING TO REFORM THE LAW: THE COMMITTEE ON SEXUAL OFFENCES AGAINST YOUNG PERSONS 1925

The Children and Young Persons Act 1933, as shown in the previous chapter, contains a number of provisions which relate to child witnesses. These were in part attributable to recommendations made almost a decade earlier, by an inter-departmental committee established by the Government in July 1924 to determine the prevalence of sexual offending against children and young people and to recommend necessary changes in the law and its administration.<sup>1</sup> At the time of its publication, the committee's report,<sup>2</sup> while well-received by the public, aroused considerable opposition from the legal profession.<sup>3</sup> Largely due to this adverse response, the Government took no action on the report other than to issue a Home Office circular which incorporated some of the committee's proposals for changes in police and court practice, at the same time minimising the potential impact of these by allowing discretion for differences in local circumstances.<sup>4</sup> In 1932 a number of campaigning organisations including the Howard League, National Council of Women, and the National Vigilance Association, formed a Joint Committee on Sexual Offences against Children to press for implementation of the report's proposals. The Joint Committee was relatively short lived, disagreements between its members on the proper role of the criminal law in this area weakening its effectiveness,<sup>5</sup> but nevertheless a degree of

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<sup>1</sup> Similar initiatives were underway in other countries. For example, in Norway a campaign by the National Association of Women resulted in 1926 in the enactment of statutory rules on child witnesses in cases of sexual offences. An out-of-court interview of the witness by an examining magistrate was introduced, the magistrates' report of the interview being read out at court in place of the child's testimony. Although some modifications have subsequently been introduced (e.g., tape- or video- recording the interview) the principle of an out-of-court judicial interview has been maintained. Andenaes, J. (1990) 'The Scandinavian Countries.' In: Spencer, J. R., Nicolson, G., Flin, R. and Bull, R. (eds.) *Children's Evidence in Legal Proceedings: An International Perspective* J. R. Spencer: Cambridge, p. 10.

<sup>2</sup> Committee on Sexual Offences against Young Persons (1925) *Report*. (Cmd 2561). *Parliamentary papers 1924-1925*, vol. 15: London.

<sup>3</sup> Hooper, C.A. (1992) 'Child sexual abuse and the regulation of women: variations on a theme.' In: Smart, C. (ed.) *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality*. Routledge: London, p. 65.

<sup>4</sup> *Ibid.*, Endnote 3, p. 76.

<sup>5</sup> *Ibid.*, pp. 58 and 66.

reform was finally achieved. The issues which are addressed in the 1925 report closely resemble those debated in the 1980's (see later) and it is useful to consider them in relation to the circumstances which led the government to establish the committee and then show considerable reluctance to act on its recommendations.

This chapter outlines the circumstances in which the committee was established; describes its findings; and discusses why its recommendations were not acted upon. A brief analysis of the position of child witness in the intervening period, between 1933 and the mid-1980's, then follows.

### **Report of the Committee on Sexual Offences against Young Persons 1925**

The committee's report was a wide-ranging one, dealing with the extent of sexual offending against children and young people; the adequacy of existing law; jurisdiction of the courts; rights and characteristics of offenders; and prevention. It gave detailed attention to the difficulties involved in trials in which children were the complainants, noting that a:

... difficulty which has been present with us throughout our deliberations has been to reconcile measures which are in the best interests of the young victims of these offences with the essential requirements of the administration of justice. On the one side are the law and procedure which are inevitably and properly framed to ensure a fair and impartial trial, and which entail formality and publicity and the necessity for strict legal proof. On the other side are children who, on account of their immaturity, are unfit to be associated with courts of justice, and for whom, on account of the nature of the wrongs they have suffered, publicity may be harmful in the extreme. A very special responsibility for the care and protection of the young rests upon the community in the circumstances with which our inquiry deals.<sup>6</sup>

One of the nine sections of the report was concerned exclusively with difficulties in proving a sexual offence against a child at court. The committee acknowledged the stressful nature of a court appearance for the child complainants involved in these cases,<sup>7</sup> and noted the 'almost insuperable'<sup>8</sup> problem arising when a child was unable to speak of the offence in court through fear or embarrassment. It considered whether

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<sup>6</sup> Committee on Sexual Offences against Young Persons (1925) *Op. cit.* note 2: para. 3, p. 5.

<sup>7</sup> *Ibid.*, para. 61, p. 40.

<sup>8</sup> *Ibid.*, para. 66, p. 43.

children should be protected from appearing in person at court, their evidence being taken instead at an earlier stage and presented at the trial in the form of a written deposition. However it rejected this idea, concluding that:

Save in exceptional circumstances, we are convinced that it is necessary for the child to give evidence in Court. A written statement is much less likely to carry conviction to the mind of the Court or jury, especially when they know that the child could itself give evidence before them. The court is also assisted in judging the truth of a charge by the demeanour of the witness and by the manner in which the evidence is given.<sup>9</sup>

It went on to examine alternative ways of addressing the problem of cases being lost or withdrawn because a child had broken down and been unable to complete his/her evidence, or had been so overcome with fright or distress that no evidence was obtained at all. It considered permitting the child's written deposition to be read out in court and the child asked on oath, sentence by sentence, if each statement were true. However it concluded that:

This procedure is contrary to the accepted rules of evidence and we consider it undesirable to suggest so far-reaching a change for one particular class of case.<sup>10</sup>

Nevertheless the committee recommended a number of practical steps designed to reduce the anxiety of a court appearance for a child. It proposed that solicitors should be allowed to take children through their original statement before they appeared in court, to refresh their memory;<sup>11</sup> that the timing of a child's appearance in court should be planned to avoid the child becoming overtired by long periods spent waiting in the vicinity of the courtroom;<sup>12</sup> that separate waiting rooms should be provided;<sup>13</sup> re-iterated Home Office advice that a support person, who 'preferably should be her mother or some other female relative or friend' should be with the child in court;<sup>14</sup> and recommended that the public gallery should be cleared during the

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<sup>9</sup> *Ibid.*, para. 58, p. 38.

<sup>10</sup> *Ibid.*, para. 66, p. 44.

<sup>11</sup> *Ibid.*, para. 52, p. 35.

<sup>12</sup> *Ibid.*, para. 55, p. 36.

<sup>13</sup> *Ibid.*, para. 53, p. 36.

<sup>14</sup> *Ibid.*, para. 62, p. 40.

child's testimony.<sup>15</sup> Additionally it argued that these cases should be given priority since delay not only put an unacceptable strain on a child but was likely to impair the child's recall of the offence, thus contributing to the child's potential problems under cross-examination.<sup>16</sup>

The committee went on to examine problems attributed to the competency test, and the corroboration requirement. It noted that:

... it is most difficult to tell if any child really understands the nature of the oath [...] but [...] it is much less difficult to determine if a child understands the obligation and duty of telling the truth.<sup>17</sup>

It acknowledged the lack of consistency in practice, some courts swearing children of six or seven and others refusing to swear those of ten or eleven,<sup>18</sup> and effectively recommended the abolition of the competency test, proposing that any child able to tell a connected story should be allowed to give evidence on oath.<sup>19</sup> In so-doing it argued that since corroboration was required where children gave unsworn evidence, it was preferable that their evidence should be given on oath.

The committee furthermore noted the confusion arising from the practice of requiring corroboration of children's sworn evidence; something not essential in law. It acknowledged that:

It would appear to be only right that a Judge in summing up [...] should in every case where the young person's evidence is challenged, and met with an emphatic denial on oath, tell [the jury] that they are confronted with one oath against another, and address to them a clear and definite warning as to the dangers of accepting the young person's evidence against the man's unless there is some other evidence implicating the accused.<sup>20</sup>

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<sup>15</sup> *Ibid.*, para. 64, pp. 42-43.

<sup>16</sup> *Ibid.*, para.s 55-57, pp. 36-38.

<sup>17</sup> *Ibid.*, para. 68, p. 46.

<sup>18</sup> *Ibid.*, para. 68, p. 46.

<sup>19</sup> *Ibid.*, para. 68, p. 47.

<sup>20</sup> *Ibid.*, para. 69, p. 47.

However, it recommended that the Appeal Court ruling in the case of *Crocker*,<sup>21</sup> which held that the jury could convict on the uncorroborated evidence of a child if it was satisfied the child's account was true, should be re-emphasised.<sup>22</sup> It further expressed the view that the wording and manner of delivery of the corroboration warning had to be considered carefully to avoid the jury interpreting this to mean it was always unsafe to convict in the absence of corroboration.<sup>23</sup> The corroboration rules essentially being concerned with the reliability of children's evidence, the committee took the conduct of the criminal investigation of offences against children as being within its remit and went on to include recommendations on the gender and training of police investigators.<sup>24</sup>

The response of the legal profession was unequivocal. An unsigned article which appeared in two instalments in *The Law Journal*<sup>25</sup> stated: '... so intent is the committee on protecting the young, it has lost sight almost entirely of its duty of also protecting the innocent adult.'<sup>26</sup> The committee's proposals to reform the administration of the law were characterised as designed to establish a 'special machinery patently calculated to assure [...] conviction',<sup>27</sup> and it was argued that:

... the larger part of these recommendations are founded on the popular misconception that every prosecution is necessarily well-founded and every defence inevitably a speculative subterfuge.<sup>28</sup>

Acceptance of the report's proposals, asserted the authors, would undermine the fundamental principle of the presumption of innocence. Thus all of the report's recommendations for practical measures to assist child witnesses were rejected out of hand, while the suggestion that there might be grounds for reforming the rules of evidence was held not only to be retrogressive, but undermining of the constitution

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<sup>21</sup> *Crocker* (1921) Criminal Appeal Reports, vol. 17, pp. 45-46.

<sup>22</sup> Committee on Sexual Offences against Young Persons (1925) *Op. cit.*, note 2: para. 69, pp. 48-50.

<sup>23</sup> *Ibid.*, para. 69, p. 49.

<sup>24</sup> *Ibid.*, para. 45, p. 31.

<sup>25</sup> 'Sexual Offences Against Young Persons.' *The Law Journal* 30.1.1926 p. 97; 6.3.1926, pp. 215-216.

<sup>26</sup> *Law Journal* 30.1.26 *Op. cit.*, note 25, p. 97.

<sup>27</sup> *Law Journal* 6.3.26 *Op. cit.*, note 25, p. 215.

<sup>28</sup> *Ibid.*, p. 215.

and of liberty. Expressing ‘the strongest possible caution against the relaxing of any of the rules and regulations as to evidence and its production’, the authors implied that the report did not command the support of those legal professionals who had been members of the committee.<sup>29</sup> In particular, the inclusion in the report of memoranda by individual committee members dissenting from specific recommendations (the majority of which focused on the questions of the age of consent and the defence of reasonable belief rather than the above issues) was held to ‘confirm our supposition, that there were strongly conflicting points of view in the proceedings of the Committee.’<sup>30</sup>

The authors’ assertion that the committee’s objective was the establishment of a system of criminal trial which would ensure the conviction of those responsible for sexual offences against children, while an exaggeration, nevertheless encapsulated the essence of the issues in dispute. The report queried the effectiveness of existing trial procedures for dealing with cases involving child complainants, and stated categorically:

Many witnesses who are well qualified to form an opinion have maintained firmly that in a great number of trials for sexual offences against young persons the guilty party escapes conviction.<sup>31</sup>

What was at issue here was whether or not there were grounds for conducting trials in a different way in these cases. Logically, the subject of child witnesses becoming the subject of special rules and procedures which would acknowledge their immaturity should not have presented lawyers with a difficulty. Children were already the subject of special rules; those relating to competence and corroboration. However, the problem concerned the direction of the proposed changes. While the existing rules served to safeguard the rights of the defendant, and thus reflected the presumption of innocence underpinning the criminal justice system, the committee’s recommendations, in being concerned with the removal of obstacles to the prosecution of offences against children, was clearly saying that the balance in such

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<sup>29</sup> *Ibid.*, p. 216.

<sup>30</sup> *Law Journal* 30.1.26 *Op. cit.* note 25, p. 97.

<sup>31</sup> Committee on Sexual Offences against Young Persons (1925) *Op. cit.*, note 2: para. 11, p. 11.

trials needed alteration. The members of the committee, like the authors of the article in the *Law Journal*, believed children's evidence was liable to contain inaccuracies, and their report states:

The statement of the offence is based on truth, but, owing to the receptivity of a child's mind, details may perhaps be added, and after long delay exaggeration may creep in, and the defence will undoubtedly make much of this at the trial. The man is justly entitled to the benefit of inaccuracies in the evidence, and yet the child may still be speaking the truth as to the commission of the offence.<sup>32</sup>

Thus, both sides believed that a failure to recognise qualitative differences between the evidence of children and that of adults was not in the interests of justice. The conclusions they drew from this, however, were diametrically opposed. While the authors of the *Law Journal* article believed there was a need for rules to safeguard defendants from the risk of being unfairly convicted on unreliable evidence, the committee believed there had to be some relaxation of the rules to enable the courts to adopt procedures which would be sensitive to children's developmental needs and ensure their evidence would not be unfairly rejected.

### **Social purity and child welfare campaigns**

The committee's questioning of some of the legal profession's fundamental beliefs and traditions was always likely to arouse opposition. What may have contributed to the intensity of the ensuing debate was its association with other strongly held beliefs, in particular those concerning sexuality and the role which the criminal justice system should play in regulating sexual behaviour. The establishment of the Committee on Sexual Offences against Young Persons had followed a lengthy period of campaigning by the social purity movement on both of the above issues. During the late nineteenth century social purity campaigners had pressed for legislation to establish a single code of sexual conduct for men and women, and had emphasised the role of the criminal justice system in suppressing vice. Initially their campaigns focused on child and adult female prostitution and legislation was sought both to ban brothels and to raise the age of consent, which at the time was twelve. Campaigners challenged not only the

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<sup>32</sup> *Ibid.*, para. 67, p. 45.

sexual double standard characterising the period but also the prevalence of attitudes which allowed working class women and children to be treated as persons of little value. The women and children the campaigners were seeking to help were portrayed by them as the innocent, passive victims of unscrupulous men. The campaign was highly emotive and attracted unusual alliances; a meeting held on 16 July 1885 heard a resolution proposed by General Booth of the Salvation Army and seconded by the feminist Josephine Butler, recommending that:

In the name of God and of justice and of purity [...] the law should be immediately amended so as to better protect women and children from the awful dangers to which they are now exposed;<sup>33</sup>

and calling on parliament to pass: 'a bill for the protection of young girls from the evil lusts of wicked men.'<sup>34</sup> This was achieved in the Criminal Law (Amendment) Act 1885 which outlawed brothel keeping and the procurement of women for prostitution, and raised the age of consent to sixteen.

During this debate attention had focused on the sexual risk to children and adolescents from men outside the home.<sup>35</sup> State interference in family relationships was difficult for the Victorians to contemplate, since it challenged the *laissez faire* assumptions of contemporary social policy. Pressed to support legislation to protect children from parental cruelty, Lord Shaftesbury had responded in 1871:

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<sup>33</sup> Quoted in: Gorham, D. (1978) 'The Maiden Tribute of Modern Babylon Re-examined: Child Prostitution and the Idea of Childhood in Late Victorian England.' *Victorian Studies* 21(3), p. 364.

<sup>34</sup> *Ibid.*, p. 364.

<sup>35</sup> There is some evidence that extra-familial child sexual assault became increasingly apparent in the early nineteenth century, possibly associated with the growth of industrialisation and urbanisation. North East Assize records show a significant increase in the number of child sexual assault prosecutions between 1800-1845, many involving itinerant skilled workers living in lodgings where there were children: Clark, A. (1987) *Women's Silence, Men's Violence. Sexual Assault in England 1770-1845*. Pandora: London, p. 98. This may have been a factor in the focus on extra-familial abuse subsequently adopted by the purity campaigners. In relation to this, see also Steedman's comment that mid-Victorian society was a society of the young - between 1800 and 1900 children under 15 years consistently represented between 30 and 40 percent of the population. 'In societies like this, children are usually highly visible on the streets.' (Where, in terms of extra-familial child sexual assault, there may be thought to be an element of risk.) Steedman, C. (1995) *Strange Dislocations: Childhood and the Idea of Human Interiority, 1780-1930*. Harvard University Press, Cambridge, Massachusetts, pp. 125-126.

The evils you state are enormous and indisputable, but they are of so private, internal and domestic a character as to be beyond the reach of legislation, and the subject, indeed, would not, I think, be entertained in either House of Parliament.<sup>36</sup>

However concern about the circumstances in which many infants and children were living was intense at this time and the establishment of localised campaigning groups in some of the larger cities led in May 1889 to the formation of the National Society for the Prevention of Cruelty to Children. The Society actively sought to change attitudes towards the role of the state in family life, arguing that:

... the worse sufferings of little children [arise] through the instrumentality of vicious and degraded parents, and [are] practised in the privacy of the home.<sup>37</sup>

The NSPCC co-ordinated efforts to promote legislation in Parliament and was instrumental in securing the passage of the Prevention of Cruelty to Children Act 1889; an Act which was referred to as the Children's Charter, and which substantially modified the common law rights of parents, making wilful cruelty to a child a punishable offence. In the five years immediately following its implementation, 5,792 people were prosecuted under the Act, 94 per cent of whom were convicted.<sup>38</sup>

The NSPCC had close links with the National Vigilance Association, a leading purity organisation, as the Reverend Benjamin Waugh, the first director of the NSPCC, was also a member of the council of the NVA. Together the two organisations began to address the problem of incest which had come increasingly to public attention towards the end of the nineteenth century, when it was attributed to urban poverty and overcrowding.<sup>39</sup> However, the analysis offered by the two organisations reflected the beliefs of the social purity campaigners. They shared a concept of children as essentially innocent, but vulnerable to corruption, and viewed incest as a moral problem whose danger lay in its power to corrupt.<sup>40</sup> In this analysis sexual activity

<sup>36</sup> Quoted in: Pinchbeck, I. and Hewitt, M. (1973) *Children in English Society Vol. 2: From the Eighteenth Century to the Children Act 1948*. Routledge and Kegan Paul: London, p. 622.

<sup>37</sup> Quoted in: Pinchbeck, I. and Hewitt, M. (1973) *Op. cit.*, note 36, p. 622..

<sup>38</sup> *Ibid.*, p. 628.

<sup>39</sup> See for example: The Royal Commission on the Housing of the Working Classes (1885). (Cmnd 4402-1). In: *Parliamentary Papers 1884-1885*. vol. 30, p. 267.

<sup>40</sup> Gorham, D. (1978) *Op. cit.*, note 33, pp. 371-2.

generally was defined as a potent source of corruption, but incest, in exposing children to sexual experience from an early age, was thought to risk immersing them in depravity so deeply that it would become ingrained.

The solution to the problem which the two organisations proposed was that of deterrence. At this time incest was an ecclesiastical and not a criminal offence. However, the NSPCC and the NVA began to use the Criminal Law (Amendment) Act 1885 as a basis for prosecuting fathers for sexual offences against their daughters. Nevertheless, they found this problematic as the law required parental consent for medical examinations. Furthermore, prosecutions had to be brought within three months of the occurrence of the offence. They therefore began a vigorous campaign for incest itself to be specifically brought within the remit of the criminal justice system. There were unsuccessful attempts to carry incest bills in 1899-1900, 1903 and 1907, the Prohibition of Incest Act finally reaching the statute book in 1908. Yet despite this, successful incest prosecutions were few in number and remained difficult to achieve. The NSPCC became increasingly aware of the difficulties posed by the rules of evidence, and the distressing experience which giving evidence proved to be for many child complainants. It was in this context that the government came under pressure to review the administration of the law.

### **Changes in the conceptualisation of sexual offences against children**

The report of the Committee on Sexual Offences against Young Persons makes a number of criticisms of the way the courts then dealt with child witnesses. However, within the report are indications that the construction of incest and sexual offending against children which had dominated much of the campaigning rhetoric on the issues, was changing, as were attitudes towards the role of the criminal justice system in responding to the problem. Gorham has argued that beliefs about the nature of childhood altered fundamentally towards the end of the nineteenth century, with the emergence of the idea that children grow through a series of developmental stages.<sup>41</sup> This contributed to a re-evaluation of the belief in children as essentially asexual, and the articulation of alternative theories in which sexuality was identified as one of the

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<sup>41</sup> *Ibid.*, p. 369.

developmental processes in which children are involved. In turn, this fuelled debates about responsibility for sexual offending against children, suggesting that this may not be as straightforward as the purity campaigners had argued. The growing influence of these ideas is shown in the committee's report, which states: 'We have evidence that the number of girls who begin to lead immoral lives at 16 is large.'<sup>42</sup> It continues:

We consider that this is due to the fact that the girl of 16 is often mentally and emotionally unstable; she has not finished growing and developing; and though she may be excited and her passions awakened, yet she cannot really appreciate the nature and result of the act to which she consents.<sup>43</sup>

The report illustrates here the beginning of a construction of girls as in need of protection from themselves rather than as solely at risk from exploitation by men. In this developing discourse, sex is identified as an essentially healthy instinct, which is not necessarily damaging in itself. The potential harm in too early an introduction to sexual experience is seen as involving in the majority of cases physical rather than moral consequences.<sup>44</sup>

In attributing to children and adolescents nascent sexual desires or impulses which may contribute to their acquiescence in sexual activity, the report is led to propose other solutions to the problem than that of criminalisation alone. Parents are identified as a primary source of help:

It is a great help to boys and girls [who have been assaulted] if they receive sympathetic and sensible treatment from their parents [...] [T]he strengthening of the responsibility of parents is, in our opinion, the best method for protecting children.<sup>45</sup>

Education, rather than criminalisation, becomes the way forward, both to increase parental awareness of children's physical and emotional needs, and to protect children from the risks of boredom and lack of occupation:

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<sup>42</sup> Committee on Sexual Offences against Young Persons (1925) *Op. cit.*, note 2: para. 38, p. 23.

<sup>43</sup> *Ibid.*, para. 38, p. 23.

<sup>44</sup> *Ibid.*, para. 38, p.23.

<sup>45</sup> *Ibid.*, para.s 93-94, pp. 66-67.

It is the mind empty of interests which is liable to become obsessed with unhealthy imaginings, leading sometimes to the commission of indecent acts.<sup>46</sup>

The report's analysis of offenders similarly reflects shifts in thinking; the report notes the considerable diversity among offenders and argues for care and thought to be given to the circumstances of each case when deciding on the best way of responding.<sup>47</sup> Treatment or diversion will in many cases be more effective than a policy of deterrence, it suggests.<sup>48</sup> While the report accepts that prosecution and custodial sentencing may be necessary for some serial offenders, it rejects the suggestion that most sexual offenders offend repeatedly, and views many of those with multiple convictions as socially inadequate rather than dangerous. It advises that the merits of prosecution may need to be particularly carefully assessed in cases of incest, pointing to the low level of reporting of this offence, and the adverse consequences a prosecution may have for the family as a whole:

The special relationship existing between members of a family creates difficulties which often prevent disclosure to the police when an offence has been committed. A conviction for incest may deprive the family of the support of a father or brother for many years, and there may be no source of income other than Poor Relief, during the time he is in prison.<sup>49</sup>

The role of the Director of Public Prosecutions in determining whether there should be a prosecution in cases of incest is highlighted in the report, which recommends that DPP involvement should be extended to other forms of sexual offending against children.<sup>50</sup> The report further notes the practice of reducing charges in cases reaching the courts, as a means of securing guilty pleas and avoiding the necessity for children to give evidence.<sup>51</sup> The report makes it clear that this practice can result in the seriousness of offences becoming masked, but acknowledges that it has certain merits.<sup>52</sup> Overall, the report suggests that sexual offending against children is a

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<sup>46</sup> *Ibid.*, para. 123, p. 81.

<sup>47</sup> *Ibid.*, para. 75, p. 56.

<sup>48</sup> *Ibid.*, para.s 82-83, pp. 59-61.

<sup>49</sup> *Ibid.*, para. 16, p. 13.

<sup>50</sup> *Ibid.*, para. 50, p. 33.

<sup>51</sup> *Ibid.*, para. 9, p.9.

<sup>52</sup> *Ibid.*, para. 9, p. 10.

complex problem to which a policy of criminalisation as a method of deterrence is unlikely to provide a full solution.

### **Sexual offences against children: the role of the criminal justice system**

The report's analysis of the role which the criminal justice system should play in dealing with sexual offences against children marks a significant departure from that of the purity movement. Purity campaigners had placed the criminal justice system at the centre of their proposals for responding to such offences. They saw the issues in clear cut terms; the problem was one of morality; its solution was deterrence. They approached the issues with fervent evangelical enthusiasm, believing that they were confronting 'a dark and cruel wrong'<sup>53</sup> which no right minded person would support, and their arguments had a powerful emotional appeal for the general public. Oscar Wilde had commented: '... to pose as a champion of purity, as it is termed, is, in the present condition of the British public, the surest mode of becoming for the nonce a heroic figure.'<sup>54</sup> At this time the belief that the law should be used as a means of improving morals became widespread. However, even at the height of the movement's popularity, questions were raised about the validity of its analysis and the effectiveness of the solution which it proposed. Josephine Butler, who had supported the campaign for the raising of the age of consent, became increasingly concerned at the implications of relying on the criminal law to transform social and sexual behaviour, and eventually warned:

Beware of "Purity Societies" [...] ready to accept any amount of inequality in the laws, any amount of coercive and degrading treatment of their fellow creatures in the fatuous belief that you can oblige human beings to be moral by force.'<sup>55</sup>

Over-legislation risked harassment of those the law was seeking to protect, she warned, as laws could be and often were, unjustly administered.

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<sup>53</sup> Gorham, D. (1978) *Op. cit.* note 33, p. 355.

<sup>54</sup> Hart-Davis, R. (ed.) (1979) *Selected Letters of Oscar Wilde*. Oxford University Press: Oxford.

<sup>55</sup> Quoted in Bland, L. (1992) 'Feminist Vigilantes of Late-Victorian England.' In: Smart, C. (ed.) *Op. cit.*, note 3, p. 37.

Loss of confidence in deterrence as a solution to social problems increased with the development of a growing awareness of the degree of poverty in which many working people lived. Government concern at the physical debility of many army recruits in the Boer War had led to extensive research into the health and living conditions of the working classes, the conclusions of which emphasised that poor health was the result of inadequate food, housing and clothing rather than moral failings. These findings pointed to a need to reassess government social policies and contributed to pressure for a re-evaluation of the policy of criminalising parents whose children were believed to be neglected. The Fabian Women's Group, for example, wrote:

Some painful cases show the way in which the State, as guardian of its children, uses its great power merely to punish the parent and not to protect the child. [...] Suppose the State, as co-guardian of the child, stripped off, when dealing with parents, the uniform of a police-constable with a warrant in his pocket. Suppose it approached them [...] plac[ing] [...] all the help at its command at the service of [...] the fathers and mothers? Why should it not act frankly with them in the national interest, and help them to see that the needs of the child are supplied?<sup>56</sup>

The movement away from reliance on the criminal justice system as a means of dealing with neglect foreshadows the approach taken to sexual offending in the committee's report. There are occasional reflections in the report of the beliefs of the purity movement; for example, noting that in many cases Mother and Baby, or Rescue Homes, often decided against involving the police when under-age girls were found to be pregnant, it states:

... it could not fail to [...] raise the moral standard generally, if it became known that enquiries would be instituted whenever an offence was committed against a girl so young as 15 years of age.<sup>57</sup>

Nevertheless, its overall tenor leans towards a welfare solution involving a flexible range of options, and an emphasis on education and treatment. As an analysis of sexual offending against children it is not always internally consistent and is hampered by taking as its starting point the adequacy of existing categories of offences rather

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<sup>56</sup> Reeves, M. P. (1913) *Round About a Pound a Week*. Re-published by Virago: London, 1979; pp. 224 and 226.

<sup>57</sup> Committee on Sexual Offences against Young Persons (1925) *Op. cit.*, note 2: para. 17, p. 14.

than establishing what this form of abuse involved. However the report was an important attempt to evaluate the extent of the problem, and reflected influential trends in the social policy thinking of the time. Why did the government take no decisive action to implement its recommendations?

An answer may be that in contrast to the simplicity of the analysis of sexual offending against children offered by the purity movement, the report saw the problem as a complex one requiring a flexible range of options in order to respond to the individual needs of those involved. It was therefore unable to offer a single, clear, solution which might have exerted wide general appeal and placed the government under pressure to act, as had been the case when the age of consent was raised in 1885. Furthermore, the difficulties experienced by children required to give evidence when prosecutions were brought, which the report acknowledged, became obscured by the arguments which developed around the issue of the responsibility for these offences. ‘Whatever practical measures of law are available, to prevent whoredom among young women, we shall be the first to support;’ commented the *Law Journal*;

... but if their chastity by compulsion of the criminal law was the object of the Committee, it is difficult to see upon what grounds it has rejected the suggestion of authoritative witnesses that girls should be made “liable for prosecution where it can be proved that they have incited” the offences against themselves. We have heard that expedient more than once recommended at Assizes, and with excellent reason.<sup>58</sup>

This aspect of the debate was heated but unresolved. However, in questioning the construction of the young victim of sexual assaults as the defenceless, innocent party, it undermined support for changes in the treatment of child complainants by the legal system. Doubts among the general public, however slight, over the question of responsibility or consent, whether the latter were corrupted or not, could be mobilised to reinforce reluctance to adopt proposals which appeared to have implications for the presumption of innocence. Moreover, the degree of hostility shown by the legal profession to the report’s central recommendations was in itself a potent incentive not to disturb the status quo.

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<sup>58</sup> *Law Journal* 6.3.1926. *Op. cit.*, note 25, p. 216.

### **The child witness: 1933 - 1980**

There was little pressure for reform either of the rules relating to children's evidence or the way in which child witnesses were dealt with when testifying in court, in the fifty years following the enactment of the Children and Young Persons Act 1933. Sporadic attempts were made to draw attention to the issues at different times, but these do not appear to have had a significant impact or to have come to the notice of the general public. Mullins, for example, was strongly critical of contemporary practice; in an article written in 1937 he argued:

I have never seen a child giving evidence before a jury without a feeling of horror. Personally I would rather face any result than allow a *child of mine* to do this. The formality of the court, the robes and wigs, the very presence of the jury, the kind of advocacy which trial by jury evokes, must inevitably do serious psychological harm to a child witness. These very factors prevent the truth from emerging, and every one of them is inessential to justice.<sup>59</sup>

The article generated some correspondence in the *Law Journal* and a group of psychologists began to consider how further reform might be achieved, but their efforts were abandoned when war broke out in September 1939.<sup>60</sup> Mullins later acknowledged that he had seen many acts of kindness shown to child witnesses by lawyers and the judiciary but argued that 'kindness alone cannot succeed, for fundamentally the circumstances in which judges do their work with juries are wrong when children give evidence in cases of sexual assault.'<sup>61</sup> He suggested that the reforms introduced in 1933 had done little to improve the position of the child witness:

In sections 42 and 43 of the Children and Young Persons Act 1933, an attempt was made to provide informal methods when children gave evidence in the higher courts [...]. But as is usual with official attempts to secure relaxation of hoary legal methods, the attempt completely failed, because of the legal limitations introduced to prevent legal opposition. The law, as so often happens, has provided a quite ineffectual remedy for a glaring evil, thus making matters worse than before, because since 1933 the authorities have

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<sup>59</sup> Mullins, C. (1937) 'Children in the Courts.' *The Law Journal* 23.1.1937, p.56.

<sup>60</sup> Mullins, C. (1943) *Crime and Psychology*. Methuen: London, p. 200.

<sup>61</sup> *Ibid.*, p. 199.

doubtless been convinced that they have legislated the problem out of existence.<sup>62</sup>

Further efforts were made in the 1960's to draw attention to the difficulties experienced by child witnesses. Sir Basil Henriques put a number of proposals to the Magistrates' Association, recommending that children should not be required to give live evidence at committal hearings; that when appearing in jury trials their evidence should be taken in a small room under conditions as close as possible to those of a juvenile court; that the public should not be allowed in court during a child's testimony; that the rule that unsworn evidence could only be corroborated by sworn evidence should be abolished; and that defendants should be required to be legally represented to avoid them cross-examining children in person.<sup>63</sup> The Association rejected his view that the stress of a court appearance might be reduced by changing the layout of the courtroom, arguing that

[T]he disturbing effect of appearing in court is largely due to the whole nature of the process rather than to the furnishing of the courtroom and the wigs and robes of the Bench and Bar.<sup>64</sup>

However, despite its support for Henriques' other proposals, neither these nor the Association's resolutions were taken up. It was not until the mid-1980's that any significant change in the treatment of child witnesses became possible. Then, for reasons which are discussed in the next chapter, the position of the child witness was fundamentally transformed.

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<sup>62</sup> *Ibid.*, p. 196.

<sup>63</sup> Henriques, B. (1961) 'Sexual Assault on Children.' *British Medical Journal* pp. 1629-31.

<sup>64</sup> Magistrates Association (1962) *Memorandum on Criminal Procedure and Child Victims of Sexual Offences*. The recommendations are re-produced in: Gibbens T. C. N., and Prince, J. (1963) *Child Victims of Sex Offences*. Institute for the Study and Treatment of Delinquency: London, pp. 20-21.

## **CHAPTER FIVE**

### **REFORMING THE LAW: THE 1988 AND 1991 CRIMINAL JUSTICE ACTS**

The 1988 and 1991 Criminal Justice Acts progressively reformed the law of evidence relating to child witnesses and introduced new procedures for children testifying in cases involving sexual or violent offences. In this chapter, the processes by which these reforms were achieved are analysed. A chronological account of the passage of the two Acts is given. This is followed by details of the debate on the reforms as this was presented in the news media, and as it was argued by researchers and academics. There then follows an examination of other factors which had a particular influence on the reform process. It is suggested that public anxiety about child sexual abuse, and challenges to the welfare ethos which had informed prosecution policy in this area, created a climate of opinion in which the reforms became possible after fifty years of relative inattention to the needs of child witnesses. Nevertheless these same factors constrained the reforms in particular directions which rendered many child witnesses invisible, and which may be regarded as having served specific political and professional interests as much as those of children.

#### **The progress of the reforms through Parliament**

##### **The Criminal Justice Act 1988**

The government's initial plans for child witness reform did not extend to reform of the law of evidence, focusing instead on the question of court procedure. In the autumn of 1986 the Home Secretary, Douglas Hurd, outlining his plans for a new Criminal Justice Bill, announced that this would introduce live video links to enable children under the age of fourteen to give evidence in child abuse cases without having to see their alleged attacker.<sup>1</sup> As further details of the proposals emerged, it was indicated that the video link provisions would not be limited to children who were the victims of abuse, but would include children who had witnessed sexual or violent offences

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<sup>1</sup> 'Courts may use videos in cases of child abuse.' *The Times* 10.10.86.

against others.<sup>2</sup> Nevertheless, the video link was not envisaged as a facility universally available to child witnesses, and no reference was made to children giving evidence regarding other offences.

The Criminal Justice Bill received its first reading on 13 November 1986. In the debate during the Bill's second reading speakers from both sides of the House welcomed the commitment to reduce the trauma of a court appearance for children involved in abuse prosecutions but questioned whether the government's proposals went far enough. Ivan Lawrence, (now Sir), a Conservative, suggested that the introduction of a video-link system would not be as straightforward as the government believed. Nevertheless, referring to an article by Glanville Williams which had been published the previous day, and which advocated taking the evidence of child witnesses at a pre-trial hearing,<sup>3</sup> he indicated that a more fundamental reform may be 'more acceptable than this simple proposal'.<sup>4</sup> The Opposition MP Llin Golding expressed similar doubts about whether the Government's proposals would prove adequate:

Many people, including the Police Federation, do not think that the proposals in the Bill for a live video link for certain assault and sexual offences do much to help child witnesses. Video recordings may be the answer. They should at least have been given serious consideration before the Bill was drafted.<sup>5</sup>

In the debates which took place over the next year and a half the option referred to by Ivan Lawrence, of removing children's evidence from the conventional trial process and taking it at a separate hearing, received little attention. Instead, the efforts of reformers focused on the proposal, mentioned by Llin Golding, that video recordings of investigative interviews with children should be admitted as evidence in child abuse prosecutions. The opportunity for children to be questioned in court by a specialist child examiner rather than by advocates was also sought.

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<sup>2</sup> 'Live video link for child evidence. Witnesses of violence spared courtroom trauma.' *The Times* 4.11.86.

<sup>3</sup> Williams, G. (1986) 'More humanity, Mr Hurd.' *The Times* 25.11.86. Note: Williams was unhappy with this title which he says was given to the article by sub-editors. Williams, G. (1987) 'Video-taping Children's Evidence.' *New Law Journal* 30.1.87, p. 108.

<sup>4</sup> *Hansard (Commons)* 27 November 1986, column 507.

<sup>5</sup> *Hansard (Commons)* 27 November 1986, column 507.

Amendments proposing that video recordings of interviews with child witnesses should be admitted as evidence, and that the courts should be permitted to allow children giving evidence over a video link to be questioned by a single individual rather than by prosecution and defence counsel, were debated in the Commons in late March. The government rejected the 'fit person' amendment on the grounds that this would interfere with the right of defendants to have the evidence against them tested by counsel of their choice,<sup>6</sup> and, while expressing some interest in the admissibility of video recorded interviews, nevertheless rejected the proposal arguing that as yet there was insufficient evidence that the use of such recordings would assist child witnesses or contribute to the efficient transaction of court business.<sup>7</sup>

A demonstration of the video link was conducted in the Inner Temple but failed to unite opinion on the merits of this scheme.<sup>8</sup> Then, in response to growing pressure for video-recorded interviews with child witnesses to be admitted in evidence the Home Office issued a discussion document on the way in which video technology might be used in child abuse trials.<sup>9</sup> At the same time, acceding to calls to review the law of evidence relating to child witnesses, the government commissioned an evaluation by the Home Office Research and Planning Unit of research on children's reliability.<sup>10</sup> Shortly after this the Criminal Justice Bill fell, having failed to complete its passage through parliament before the general election in June 1987.

The Bill was re-introduced in the autumn, the Conservative government having been re-elected. Douglas Hurd had now received the results of the Home Office evaluation

<sup>6</sup> *Hansard (Commons)* 31 March 1987, column 964.

<sup>7</sup> *Hansard (Commons)* 31 March 1987, column 965.

<sup>8</sup> Gibb, F. (1987) 'Lawyers split over court video links.' *The Times* 6.3.87.

<sup>9</sup> Home Office (1987) *The use of video technology at trials of alleged child abusers*. Consultation paper issued 8 May 1987, Home Office: London. Note: It is apparent from this document that although the government was clear about the objective of a video link (to protect children from the fear and distress associated with giving evidence in the presence of their attacker), no detailed planning had been undertaken at this stage. It was left open, for example, whether the judge, counsel, or jury should remain in the courtroom or accompany the child - see para. 17, pp. 6-7.

<sup>10</sup> Evans, P. (1987) 'Video study to assist children in abuse cases.' *The Times* 9.5.87. The report was published later the same year, see note 11.

which he had commissioned<sup>11</sup> and was prepared to acknowledge the need for partial reform of the rules of evidence. He indicated his intention to modify the requirement for corroboration of children's unsworn evidence, and told members of the Conservative party in Liverpool:

I believe the present rules on corroboration are too rigid and in the interest of justice need to be reformed. Let the jury decide on the basis of all the evidence, rather than constructing an artificial and insurmountable barrier to conviction.<sup>12</sup>

It nevertheless appeared that Hurd's attitude towards procedural reform had now hardened, despite earlier reports of his apparent willingness to be persuaded of the case for the admissibility of video recorded interviews.<sup>13</sup> Efforts to extend the Bill's procedural provisions moved to the House of Lords where a cross-party group of peers, led by Lady Faithfull, tabled amendments similar to those which had been debated in the Commons in the spring.<sup>14</sup> However, on the eve of the debate in the House of Lords it was reported that the government would reject the amendments, John Patten, Minister of State at the Home Office stating: 'I do not see the issue of video recordings as being central'.<sup>15</sup>

In the debate itself Lord Caithness, for the government, rejected a proposal that in cases involving a child witness under the age of fourteen the court should be able to direct that the child should be questioned by a person acceptable to the prosecution and defence, stating:

We all acknowledge that giving evidence at Crown Court [...] can be a distressing experience for a young child. We all wish to minimise this distress as far as possible. [...] But we must ensure that reforms are justified and we must ensure that the right of an accused person to a fair trial is not infringed [...]. This amendment presupposes that there is some way in which a child's evidence can be elicited by sympathetic questioning without upsetting her. The plain fact is that if a man pleads not guilty to a charge of sexually

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<sup>11</sup> Hedderman, C. (1987) *Children's evidence: the need for corroboration*. Research and Planning Unit Paper 41, Home Office: London.

<sup>12</sup> Evans, P. (1987) 'Hurd to lift bar on child evidence.' *The Times* 3.10.87.

<sup>13</sup> Evans, P. (1987) 'Hurd plans wider video use.' *The Times* 11.4.87.

<sup>14</sup> Gunn, S. (1987) 'Peers press for video evidence in child cases.' *The Times* 4.9.87.

<sup>15</sup> 'Doubt over taped evidence.' *The Times* 20.10.87.

molesting a young girl he is, in effect, saying that she is lying. I cannot see how he can hope to be acquitted unless at some stage she is asked on his behalf whether she is lying. [...] I see no way round this dilemma. In these circumstances cross-examination is bound to be upsetting no matter who undertakes it. [...]

On the other hand, interposing a child examiner between the defence and the principal prosecution witness would undoubtedly dilute the interaction between counsel and child which is a key part of protecting the right of the accused person who, we must remember, is innocent until proven guilty. [...] I do not believe that any counsel worth his salt would agree that his client's case should be conducted by, say, a social worker or some other well meaning person. I find it inconceivable that he would permit the crucial witness to be questioned by anyone other than himself.<sup>16</sup>

The amendment was withdrawn and there then followed a closely argued debate on an amendment calling for the admissibility of video recorded evidence. Lord Silkin, putting the amendment, argued that the government's reforms, while welcome, did not go far enough; children would still be required to give evidence months after the offence(s) had occurred when their memory of what had happened was no longer fresh; the link would not remove the formality of the examination process; cross-examination would remain distressing; and many of the legal restrictions on children's evidence would continue to be in place. Admitting a video recording of an early interview with a child witness would assist in ensuring that children would feel able to speak freely and 'without the fears engendered by even the most benign court procedures'.<sup>17</sup> The amendment received considerable support including that from, among others, Lord Denning, who argued:

I support the amendment in the strongest possible terms. [...] In getting at the truth, the statement made by the child immediately afterwards, or as soon afterwards as possible, to a caring person who understands, will carry conviction, if it is true, far more than any statement made in a court of law later.<sup>18</sup>

However, the mood of the House altered when Lord Hailsham intervened, saying:

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<sup>16</sup> *Hansard (Lords)* 22 October 1987, columns 266-267.

<sup>17</sup> *Ibid.*, column 274.

<sup>18</sup> *Ibid.*, column 277.

I make these observations with very great diffidence and even greater reluctance because this amendment has been supported from all quarters [...]. But let us consider quite coldly what it is we are being asked to do with this amendment. [...] It is [...] intrinsically extremely difficult for a victim to relive his or her experience in public and to recall it in words, possibly after a period of months.

The earlier amendments sought to get rid of that problem and I agreed with them. [...] [But] [i]f I have not mistaken it this amendment does something completely different [...], different in kind and different in purpose. [...] It bypasses the necessity for the victim to give evidence at all. [...] It makes it absolutely plain that the child, the victim, may give evidence but does not have to. [...] I must say, even if I stand alone on this matter, that I think this is a revolutionary suggestion put forward with the best motives by a number of well-informed and responsible people but which is nonetheless revolutionary for that. It must undermine the burden and standard of proof required before one has conviction of an absolutely detestable crime.<sup>19</sup>

The sub-section of the amendment to which Lord Hailsham was referring stated:

The fact that a video recorded interview has been tendered in evidence shall not *prevent* the child who has been interviewed from giving evidence in person at the trial and shall not affect the right of any party to cross-examine him *if* he gives evidence in person.<sup>20</sup> [My emphasis]

Whatever the intention of those drafting the amendment,<sup>21</sup> Lord Hailsham's interpretation proved persuasive. Lord Caithness supported his comments, stating that it was unclear how the amendment left the right of defendants to test the evidence against them and indicating that ministers could not agree to a proposal which undermined a fundamental aspect of the criminal justice system.<sup>22</sup> He added that the government had concerns that admitting video recordings would substantially alter the

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<sup>19</sup> *Ibid.*, columns 279-280.

<sup>20</sup> *Ibid.*, column 272.

<sup>21</sup> It was already legally possible for a trial to go ahead in the absence of a child witness. Sections 42 and 43 of the Children and Young Persons Act 1933 (derived from sections 14 and 15 of the Prevention of Cruelty to Children (Amendment) Act 1894) permit a child's evidence to be taken by a magistrate and offered in court in the form of a deposition where it can be established that a court appearance would endanger the child's life or health. Interestingly, the Criminal Justice Act 1988 itself includes a provision permitting a statement made to the police to be admitted as evidence of any fact which would be admissible as oral evidence, where a witness does not appear in person, either through fear of the defendant or because they are kept out of the way. (Section 23) Presumably, however, the point is that these provisions are designed to cover exceptional circumstances.

<sup>22</sup> *Hansard (Lords)* 22 October 1987, column 290.

way in which investigative interviews with child abuse victims were conducted, possibly to the detriment of the child.<sup>23</sup> The House was swayed by the former argument in particular, and the amendment was withdrawn.

A final attempt to secure an amendment permitting video recorded interviews to be admitted as evidence and enabling the court's questions on the interview to be relayed to the child witness by a 'prescribed person', was made in the Commons on 20 June 1988. The debate which ensued was sometimes heated, a number of speakers expressing doubt about the skills of those conducting investigative interviews<sup>24</sup> and others questioning lawyers' ability to communicate with children.<sup>25</sup> Ann Taylor, in one of the last speeches in the debate, indicated that while supporting the desire to lessen the stress on child abuse victims, opposition members nevertheless believed that the case for admitting recordings had sometimes been presented too simplistically and had exaggerated the assistance this might offer abused children. She urged the government not to 'rush into a system of giving evidence that we have not fully examined in this country and that might be fraught with difficulties'.<sup>26</sup> Her intervention was welcomed by John Patten who indicated that the government shared her concerns and for this reason had invited Judge Thomas Pigot to 'inquire into these issues'.<sup>27</sup>

As finally enacted, the Criminal Justice Act 1988 contained four main provisions relating to child witnesses. Section 32 focuses on trial procedure, permitting children under the age of fourteen to give evidence by video link in criminal trials for offences of a sexual or violent nature. Section 34 addresses the rules of evidence. Subsection 1 repeals the proviso to Section 38(1) of the Children and Young Persons Act 1933 whereby an accused person could not be convicted on the unsworn evidence of a child without there being some independent corroboration of the child's evidence. Subsection 2 abolishes the requirement for the jury to be warned of the danger of convicting on the uncorroborated evidence of a child where the only reason for the

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<sup>23</sup> *Ibid.*, column 291.

<sup>24</sup> See, for example, *Hansard (Commons)* 20 June 1988, columns 861-2; and 871.

<sup>25</sup> See, for example, *Hansard (Commons)* 20 June 1988, column 865.

<sup>26</sup> *Hansard (Commons)* 20 June 1988, column 876.

<sup>27</sup> *Ibid.*, column 879.

warning is that the evidence is that of a child. Subsection 3 allows unsworn evidence admitted under section 38 of the 1933 Act to corroborate evidence, whether sworn or unsworn, given by any other person.

The live link became operational on 5 January 1989, with the system installed in fourteen Crown Court Centres.

### **The advisory group on video evidence (The ‘Pigot Committee’)**

The terms of reference of the advisory group established by Douglas Hurd were defined by him as being to examine the ‘growing body of support for a change in the law, so that video recordings of interviews with victims could be readily used as evidence in trials for child abuse.’<sup>28</sup> However, Mr Hurd emphasised that the government could not contemplate the removal of the defendant’s right to cross-examine witnesses, and was concerned that rather than ‘making things easier for the child victim’ as proponents argued, admitting video interviews ‘might make matters worse’.<sup>29</sup>

The committee nevertheless decided to take a wider remit and the report which members produced offers an examination of both the law relating to children’s evidence and the means by which children’s testimony might be placed before the courts. Focusing on the operation of the rules of evidence, the committee concluded that the competency requirement to which potential child witnesses were subject should be dispensed with,<sup>30</sup> all children under fourteen years being regarded as competent witnesses and offering their evidence on an unsworn basis.<sup>31</sup> With regard

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<sup>28</sup> Home Office (1989) *Report of the Advisory Group on Video Evidence*. (Chairman, Judge Thomas Pigot Q. C.) Home Office: London, p. i.

<sup>29</sup> *Ibid.*, p. i. The government had argued in the House of Lords that admitting video recordings as evidence would affect the way investigative interviews were conducted. At the time interviewers could ignore the strict rules of evidence and were free to question children using such facilitative and other techniques as they thought necessary, as their primary concern was the child’s welfare. The government suggested that this important element of flexibility may be lost if interviews were to conform to the rules of evidence, and questioned whether this would benefit the children concerned. The government also expressed concern that the introduction of taped evidence would deprive children of the opportunity to be eased into their testimony by prosecuting counsel, making their first experience of questioning in court the problematic one of cross-examination. *Hansard (Lords)* 22 October 1987, columns 291-292.

<sup>30</sup> *Ibid.*, para. 5.13, p. 50.

<sup>31</sup> *Ibid.*, para. 5.14, p. 50.

to the corroboration rules, (which continued to affect many child witnesses cases through the requirement that in cases involving sexual offences the jury should be warned of the danger of convicting in the absence of corroboration) members suggested that the elaborate technical approach to corroboration which had developed was confusing and counterproductive.<sup>32</sup> They therefore recommended that the corroboration warning given in sexual offence cases should be abolished.<sup>33</sup>

Their report rejected the government's concern that admitting video-recorded evidence would result in cross-examination becoming more stressful for children,<sup>34</sup> reasserting the view that the use of pre-recorded interviews would relieve some of the pressures child witnesses faced.<sup>35</sup> Endorsing the belief that 'a majority of children are adversely affected by giving evidence at trials for serious offences under existing circumstances',<sup>36</sup> the report concluded that 'quite radical changes are now required if the courts are to treat children in a humane and acceptable way.'<sup>37</sup> It recommended that children 'ought never to be required to appear in public as witnesses in the Crown Court, whether in open court or protected by screens or closed circuit television, unless they wish to do so',<sup>38</sup> and proposed that children should 'be examined and cross-examined at an out-of-court hearing which would be itself video-recorded and later shown to the trial jury.'<sup>39</sup> Video recordings of investigative interviews would form a part of the evidence available to the pre-court hearing.<sup>40</sup> The members of the advisory group were unanimous in all their recommendations, save a proposal that it

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<sup>32</sup> *Ibid.*, para. 5.26, p. 55.

<sup>33</sup> *Ibid.*, para.s 5.30-31, p. 57.

<sup>34</sup> *Ibid.*, para. 2.21, p. 19.

<sup>35</sup> *Ibid.*, para. 2.11, p. 15.

<sup>36</sup> *Ibid.*, para. 2.12, p. 15.

<sup>37</sup> *Ibid.*, para. 2.14, p. 17.

<sup>38</sup> *Ibid.* para. 2.26, pp. 21-22.

<sup>39</sup> *Ibid.*, para. 2.25, p. 21.

<sup>40</sup> *Ibid.*, para.s 2.25, p. 21; 2.31, pp. 23-24; 2.35, p. 25. Note: the advisory group proposed a compromise between the use of video-recorded evidence as evidence-in-chief, and the traditional role of prosecuting counsel: 'We envisage that the video recorded interview, or as much of it as is to be admitted, will be shown to the child at the preliminary hearing and that he or she will be asked to confirm the account which it gives and to expand upon any aspects which the prosecution wishes to explore. After this the cross-examination will take place. Where no video recording is put in evidence we assume that evidence-in-chief and cross-examination will take place in the usual sequence.' - para. 2.31, p. 23. By contrast, the Criminal Justice Act 1991 prohibited prosecuting counsel from questioning child witnesses on any matter which, in the opinion of the court, had been dealt with in their recorded evidence: Criminal Justice Act 1988 (as amended by the Criminal Justice Act 1991) Section 32A (5)(b).

should be possible for a young or badly traumatised child to be questioned by a professional with experience of children rather than by an advocate,<sup>41</sup> from which the practising barrister on the group dissented.<sup>42</sup>

### **The Criminal Justice Act 1991**

Following publication of the Pigot committee's report on 19 December 1989, David Waddington, who had become Home Secretary, was reported to be sympathetic to its findings, and anxious to move quickly to implement reform.<sup>43</sup> A short period of consultation was announced. However, it was not until almost a year later that the government introduced its new Criminal Justice Bill, which had its first reading on 8 November 1990. The Bill adopted many of the recommendations which the advisory group had made on the rules of evidence relating to child witnesses, and included measures to abolish the competency test, and to provide for all children under the age of fourteen years to give evidence unsworn. However, the government had rejected the recommendation that children's evidence should be given at a pre-trial hearing, instead permitting video-recorded interviews with child witnesses to be admitted as evidence-in-chief at the trial itself.

The abolishment of the competency test had an uncontroversial passage through parliament. Introducing this reform, David Waddington said:

[T]he present technical rules about the competence of witnesses result in many young children who have been abused, or who have witnessed abuse, simply not being allowed to tell their story to a jury. The Pigot committee's view - and we agree with it - is that the old rules should be swept away and the age and maturity of the child should affect the weight placed upon the evidence, not whether he or she can be heard in the first place.<sup>44</sup>

This proposal was welcomed although doubt was expressed as to whether the wording of the clause would enable it to achieve the government's stated aim.<sup>45</sup>

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<sup>41</sup> Home Office (1989) *Op. cit.*, note 28, para. 2.32, p. 24.

<sup>42</sup> *Ibid.*, para. 2.34, pp. 24-25.

<sup>43</sup> Gibb, F. (1989) 'Video evidence of child sex victims backed in report.' *The Times* 20.12.89.

<sup>44</sup> *Hansard (Commons)* 20 November 1990, col. 148.

<sup>45</sup> *Ibid.*, col. 194. The same point was made by John Spencer, who argued that in stating "the power of the court in any criminal proceedings to determine that a particular person is not competent to give evidence should apply to children of tender years as it applies to other persons" section 52 of the

However, despite the admissibility of video-recorded evidence having previously been sought by reformers, the government was now criticised for their adoption of this strategy in preference to the recommendation of the Pigot committee that children's evidence should be taken in full at a pre-trial hearing.<sup>46</sup>

Attempts were made in the House of Lords on two occasions to secure an amendment introducing pre-trial hearings. In April 1991 Earl Ferrers, for the government, opposed the amendment arguing that it was impractical to expect the defence to be in a position to cross-examine a witness months before the trial itself. Furthermore, he suggested, there would be a risk that pre-trial hearings could result in repeated recalls of the child for further cross-examination, creating additional delay and subjecting the child to a series of mini-trials.<sup>47</sup> When the amendment was proposed a second time, in May 1991, its supporters argued that the pre-trial hearing would be held at a time convenient to all parties, when the defence would be in a position to conduct a thorough cross-examination.<sup>48</sup> Lord Ackner pointed out that the possibility of a recall if fresh issues or evidence arose in the course of the subsequent trial had been dealt with in the advisory committee's report, and this was not regarded as a problem either by the committee, the judiciary or the Criminal Bar.<sup>49</sup> On the other hand, he continued:

What is proposed by the Government is a recipe for disaster. The child's evidence-in-chief is to be carefully recorded. Some months later, when the trial takes place, the child is to be cross-examined. Any adult who has given a statement to a solicitor and is [...] cross-examined eight months later on that statement stands a high probability of becoming confused and unable to do justice to him or herself. How much more so the child?

If justice is to be done, we must follow the clear, concluded view of the committee [...]. If we are to reject that, the timorous souls in this context will

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Criminal Justice Act 1991 was equating children with adults, and so required from them a higher level of understanding than that demanded by section 38 of the Children and Young Persons Act 1933 which it abolished. *Archbold News* 2.7.93. The government subsequently accepted this point, schedule 9 paragraph 33 of the Criminal Justice and Public Order Act 1994 clarifying its intention by making it clear that judges are required to admit the evidence of a child unless the child is 'incapable of giving intelligible testimony.'

<sup>46</sup> *Hansard (Commons)* 20 November 1990, col. 195.

<sup>47</sup> *Hansard (Lords)* 22 April 1991, columns 51-53.

<sup>48</sup> *Hansard (Lords)* 21 May 1991, column 125.

<sup>49</sup> *Ibid.*, column 127.

not be the judges - who are blamed for so much - nor the Bar for being out of date, but will be the civil servants - non-practising lawyers in the Home Office - and the politicians. In my respectful submission, that would be a disaster and wholly unjustified.<sup>50</sup>

The Lord Chancellor argued on this occasion that a pre-trial hearing would introduce delay; it would be preferable for the case to be dealt with at the earliest opportunity and resolved at a single hearing.<sup>51</sup> Lord Mottistone, however, declined to withdraw the amendment, which was put to the House and defeated by only ten votes.<sup>52</sup> An attempt by reformers to secure an amendment permitting very young children or those with communication, emotional or behavioural difficulties to be questioned, by the leave of the court, by an 'appropriate third party'<sup>53</sup> was rejected on the same basis as earlier amendments on this subject, while an amendment requiring the Crown to ascertain, and take into account, the wishes and feelings of the child when considering how his or her evidence should be given, was rejected as not requiring statutory provision.<sup>54</sup>

As finally enacted, the Criminal Justice Act 1991 contains five main provisions for child witnesses. Section 52(1) establishes that the evidence of children under the age of fourteen should be unsworn; section 52(2) abolishes the competency test; section 55(7) bars the defendant from cross-examining the child; and section 53 permits the Director of Public Prosecutions to issue a notice moving certain child witness cases directly to the Crown Court, by-passing committal proceedings. The admissibility of video recordings is dealt with in section 54,<sup>55</sup> section 54(1) permitting such recordings to be admitted as evidence in criminal proceedings where the child was under 17 when the recording was made in the case of sexual offences or under 14 in offences of violence; section 54(3) bars the use of recordings where the child will not be available for cross-examination at the trial; and section 54(5) specifies that the child should not

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<sup>50</sup> *Ibid.*, column 129.

<sup>51</sup> *Ibid.*, columns 138-139.

<sup>52</sup> *Ibid.*, column 141.

<sup>53</sup> *Hansard (Lords)* 22 April 1991, column 59.

<sup>54</sup> *Hansard (Lords)* 21 May 1991, column 144.

<sup>55</sup> This becomes section 32A of the Criminal Justice Act 1988.

be examined-in-chief on any matter which, in the opinion of the court, has been dealt with in the recorded testimony.

### **Issues in relation to the parliamentary debates**

A number of issues emerge from the parliamentary debates.

Firstly, it is noteworthy that although reform of the rules of evidence relating to child witnesses was not initially on the government's agenda, once persuaded there was a case for change, this aspect of the reform process was achieved speedily and with minimal opposition. Within the space of three years, the discriminatory rules which since the eighteenth century had distinguished children's evidence from that of adults, and had given it significantly less status, were initially modified and then abolished.<sup>56</sup> What is particularly striking is the uncontroversial way in which this reform was achieved.

Considerably more controversy attached to the subject of procedural reform. However, what is especially striking is the narrow focus of the debate about the means of accommodating the needs of child witnesses within the trial process. A number of strategies for modifying trial procedures in order to meet the needs of child witnesses had been proposed during the preceding sixty years. As shown in Chapter Four, an inter-departmental committee had considered this question in 1925, and had discussed a range of options including taking children's evidence at a pre-trial deposition hearing, and adopting new procedures for children's in-court testimony.<sup>57</sup> A case for greater informality when examining child witnesses had been made by the Magistrates' Association in 1949, and proposals for sexual offences against children to be heard by a special tribunal, or for a tape-recording of the victim's evidence to be presented at court in the child's absence, had been advocated by Glanville Williams in

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<sup>56</sup> As indicated in note 45, it can be argued that the abolition of the competency test was not finally achieved until 1994. Nevertheless paragraph 33, Schedule 9, of the Criminal Justice and Public Order Act 1994 can also be said to clarify the government's intention in S52(1) of the Criminal Justice Act 1991.

<sup>57</sup> Committee on Sexual Offences against Young Persons (1925) *Report*. (Cmd 2561). *Parliamentary Papers 1924-1925*, vol. 15: London, para.s 58-66, pp. 38-44.

the 1950's.<sup>58</sup> Furthermore, in the 1960's Libai had published a detailed analysis of the differing methods used when hearing children's testimony in Israel, Scandinavia and the United States, and had suggested two strategies for accommodating the needs of child witnesses. The first of these involved the establishment of a 'child courtroom' whereby children's testimony would be taken live in a small informal room by the trial judge, counsel, and a child examiner, observed through a one-way mirror or over closed-circuit television by the defendant(s) and jury; while the second involved a pre-trial hearing, held in the same child courtroom, but at which the child's evidence-in-chief and cross-examination would be video recorded for presentation at the trial itself.<sup>59</sup> Given this history of proposals for circumventing the need for children to give formal evidence at court, it is surprising that in the 1980's the option of a pre-trial hearing received virtually no attention until it was raised by the Pigot committee. Yet once on the agenda, parliamentary champions of reform abandoned their advocacy of video-recorded interviews to support the Pigot proposal. The video-recording of an investigative interview continued to be seen as an important piece of evidence which might be employed within the overall examination of a child witness during a pre-trial hearing, but the recorded interview was no longer itself regarded as the primary focus of reform. A possible explanation for the delay in proposing pre-trial hearings for children's evidence, and for the government's continued emphasis on the use of video-recordings of investigative interviews will be outlined later in this chapter.

The narrowness of the debate on reform in England and Wales becomes evident when the consultation paper issued by the Home Office in 1987 is compared with the equivalent document issued by the Scottish Law Commission in 1988,<sup>60</sup> or a comparison is drawn between the report of the Pigot Committee and the report by the Scottish Law Commission.<sup>61</sup> While the Home Office paper focused solely on the related questions of the practical operation of the live link, and the admissibility of

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<sup>58</sup> Williams, G. (1963) *The Proof of Guilt: A Study of the English Criminal Trial*. Stevens and Sons: London. (3rd edition; first published 1955), pp. 334-338.

<sup>59</sup> Libai, D. (1969) 'The Protection of the Child Victim of a Sexual Offence in the Criminal Justice System.' *Wayne Law Review*; see especially pp. 1012-1032.

<sup>60</sup> Scottish Law Commission (1988) *The Evidence of Children and Other Potentially Vulnerable Witnesses*. Discussion Paper No. 75, Scottish Law Commission: Edinburgh.

<sup>61</sup> Scottish Law Commission (1990) *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses*. HMSO: Edinburgh.

video-recorded evidence,<sup>62</sup> the Scottish Law Commission consultation document offered a wide-ranging review of existing law and practice, evaluating the advantages and disadvantages of a variety of strategies used in other countries for obtaining children's testimony. These included the use of pre-trial recorded depositions; closed circuit television; questioning by a specialist child advocate; and informal methods of taking evidence from children conventionally in court. Overall, it expressed more doubt about the benefits of video technology than did the Home Office, considering that a live-link system would be unlikely to relieve a child's anxiety since the child would be in a separate room where s/he may feel remote and isolated, especially if surrounded by cameras and technical equipment.<sup>63</sup> It was similarly not persuaded that video recordings of investigative interviews should take the place of children's evidence-in-chief, believing this risked creating confusion between the investigation of an offence and securing testimony for use in court.<sup>64</sup> Instead it supported the use of pre-trial deposition hearings<sup>65</sup> and the adoption of a range of practical measures to assist children who continued to testify in open court.<sup>66</sup> In its final report, having had the opportunity to observe the use of the live link system operating in the Central Criminal Court in London, the Scottish Law Commission modified its attitude towards the use of closed-circuit television.<sup>67</sup> Nevertheless, rather than recommending a single strategy as did the Pigot committee, it proposed a flexible approach to allow for individual differences among child witnesses.<sup>68</sup> Thus while supporting the introduction of closed circuit television and evidence on commission (a pre-trial deposition hearing) as a means of bringing an essential measure of responsiveness into the criminal justice system, it nevertheless continued to emphasise the benefits of informal methods of taking children's in-court testimony, believing that with sympathetic pre-trial preparation, and child-centred facilities and questioning, the majority of children would be able to give evidence by conventional means.<sup>69</sup> In this emphasis on flexibility; identification of both advantages and disadvantages in the

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<sup>62</sup> Home Office (1987) *Op. cit.*, note 9, para. 3, p. 1.

<sup>63</sup> Scottish Law Commission (1988) *Op. cit.*, note 60, para. 5.68, p. 108.

<sup>64</sup> *Ibid.*, para. 5.38, p. 89.

<sup>65</sup> *Ibid.*, recommendations 17-22, pp. 136-139.

<sup>66</sup> *Ibid.*, recommendations 1-10, pp. 131-134.

<sup>67</sup> Scottish Law Commission (1990) *Op. cit.*, note 61, para. 4.29, p. 21.

<sup>68</sup> *Ibid.*, para. 4.8, p. 16.

<sup>69</sup> *Ibid.*, para. 1.8, p. 3.

video-link and video-recorded evidence options; and discussion of informal methods for taking children's evidence conventionally, the report by the Scottish Law Commission differs markedly from the report of the Pigot committee. The latter essentially advocates a single solution; identifies no disadvantages in using video-recordings of investigative interviews;<sup>70</sup> and does not address the option of an informal approach to live oral testimony.

The two reports are further differentiated by their discussion of the children to whom procedural reform should apply. While the Pigot report states:

It seems to us that the new procedures should apply at trials on indictment for violent and sexual offences and offences of child cruelty and neglect.<sup>71</sup>

it offers no rationale for this other than that the Criminal Justice Act 1988 provides a precedent in its definition of the cases to which the video link should apply. By contrast, the Scottish Law Commission states:

A further general issue is whether any new rules or procedures should be limited in their availability and use. [...] We for our part can see no justification for imposing such limitations. While it may be the case that children who have, for example, been the victims of sexual abuse will as a rule be particularly damaged and particularly vulnerable if required to give evidence by conventional means, it does not follow, in our opinion, that they will necessarily be the *only* children in that situation; nor indeed does it follow that *all* sexually abused children will need special measures. We consider that any new rules or procedures should be available for all children [...] where stated grounds for using them have been established.<sup>72</sup> [Original emphasis]

The absence of any debate in England and Wales on the restriction of the use of the proposed new procedures to cases involving sexual or violent offences is particularly striking, especially as the reform of the rules of evidence applied to all child witnesses. A possible explanation for the effective invisibility of child witnesses who were not themselves victims of abuse, will be discussed later in this chapter.

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<sup>70</sup> Home Office (1989) *Op. cit.*, note 28, para.s 2.20-24, pp. 19-21.

<sup>71</sup> *Ibid.*, para. 2.37, p. 25.

<sup>72</sup> Scottish Law Commission (1990) *Op. cit.*, note 61, para. 1.7, pp. 2-3.

### **Influences on the reform process**

The influences on the reform process are discussed in the following sections, in order to examine why the debate took the form it did. A number of factors are considered, including the influence of the media; the academic contribution; the input of professional organisations; expressions of public concern about child sexual abuse; and challenges to the welfare ethos which had influenced prosecutorial practice in abuse cases.

### **The case for reform: the media debate**

It is widely asserted that the media has an influential role in the social policy process. Franklin and Parton have argued, for example, that the media make available to the general public aspects of social reality which as individuals they may not experience directly, thereby structuring public perceptions of social and welfare issues (often in a highly emotive way) and creating demands on government to legislate to placate heightened public anxieties.<sup>73</sup> Frequent reference was made to media reports during parliamentary debates on the Criminal Justice Act 1988 in a way which suggests that the government's willingness to introduce child witness reforms was in part attributable to media influence: Llin Golding argued that it was media reporting of a case where:

... a nine-year-old child broke down in the witness box and was unable to give her evidence, resulting in 23 charges against the accused being dropped [that] won the argument that to subject a child to such mental torture makes the law cruel and unjust.<sup>74</sup>

John Patten, Minister of State at the Home Office, likewise acknowledged that a 'number of documented cases [...] written about in the national press and shown on national television' had persuaded Ministers that there was a problem in relation to child witnesses which 'had to be solved'.<sup>75</sup> In order to evaluate the role of the media

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<sup>73</sup> Franklin, B. and Parton, N. (1991) 'Media reporting of social work: a framework for analysis.' In: Franklin, B. and Parton, N. (eds.) *Social Work, the Media and Public Relations*. Routledge: London, pp. 29-30.

<sup>74</sup> *Hansard (Commons)* 18 January 1988, column 728.

<sup>75</sup> *Hansard (Commons)* 28 June 1988, col. 274.

in the reform process, the way in which the issues in the child witness debate were presented in one national newspaper (*The Times*) is outlined below.

*The Times* began to pay increasing attention to child sexual abuse prosecutions during 1986. At this stage reports focused on the way in which the corroboration rules were preventing cases from being brought to court. For example, in March *The Times* reported that the Director of Public Prosecutions had ruled that there was insufficient corroboration to bring a prosecution in a case in which a doctor was alleged to have raped an eight year old girl, leaving her with 'horrific' internal injuries.<sup>76</sup> The report stated that *The Sun* newspaper had offered to pay for a private prosecution to be brought by the child's mother<sup>77</sup> and indicated that the admissibility of children's evidence was to be raised with the Attorney General, Sir Michael Havers. It was unusual for children under the age of fourteen to give sworn evidence in court, the report suggested, and prosecutions were hampered by the requirement for independent corroboration of the child's complaint. The following month *The Times* devoted a short article to a report in *Childright*, the magazine of the Children's Legal Centre, which argued that in classing young children as unreliable witnesses whose evidence could not be accepted unless corroborated, the law was erecting an 'obstacle course' which was preventing child molesters from being brought to justice.<sup>78</sup>

It was not until the government announced its plans for the video link that news reports began to focus on the experiences of children giving evidence in court; an earlier call by Detective Superintendent Peter Gwynn, (who chaired the joint Police/Social Services investigation team in Bexley which piloted the video-recording of investigative interviews; see later) for children's evidence to be video-recorded and for children to be excused from attendance at court, having received only a brief

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<sup>76</sup> Horsnell, M. (1986) 'No action against sex-case doctor.' *The Times* 14 March 1986.

<sup>77</sup> The outcome of the private prosecution was subsequently reported within the context of a wider article on child witnesses. The doctor was acquitted after a trial during which the girl had given evidence for almost two and a half hours. Geoffrey Dickens, who had used his parliamentary privilege to name the doctor concerned, was reported as saying that he 'had to make sure the child was listened to. It was very important that her allegations should be tested in court.' Chittenden, M. and Palmer, R. (1986) 'Picture book plan in child abuse cases.' *The Times* 14.12.86.

<sup>78</sup> Gibb, F. (1986) 'Rules 'bar' in child sex cases.' *The Times* 14.4.86; Children's Legal Centre (1986) 'All snakes and no ladders. Child sexual abuse: corroboration.' *Childright* No. 26 April 1986, pp. 12-13.

mention.<sup>79</sup> However, the video-link took the headlines in reports announcing the Criminal Justice Bill<sup>80</sup> and a feature article was published on the eve of the first debate in the House of Commons, in which Glanville Williams criticised the government's proposals as over-cautious, arguing that children should not appear in court at all but should give their evidence at a pre-trial hearing which would be video-recorded for use at the trial itself.<sup>81</sup>

In the same edition the paper carried a news article outlining the steps taken by Mr Justice McNeill to create a relaxed atmosphere in the courtroom when hearing children's evidence, describing how he would use the smallest available courtroom; sit at a desk (rather than on the bench) with the witness beside him; request that wigs and robes should not be worn; and ensure that children had the opportunity to familiarise themselves with the courtroom before giving their evidence. Referring to the government's proposals, he was reported as saying that other countries were emphasising the use of informality as a means of modifying trial processes in order to accommodate children's needs.<sup>82</sup>

This suggestion received no further attention, however; articles published over the following year focused on pleas for the introduction of pre-recorded evidence, and emphasised the 'harrowing' experiences children faced in court.<sup>83</sup> A case heard at the Old Bailey in September 1987 in which the parents and grandfather of four children were acquitted of the children's sexual abuse when one child became too distressed to complete her evidence, received extensive coverage and prompted an editorial article.<sup>84</sup> This supported the amendment on video-recorded evidence then before the House of Lords, arguing that the outcome of the Old Bailey case was 'unsatisfactory

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<sup>79</sup> Jones, T. (1986) 'Legal plea for abused children.' *The Times* 9.5.86.

<sup>80</sup> 'Courts may use videos in cases of child abuse.' *The Times* 10.10.86; Webster, P. (1986) 'Live video link for child evidence: Witnesses of violence spared courtroom trauma.' *The Times* 4.11.86; Evans, P. (1986) 'The Queen's Speech. Children will give video evidence in trial changes.' *The Times* 13.11.86.

<sup>81</sup> Williams, G. (1986) 'More humanity, Mr Hurd.' *The Times* 25.11.86.

<sup>82</sup> 'Child case judge tries informal approach.' *The Times* 25.11.86.

<sup>83</sup> Chittenden, M. and Palmer, R. (1986) 'Picture book plan in child abuse cases.' *The Times* 14.12.86; Evans, P. (1986) 'Hurd plans wider video use.' *The Times* 11.4.87; Gunn, S. (1987) 'Peers press for video evidence in child cases.' *The Times* 4.9.87; 'Police plea for video option.' *The Times* 24.9.87

<sup>84</sup> 'A child's evidence.' *The Times* 25.9.87.

to the prosecution, the defence and, above all, seriously damaging to the administrative procedures of the law'.<sup>85</sup> An accompanying news article stated that the police officer in charge of the case believed that video recorded evidence offered 'the only way we will get any justice. Children would not then have any of the pressures on them which are there at present'.<sup>86</sup>

This report was shortly followed by another detailing a decision by Judge Pigot to permit the use of screens at the Central Criminal Court in a case involving five 'terrified' children who were to give evidence against four men including the fathers of three of the children.<sup>87</sup> Describing how the first witness, a thirteen year old girl, made legal history by becoming 'the first child in England to give evidence against alleged child molesters without the ordeal of facing the accused in court' a report of the trial recounted how in 'obvious distress, she wrung her hands and rocked gently' but with sensitive management of the case by the judge and counsel, was able to complete her evidence.<sup>88</sup> A diagram beneath the article illustrated how the girl had been shielded from the defendant. The successful outcome of this case was subsequently reported to have prompted an immediate decision by the Home Office to approve the use of screens in child abuse cases.<sup>89</sup>

*The Times* continued to give sympathetic coverage to efforts to extend the child witness reforms during the remainder of the Criminal Justice Bill's passage through parliament, and returned to the issue of the difficulties placed in the way of children's testimony by the rules of evidence.<sup>90</sup> Once the Bill became law it reported efforts to speed up the introduction of the video-link,<sup>91</sup> described the use of screens as an interim measure,<sup>92</sup> and gave detailed coverage to the establishment of the Pigot

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<sup>85</sup> *Ibid.*

<sup>86</sup> 'Police plea for video option.' *The Times* 24.9.87.

<sup>87</sup> 'Screen to protect children's evidence.' *The Times* 10.10.87.

<sup>88</sup> 'Girl gives evidence from behind screen in sex assault case.' *The Times* 21.10.87.

<sup>89</sup> Sapsted, D. (1987) 'Home Office approves screens for witnesses.' *The Times* 4.11.87.

<sup>90</sup> Spencer, J. (1987) 'Child abuse: the first steps to justice.' *The Times* 3.10.87; Sapsted, D. (1988) 'Child sex evidence banned.' *The Times* 2.3.88; McKee, V. (1988) 'What is the age of reason?' *The Times* 4.4.88.

<sup>91</sup> Young, R. (1988) 'Videos allowed in child abuse cases.' *The Times* 4.8.88; Oakley, R. (1988) 'TV evidence speed-up in cases of child abuse.' *The Times* 19.12.88.

<sup>92</sup> Ellis, M. (1988) 'Barrister among six men accused of child sex abuse: Court video screens will shield alleged victims.' *The Times* 12.11.88.

committee.<sup>93</sup> There was a gradual shift in the paper's reporting the following year, however. The introduction of the live link was greeted with interest but quickly judged a failure when there was an acquittal in the first case in which the link was employed, (heard at Chelmsford Crown Court), and the first case at the Old Bailey was discontinued when the thirteen year old witness became too distressed to give evidence despite testifying from a remote witness room.<sup>94</sup> Subsequent articles referred to the link in terms which suggested that it was not a success.<sup>95</sup> A debate on pre-trial hearings for children's evidence by speakers at the Bar conference was warmly reported,<sup>96</sup> as was the sympathetic response of the Home Secretary to the report by the Pigot committee,<sup>97</sup> but a feature article on the Pigot report raised questions about children's reliability, claiming:

... scepticism has grown in the United States, where some states accept video recordings as evidence. Children are no longer as readily believed as they once were, partly as a result of studies which showed that witnesses, particularly younger ones, can be influenced by biased interrogators.<sup>98</sup>

A report of the first reading of the Criminal Justice Bill in November focused on the Bill's provisions on sentencing, and while commenting that its provisions for child witnesses 'failed to prevent the bill's receiving a more hostile reception than ministers had hoped', it nevertheless referred to 'the surprise of lawyers and judges, [that] the bill contains almost all the recommendations of the 1989 Pigot review'.<sup>99</sup>

The attention given to child witness reforms during the passage of the Criminal Justice Act 1988 was not replicated in *The Times*' coverage of the 1991 Act. Efforts to amend the child witness provisions attracted no specific attention in news reports on the progress of the legislation. Shortly after implementation of the Act *The Times*

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<sup>93</sup> 'Inquiry ordered into videos for child sex cases.' *The Times* 20.6.88; Ford, R. and Gibb, F. (1988) 'Inquiry into video tape plan.' *The Times* 20.6.88.

<sup>94</sup> Cross, D. (1989) 'TV link-up fails to calm child witness.' *The Times* 23.2.89.

<sup>95</sup> Sutherland, A. (1990) 'Striving for justice in court.' *The Times* 31.1.90; Clancy, R. (1990) 'Plea for children's evidence on video as case collapses.' *The Times* 22.6.90.

<sup>96</sup> Gibb, F. (1989) 'Changes urged to spare child sex victims.' *The Times* 2.10.89.

<sup>97</sup> Gibb, F. (1989) 'Video evidence of child sex victims backed in report.' *The Times* 20.12.89.

<sup>98</sup> Sutherland, S. (1990) 'Striving for justice in court.' *The Times* 31.1.90.

<sup>99</sup> Cowdray, Q. (1990) 'Bill aims for more consistent and fairer sentences.' *The Times* 10.11.90.

published a feature article questioning the wisdom of replacing evidence-in-chief by a video-recorded interview:

The assumption that a jury can form a complete impression of a child witness who gives live evidence solely under cross-examination is yet to be tested. Questioning by police officers and social workers on the recording is bound to contrast with courtroom cross-examination by a trained advocate. It will require an objective analysis of the child's evidence by the jury if justice is to be done.<sup>100</sup>

A comparison of these news reports and feature articles with parliamentary debates suggests that while media reports of specific trials undoubtedly contributed to the development of a climate of opinion in which reform first became possible, and newspapers provided reformers with a means by which to publicly advocate change, the media's influence on the reform process was by no means deterministic. The government's initial decision to propose the introduction of the video-link does not appear to have been related to any prior demands for this system from the media and from 1990 there was a growing divergence between the focus of news reports and the direction of government policy. As will be discussed later, the media itself was subject to a range of influences, and may be seen as having been responsive both to public events and the promotion by professional groups of their particular interests and concerns.

### **The case for reform: legal and psychological perspectives**

The debate on child witnesses raised many questions; could the existence of exclusionary rules of evidence be justified in the light of research on children's cognitive development? was some modification of trial procedures necessary to enable children to testify effectively? what would be the impact of any new procedures on the rights of defendants? and what should be the balance between the rights of defendants and the welfare of child witnesses? The academic contribution to the examination of these issues included commentary and reports of empirical findings, the former from legal academics and the latter from psychological research.

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<sup>100</sup> Leslie, F. (1991) 'Problems in view for videos.' *The Times* 13.10.91.

Among legal academics the child witness was a minority interest, but Glanville Williams and John Spencer (described by the former as constituting ‘a two-man pressure group’)<sup>101</sup> campaigned tirelessly for reform. Williams had long argued that the corroboration rules presented a formidable obstacle to the prosecution of offences against children,<sup>102</sup> and had advocated that cases involving child victims should be tried by a specialist tribunal, or alternatively, that children’s evidence should be taken at a pre-trial hearing.<sup>103</sup> As interest in the child witness re-emerged in the 1980’s, Williams supported efforts to secure the admissibility of video-recorded evidence,<sup>104</sup> but saw this as the minimum desirable change in the law,<sup>105</sup> pre-trial hearings remaining his preferred solution.<sup>106</sup> As indicated previously, however, this option received little attention until the publication of the Pigot report. John Spencer, by contrast, addressed the case for sparing child witnesses a court appearance altogether,<sup>107</sup> but adopted a gradualist approach and attempted to anticipate the response of politicians and legal professionals to the changes proposed.<sup>108</sup> He advocated the admissibility of video-recordings of investigative interviews, affirming the case for this on child welfare grounds but primarily arguing that the recordings would provide a more detailed and reliable account of what had occurred than evidence given months later in court.<sup>109</sup> His predominant concern was with the effectiveness of the law, and he suggested that in cases involving child victims prosecutions were failing ‘because the rules of evidence in criminal cases prevent

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<sup>101</sup> Williams, G. (1987a) ‘Children’s Evidence by Video.’ *Justice of the Peace* 30.5.87, p. 339.

<sup>102</sup> Williams, G. (1963) *Op. cit.*, note 58, p. 180.

<sup>103</sup> *Ibid.*, p. 337-338.

<sup>104</sup> Williams, G. (1987b) ‘Videotaping Children’s Evidence.’ *New Law Journal* 30.1.87 pp. 108-112.

<sup>105</sup> Williams, G. (1987a) *Op. cit.*, note 101, p. 339

<sup>106</sup> Williams, G. (1986) ‘More humanity, Mr Hurd.’ *The Times* 25.11.86. See also: Scottish Law Commission (1988) *Op. cit.*, note 60, para.s 5.37-5.42 pp. 88-92.

<sup>107</sup> Spencer, J. (1987) ‘Child abuse: the first steps to justice.’ *The Times* 3.10.87; Spencer, J. R. and Tucker, P. G. (1987) ‘The Evidence of Absent Children.’ *New Law Journal* 28.8.87, pp. 816-817.

<sup>108</sup> See in particular: Spencer, J. (1988a) ‘Child Witnesses: A case for legal reform?’ In: Davies, G. and Drinkwater, J. (eds.) *The Child Witness - Do the Courts Abuse Children?* British Psychological Society, Division of Criminological and Legal Psychology: Leicester, pp. 6-20.

<sup>109</sup> ‘.. to make the whole issue of videotapes turn on the protection of the child is surely to miss the point. The courts are not concerned with protecting witnesses, or defendants, or anyone, except as something secondary to their main purpose, which is discovering the truth in order to do justice. The real reason why we need the prosecution to be able to put videotapes of early interviews in evidence is that they are capable of giving the court a fuller and more reliable account of what happened than it is otherwise likely to hear.’ Spencer, J. (1987b) ‘Child Witnesses - A Further Skirmish.’ *New Law Journal* 4.12.87, p. 1128.

intelligent use being made of information which is available in this kind of case'.<sup>110</sup> His concern with this issue led him to press in particular for reform of the competency test and corroboration rules. In relation to the former Spencer argued that while a young child may be unable to understand abstract concepts such as 'truth' or 'duty', she nevertheless may be capable of describing what had happened to her: 'common sense suggests that we should be cautious in accepting what she says. But it does not suggest that we should simply refuse to listen to her'.<sup>111</sup> In a similar vein he suggested that while the idea behind a corroboration rule was a sound one, the requirement for corroboration of unsworn evidence by children was proving a barrier to justice.<sup>112</sup> He therefore responded with dismay to the partial reform by the Criminal Justice Act 1988 of the rules of evidence:

What is really depressing is the inept way we have been tinkering with little bits of the law relating to children's evidence without appreciating that there is a general problem to be considered.

What is the use of making it possible for the courts to convict on the uncorroborated evidence of little children, and giving them the "live-link" to give evidence by, when little children are incompetent to give evidence by whatever means?<sup>113</sup>

Spencer's views had considerable influence on the reform process. John Patten invited him to advise the government on the 1991 Criminal Justice Bill<sup>114</sup> and the Pigot report reiterated a number of his arguments.<sup>115</sup> However, some of the articles which Spencer published in journals addressing the legal profession were written in a polemical style, and in these he at times oversimplified alternative perspectives, or was dismissive of government's reservations. For example, reporting the debate in the

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<sup>110</sup> Spencer, J. (1988a) *Op. cit.*, note 108, p. 6.

<sup>111</sup> Spencer, J. (1988b) 'Reforming the Competency Requirement.' *New Law Journal* 4.3.88, p. 147.

<sup>112</sup> Spencer, J. (1988a) *Op. cit.*, note 108, p. 14.

<sup>113</sup> Spencer, J. (1988c) 'How not to reform the law.' *New Law Journal* 15.7.88, pp. 497-498.

<sup>114</sup> *Hansard (Commons)* 25 February 1991, column 683.

<sup>115</sup> For example, in rebutting the government's concern that admitting video recordings would highlight any discrepancies between a child's early statements and statements in court, and may result in a longer and more detailed cross-examination, the report follows the argument adopted by Spencer - that this situation already existed, as previous inconsistent statements (whether in documentary or video-recorded form) were already admissible: Home Office (1989) *Op. cit.*, note 28, para. 2.21 p. 19; Spencer, J. (1987a) 'Child Witnesses and the Criminal Justice Bill.' *New Law Journal* 6.11.87, p. 1032.

House of Lords on 22 October 1987 (discussed earlier), he referred in the following terms to Lord Hailsham's intervention:

... the proposal is merely to change the rules governing what evidence can be used to prove the defendant's guilt to the jury [...]. So Lord Hailsham's main point [that the amendment had implications for the standard of proof] is misleading and irrelevant.<sup>116</sup>

He omitted to mention that the wording of the amendment may have played some part in its failure and could be read to support Hailsham's concerns. Similarly, responding to government reservations that it may be more stressful for a child to watch a video-recording of an earlier investigative interview and then be cross-examined on this, than to be led sympathetically through their evidence-in-chief by prosecuting counsel before being tested by the defence, Spencer wrote:

... as a guess about what children find distressing - because a guess is all it is - it looks a very uninspired one. The person who conducts a video-interview will have built up a rapport with the witness; but prosecuting counsel will invariably be a total stranger. Everybody knows that it is when prosecuting counsel tries to get the child to talk that many child witnesses go dumb with fright.<sup>117</sup>

In these articles Spencer was primarily concerned with persuasion rather than the careful evaluation of opposing arguments. Nevertheless, the question posed by government ministers regarding the respective merits of pre-recorded evidence and sympathetic questioning by prosecuting counsel, was quite legitimate if concern for children's welfare was a genuine priority. Yet, as Spencer implicitly acknowledged, there was no body of empirical research, conducted from a legal perspective, on which such an evaluation might be based.

Some systematic research on child witnesses was, however available. Psychologists had begun to examine the reliability of children's testimony in the early 1900's, the French psychologist Binet generally being regarded as the first to empirically

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<sup>116</sup> Spencer, J. R. (1987a) *Op. cit.*, note 115, p. 1032.

<sup>117</sup> Spencer, J. (1987b) *Op. cit.*, note 109, p. 1127.

investigate this issue.<sup>118</sup> Binet had published the results of his experiments on children's susceptibility to suggestion in 1900, shortly after which Stern began to conduct similar research in Germany, Pear and Wyatt meanwhile taking up the same subject in England.<sup>119</sup> In these early studies children were asked to give a narrative account of a picture they had been shown or a simulated incident staged by the researchers, before having put to them questions involving various degrees of suggestion. The results appear to have been largely comparable,<sup>120</sup> and showed that while incomplete, children's spontaneous narrative reports were nevertheless highly accurate. However, the information children gave in response to questioning contained more errors, the inaccuracies increasing in line with the degree of suggestion implicit in the question. The practical implications of these findings appear to have been the subject of contention between lawyers and psychologists, and Goodman has reported that as a result many psychologists retreated from the study of testimony after about 1910.<sup>121</sup> It seems, however, that while these studies can be seen as demonstrating that children could be potentially accurate witnesses, recounting events and answering non-leading questions reasonably correctly, what tended to be emphasised at the time was children's susceptibility to suggestion. Accounts are available of cases in which the psychologists Varendonck and Marbe, for example, gave expert testimony discrediting evidence given by young witnesses.<sup>122</sup>

It was not until the 1970's that a significant new body of psychological research began to develop.<sup>123</sup> By this stage more was known about children's cognitive development and psychologists including Goodman in America, and Dent in England, began to

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<sup>118</sup> Goodman, G. S. (1984) 'Children's Testimony in Historical Perspective.' *Journal of Social Issues* 40(2), p. 19.

<sup>119</sup> *Ibid.*, p. 20-21; Davies, G., Flin, R. and Baxter, J. (1986) 'The Child Witness.' *The Howard Journal* 25(2), pp. 85-86.

<sup>120</sup> Reports of many of these experiments have not been translated (Goodman, G. S. (1984) *Op. cit.*, note 118, p. 20) and I am relying here on the accounts given by Goodman, and by Davies et al, referred to above.

<sup>121</sup> Goodman, G. S. (1984) *Op. cit.*, note 118, p.22.

<sup>122</sup> *Ibid.*, p. 20 and pp. 26-31; Davies, G., Flin, R. and Baxter, J. (1986) *Op. cit.*, note 119, p. 86.

<sup>123</sup> It may be relevant that eye-witness identification evidence became a subject of concern at about this time. Following a number of highly publicised cases, including those of George Davis, Patrick Meehan and James Hanratty, the Home Office established a committee in April 1974, chaired by Lord Devlin, to examine evidence of identification. The case of the political activist Peter Hain, prosecuted in 1976 for an attempted bank robbery, is of particular interest, as the Crown's case relied on the evidence of the bank cashier and three boys who had chased the man concerned. Hain, P. (1976) *Mistaken Identity: The Wrong Face of the Law*. Quartet: London, pp. 44-52.

focus on the strengths of children's memory<sup>124</sup> and the influence of different styles of questioning on the accuracy and completeness of their reports.<sup>125</sup> Additionally, research on adults' eye-witness testimony now showed that children were not unique in their susceptibility to suggestion, adults also demonstrating the propensity to be vulnerable to (mis)leading questions about events which they had observed.<sup>126</sup>

In a Home Office review of these more recent studies, Hedderman expressed caution about the extent to which the findings could be extrapolated to children's testimony in court.<sup>127</sup> The majority of the studies continued to rely on experimental tests, employing video-tapes, photographs, or brief incidents staged by the researchers, to test the accuracy of children's recall and their susceptibility to leading questions. Hedderman argued that the unrealistic settings and stimuli involved were too dissimilar from the experiences of abused children to make conclusions about whether, and at what age, children could be regarded as reliable witnesses, anything more than tentative. Nevertheless, she suggested that the overall trend of the studies showed that memory capacity is not a function of age, although the acquisition of skills for operating the memory system did appear to be related to other forms of cognitive maturation, such as the ability to think conceptually.<sup>128</sup> While non-deliberate memory was shown to rely less on the use of sophisticated operational techniques than deliberate memory, and child victims of offences were unlikely (she suggested) to attempt to deliberately memorise details of their experiences, they would, notwithstanding this, be required to exercise deliberate recall and recognition techniques when acting as witnesses in a legal context.<sup>129</sup> She therefore commented:

... whilst children even younger than five may have stored some information about an abusive experience, the question of whether they can be reliable witnesses depends on whether their memories are robust and whether it is

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<sup>124</sup> Goodman, G. (1984) *Op. cit.*, note 118, p. 18.

<sup>125</sup> Dent, H. R. and Stephenson, G. M. (1979) 'An experimental study of the effectiveness of different techniques of questioning child witnesses.' *British Journal of Social and Clinical Psychology*, vol. 18, pp. 41-51.

<sup>126</sup> Davies, G., Flin, R. and Baxter, J. ((1986) *Op. cit.*, note 119, p. 88.

<sup>127</sup> Hedderman, C. (1987) *Op. cit.*, note 11, p. 34.

<sup>128</sup> *Ibid.*, p. 27.

<sup>129</sup> *Ibid.*, p. 28.

possible to compensate for their lack of deliberate recall skills by external cues.<sup>130</sup>

In relation to suggestibility, she accepted that people of all ages are susceptible to suggestion, although there was general (if not complete) agreement among the studies reviewed that children under five years are particularly vulnerable to suggestive questioning.<sup>131</sup> She therefore found some support in these studies for the reluctance of the courts to call children under five years as witnesses,<sup>132</sup> but nevertheless recommended:

... children need not be debarred from giving evidence simply on the basis of age. Their individual abilities and circumstances should be considered in deciding whether they would make competent and credible courtroom witnesses and whether they would sustain any psychological damage by so doing.<sup>133</sup>

She further concluded, on the basis of experimental studies of mock jurors' responses to the evidence of both children and adults, that 'admonishing jurors to view children's evidence sceptically seems a somewhat dubious exercise'<sup>134</sup> and that a general legal requirement for corroboration of children's testimony would seem unnecessary.<sup>135</sup>

Hedderman's report, and the research on which it was based, would appear to have made a significant contribution to the reform of the rules of evidence relating to children's testimony, and the non-contentious manner in which this was achieved. It is noteworthy, however, that while the psychological research which she reviewed focused on children's reliability irrespective of their witness status or the type of case involved, Hedderman's report referred specifically to the testimony of child victims of sexual abuse. Nevertheless, when the rules of evidence were reformed, the changes had universal application, covering all child witnesses.

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<sup>130</sup> *Ibid.*, p. 28.

<sup>131</sup> *Ibid.*, p. 28.

<sup>132</sup> *Ibid.*, p. 31.

<sup>133</sup> *Ibid.*, p. 34.

<sup>134</sup> *Ibid.*, p. 32.

<sup>135</sup> *Ibid.*, p. 34.

If the reform of the rules of evidence was assisted by the existence of a well-established body of research, the position was less propitious when it came to procedural reform. No empirical evidence was available at this time by which to evaluate video-link and video-evidence provisions introduced in other countries.<sup>136</sup> Moreover, little evidence was available on the impact on children of giving evidence in court. A study had been conducted on this issue in the United Kingdom in the early 1960's by Gibbens and Prince,<sup>137</sup> and work had begun in Scotland on the sources of stress experienced by child witnesses.<sup>138</sup> However, such scientific evidence as there was, while confirming that many children found a court appearance stressful,<sup>139</sup> did not in itself lend direct support to the government's preferred means of procedural reform. Rather, it tended to reinforce the view of the Scottish Law Commission that with sympathetic pre-trial preparation and the adoption of informal procedures at court, many children would be able to testify effectively in the conventional manner. This research is discussed in more detail in Chapter Eight, but what should be noted here is that while the study by Gibbens and Prince suggested that the potential harm in a court appearance lay in the situation this could create, particularly in terms of its impact on the family and wider social relationships of the child witness involved,<sup>140</sup> this issue was largely absent from the later studies where the emphasis was on forms of stress which can be altered or controlled, such as pre-trial delay, the re-scheduling of cases, and direct confrontation with the accused.<sup>141</sup>

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<sup>136</sup> Murray, K. (1988) *Alternatives to In-court Testimony in Criminal Proceedings in the United States of America*. Research Paper on Evidence from Children, Scottish Law Commission: Edinburgh, p. 33.

<sup>137</sup> Gibbens, T. C. N., and Prince, J. (1963) *Child Victims of Sex Offences*. Institute for the Study and Treatment of Delinquency: London.

<sup>138</sup> Flin, R. and Bull, R. (1990) 'Child Witnesses in Scottish Criminal Proceedings.' In: Spencer, J. R., Nicholson, G., Flin, R. and Bull, R. (eds.) *Children's Evidence in Legal Proceedings: An International Perspective*. J. R. Spencer: Cambridge, pp. 193-200.

<sup>139</sup> Flin, R. (1988) 'Child Witnesses: The Psychological Evidence.' *New Law Journal* p. 610

<sup>140</sup> Gibbens, T. C. N., and Prince, J. (1963) *Op. cit.*, note 137, p. 5.

<sup>141</sup> See Spencer, J. R. and Flin, R. (1990) *The Evidence of Children: the Law and the Psychology*. Blackstone: London, pp. 287-298. Here Flin distinguishes between 'system variables' (procedures which can be improved to ensure that child witnesses are exposed to a minimum of stress), and 'mediating variables' such as the child's relationship to the defendant, or the degree of support received by the child, which are less amenable to intervention. She therefore focuses her discussion of stress on the former. The distinction is an important and valid one, particularly when considering what practical measures can be introduced to ameliorate children's experience of the criminal justice system. What I wish to highlight, however, is that in focusing the discussion of stress in this way, the issues referred to by Gibbens and Prince largely disappeared from discussion.

### **Concern about child sexual abuse**

Deviancy theorists, notably Cohen, have drawn attention to the way in which social policy is at times subjected to the influence of 'moral panic', whereby a phenomenon or group of persons become identified as a threat to social values and interests, arousing intense public anxiety. Such episodes tend to be ephemeral, but while relatively short-lived, can generate demands for changes in the law or social policy which have important and long-term repercussions.<sup>142</sup> The concept is of particular value in the present case, there being considerable evidence that the child witness reforms introduced in 1988 and 1991 were an outcome of the atmosphere of moral panic which surrounded the subject of child sexual abuse during the mid-1980's, putting the government under pressure to demonstrate a commitment to respond. The relationship between anxiety about child sexual abuse and demands for child witness reform is outlined below. However, as the following section will then demonstrate, it was not this anxiety alone which generated the conditions which brought about the reforms, but more specifically, the re-definition of child sexual abuse as a problem requiring a criminal justice, rather than a welfare, response.

Earlier sections of this chapter have shown that the procedural reforms introduced by the 1988 and 1991 Criminal Justice Acts were restricted to children testifying in cases involving sexual or violent offences, and that the rationale for not extending these provisions to other potential child witnesses was not addressed. Reports of parliamentary debates are in fact striking for the way in which their use of the term child witness is synonymous with that of child victim of sexual abuse. As the two preceding chapters have shown, discussion of the child witness has most frequently been conducted within the context of sexual offending against children. However, while the majority of child witnesses would seem to testify in abuse cases, this does not mean their evidence is restricted to this category of offences. It is not possible to determine with what frequency children testify in cases other than those concerned with abuse, as no statistics are collected on this. Davies, Flin and Baxter have noted, however, that children are the most frequent victims of road accidents and as such are

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<sup>142</sup> Cohen, S. (1973) *Folk Devils and Moral Panics*. Paladin: St. Albans, p. 9.

sometimes the only witness other than the motorist concerned,<sup>143</sup> and in America clinicians have described work undertaken with children giving evidence in cases of homicide.<sup>144</sup> In the United Kingdom, Morgan and Zedner, in a study of the impact of a wide range of crimes on children, found that only a minority of children in their research sample were eventually required to give evidence in a criminal prosecution, but interestingly, these all involved cases of physical assault.<sup>145</sup> This latter study was not published until 1992, but the Peter Hain case in 1976 provides one well-known example of a non-abuse case which was highly dependent on children's evidence.<sup>146</sup> It is therefore valid to ask why the debate on the child witness was so exclusively concerned during the 1980's with children who were sexually abused. The obvious answer would seem to be the extreme public anxiety which this issue aroused at the time.

During the 1980's there was a rapid increase in the number of cases of child sexual abuse being identified. In March 1986 the NSPCC published the results of a survey showing that known cases of sexual abuse had doubled in 1985,<sup>147</sup> and in December of the same year announced that the number of children reported to have been abused had increased by more than 125 per cent in the previous twelve months.<sup>148</sup> Six months later the Society reported a further rise of 137 per cent in the cases recorded.<sup>149</sup>

It was not a new problem. Chapter Four has shown how child sexual abuse was the subject of feminist campaigning in the late nineteenth and early twentieth centuries, and has described the way in which concern about this form of abuse was interwoven with attempts to introduce child witness reforms in the 1920's. Cases involving

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<sup>143</sup> Davies, G., Flin, R. and Baxter J. (1986) *Op. cit.*, note 126, p. 82.

<sup>144</sup> See, for example, Pynoos, R. S. and Eth, S. (1984) 'The Child as Witness to Homicide.' *Journal of Social Issues*, 40(3).

<sup>145</sup> Morgan, J. and Zedner, L. (1992) *Child Victims: Crime, Impact and Criminal Justice*. Clarendon: Oxford, p. 141.

<sup>146</sup> This was a case of robbery. See, Hain, P. (1976) *Op. cit.*, note 123.

<sup>147</sup> Bell, G. (1986) 'Child sexual abuse cases doubled last year, NSPCC survey shows.' *The Times* 22.3.86.

<sup>148</sup> 'Child sex abuse cases more than doubled.' *The Times* 10.12.86.

<sup>149</sup> Ellis, M. (1987) 'NSPCC records 137% increase.' *The Times* 30.6.87.

sexual offences against children were dealt with in the criminal courts throughout the century and Lady Justice Butler-Sloss has noted:

... in the last hundred years or more, there have been in the criminal courts many cases of children who have been raped, children who are victims of incest, children who are victims of anal abuse, children who are assaulted.<sup>150</sup>

However, despite a relatively consistent number of cases coming to official attention up to the 1980's,<sup>151</sup> sexual abuse effectively disappeared as a subject of public concern after about 1925 and its re-emergence some sixty years later was regarded by many professionals and members of the public as evidence of a new, and disturbing, social problem. The child psychiatrist, Eileen Vizard, and the senior civil servant responsible for child care policy at the Department of Health, Rupert Hughes, have described the response of professionals in the following terms:

... even the most sophisticated practitioners were taken by surprise with the emergence of an apparently new phenomenon in the early 1980's - child sexual abuse. Most shocking of all was the fact that this was yet another sort of secret abuse inflicted upon children within their own families. As the 1980's progressed, child sexual abuse victims of ever younger ages and of both sexes started to come forward with ever more complex stories of mostly, intrafamilial abuse.<sup>152</sup>

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<sup>150</sup> Butler-Sloss, Rt. Hon. Lord Justice (1993) 'From Cleveland to Orkney.' In: Asquith, S. (ed.) *Protecting Children Cleveland to Orkney: More Lessons to Learn?* HMSO: Edinburgh, p. 54.

<sup>151</sup> Despite a recommendation by the 1925 Committee on Sexual Offences against Young People that separate statistics should be kept on sexual offences against children and against adults, this has never been done. It is therefore difficult to obtain reliable figures on the number of cases dealt with annually. However, data obtained for the 1925 report shows that cases of indecent assault against young people under 16 tried by consent, and defilement of young girls under 13 and under 16 rose from 884 cases for the years 1909-1913 to 1,058 cases in 1920-24. Committee on Sexual Offences against Young People (1925) *Op. cit.*, note 57, para. 7, p. 7. Research reports published in the intervening years provide limited data on the subject, but offer some support for Lady Justice Butler-Sloss' claim. For example, in 1951 there were 209 cases of incest 'known to the police' and in 1961 335 cases: Gibbens, T. C. N., Soothill, K. L. and Way, C. K. (1978) 'Sibling and Parent-Child Incest Offenders.' *British Journal of Criminology* 18(1) p. 43; likewise, approximately 300 incest cases a year were recorded in England and Wales between 1970 and 1980: Mitra, C. L. (1987) 'Judicial Discourse in Father-Daughter Incest Appeal Cases.' *International Journal of the Sociology of Law* Vol. 15, p. 125; Criminal Law Revision Committee (1984) *Fifteenth Report: Sexual Offences* (Cmnd 9213). HMSO: London, para. 8.6, p. 64.

<sup>152</sup> Vizard, E. and Hughes, R. (1995) 'Introductory comments for Children in the Crossfire Conference, 4th and 5th April 1995.' In: The Michael Sieff Foundation *Children in the Crossfire: Conference Handbook*. The Michael Sieff Foundation: Surbiton, Surrey. (pages not numbered).

The growth in the recognition and reporting of sexual abuse was perhaps in part attributable to changes in child welfare practice (child care professionals having become increasingly preoccupied with child abuse since Henry Kempe had brought the battered child syndrome to the attention of the medical profession in 1962, and especially so since the death in 1973 of Maria Colwell which attracted widespread public attention), and to feminist campaigns around sexual and domestic violence, which had empowered women, and later children, to speak about their experiences. But whatever the reasons for its re-emergence, its impact on the public was profound. In March 1986 Esther Rantzen invited viewers of the television programme *That's Life* to send her details of their personal experiences of abuse, and over 3,000 responded.<sup>153</sup> When she then established the telephone helpline *Childline* in October 1986, accompanied by the programme *Childwatch*, 50,000 calls were received within the first twenty-four hours of the helpline opening.<sup>154</sup>

The following year public concern reached even higher levels when, on June 23, with the headline 'Hand Over Your Children; Council Orders Parents of 200 Youngsters' *The Daily Mail* reported a crisis over child sexual abuse in Cleveland. Between January 1 and July 31 1987, 276 applications for Place of Safety Orders had been made by Cleveland social workers compared with a total of 76 orders in 1986;<sup>155</sup> and during May and June 197 cases of sexual abuse were reported there in contrast to 40 diagnosed cases the previous year.<sup>156</sup> Reporting of events in Cleveland became a 'media phenomenon without precedent',<sup>157</sup> generating 9,000 press cuttings during the first five weeks of the affair,<sup>158</sup> and continuing for over a year, throughout the public inquiry which began in September chaired by (the then) Mrs. Justice Butler-Sloss, and the publication of her subsequent report.<sup>159</sup>

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<sup>153</sup> 'Support at the end of the line.' *The Times* 30.10.86. Note: The programme, advocated the introduction of the video-link, which was demonstrated to the government's interviewee, David Mellor.

<sup>154</sup> '50,000 calls to child abuse help-line in first 24 hours.' *The Times*, 1.11.86.

<sup>155</sup> Blom-Cooper, L. (1988) 'Legal Lessons from Cleveland.' *New Law Journal* 15.7.88, p. 492; *The Observer* 25.6.87.

<sup>156</sup> Eaton, L. (1987) 'Child Sexual Abuse Cases a Worry.' *Social Work Today* 29.6.87, p. 3.

<sup>157</sup> Franklin, B. and Parton, N. (1991) *Op. cit.*, note 73, p. 7.

<sup>158</sup> *Ibid.*, p. 7.

<sup>159</sup> Department of Health and Social Security (1988) *Report of the Inquiry into Child Abuse in Cleveland 1987*. (Cm 412). HMSO: London.

The extent to which the introduction of child witness reform was linked to the perceived epidemic proportions of child sexual abuse is apparent from parliamentary debates. During the first debate on amendments to the child witness provisions of the Criminal Justice Act 1988 speakers repeatedly emphasised the need for urgent action given the scale of this problem. Clare Short spoke in the following terms:

The evidence of the scale of [sexual abuse] in this country is quite horrifying and terrifying. The research evidence is that at least 10 percent of all children are sexually abused, half of them under the age of 10 years. [...] [I]t is a male problem; it is men that do it to children. This is part of our sexual culture [...]; [it] is shocking and horrifying.<sup>160</sup>

In response, David Mellor insisted that the government was determined to 'root out' child abuse.<sup>161</sup> Referring to the government's recognition of the vulnerability of children and the need to ensure their protection,<sup>162</sup> he described a series of practical measures which were being taken. These focused on efforts to encourage children to report abuse, and included a campaign to increase the awareness of children, parents and teachers of the problems of child molestation.<sup>163</sup> The centrepiece of the government's strategy, however, was the development of new investigative procedures. A pilot project had been established in Bexley in which abuse was jointly investigated by the Police and Social Services, who video-recorded their interviews with child victims.<sup>164</sup> Joint investigation was a new feature<sup>165</sup> and the Bexley project was held to have many advantages over existing practice. The introduction of video recording was seen as a particular strength of the project, and was viewed as a means both of reducing the number of times children were obliged to provide details of their

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<sup>160</sup> *Hansard* 31 March 1987, column 971.

<sup>161</sup> *Ibid.*, column 960.

<sup>162</sup> *Ibid.*, column 963.

<sup>163</sup> *Ibid.*, column 962.

<sup>164</sup> *Ibid.*, column 961.

<sup>165</sup> Contrast early child protection procedures in which the police had a peripheral role (see Department of Health and Social Security (1976) *Non-Accidental Injury To Children: Area Review Committees*. LASSL(76)2/CMO(76)2, February 1976. DHSS: London, para. 31, p. (v)), to the central role attributed to them in the 1980's - Department of Health and Social Security and the Welsh Office (1988) *Working Together: A guide to arrangements for inter-agency co-operation for the protection of children from abuse*. HMSO: London, para.s 4.5-4.7, pp. 15-16 and 5.11, p. 21.

allegations to the different people requiring to know of them,<sup>166</sup> and of increasing the likelihood of perpetrators admitting what they had done.<sup>167</sup> Mellor made it clear it the government intended to recommend that these procedures were adopted nationally.<sup>168</sup>

Subsequent debates on child witness reform were similarly dominated by the subject of abuse. In the debate held on 20 June 1988, for example, Sir Eldon Griffith proposed an amendment on video recorded evidence, supporting this with detailed case histories of sexually abused children,<sup>169</sup> while other speakers responded with case examples from their own constituencies.<sup>170</sup> The government, likewise continued to describe its proposed child witness reforms within the overall context of its strategy for dealing with sexual abuse.<sup>171</sup>

In the media, reports of efforts to secure child witness reform were frequently published in the context of accounts of sexual abuse prosecutions or the progress of the Cleveland inquiry. This was particularly so during 1987 when concern about sexual abuse was perhaps at its height. In September 1987 the collapse of a sexual abuse prosecution at the Old Bailey, described earlier, was accompanied with details of a case in which ‘a boy of nine had to be forcibly held down for an hour by psychiatrists after he revealed “horrible details” of sexual abuse by his stepfather’,<sup>172</sup> the same month *The Guardian* reported plans by Lady Faithfull to table an amendment on children’s testimony alongside an account of advice to parents from the NSPCC that they should not allow anxiety about sexual abuse to dissuade them from cuddling their children, and details of the prosecution of a mother for the sexual abuse of her three sons;<sup>173</sup> while a report of the decision by the Home Office to allow the use of screens to shield child witnesses pending the introduction of the video link,

<sup>166</sup> *Hansard* 31 March 1987, column 961.

<sup>167</sup> *Ibid.*, column 961.

<sup>168</sup> *Ibid.*, column 961. This in fact happened: See Home Office (1988a) *Home Office Circular 52/1988: The Investigation of Child Sexual Abuse*. Issued 6 July 1988, Home Office: London.

<sup>169</sup> *Hansard* 20 June 1988, columns 846-850.

<sup>170</sup> See for example, *Hansard* 20 June 1988, columns 861-862.

<sup>171</sup> See for example, *Hansard (Lords)* 22.10.87, columns 288-290.

<sup>172</sup> Morgan, A. (1987) ‘New concern over child sex evidence.’ *The Times* 25.9.87.

<sup>173</sup> ‘A louder voice for the child in abuse cases.’; ‘Keep on cuddling, parents advised.’; ‘Mother had sex with her three sons.’ *The Guardian* 29.9.87.

was printed below an account of a psychologist breaking down in tears when describing to the Cleveland inquiry her response to a colleague who was dismissive of the damaging effects of sexual abuse.<sup>174</sup>

However, there was a marked change in public attitudes following publication of the Cleveland report in July 1988. The report noted the significant role played in Cleveland by the medical diagnosis of sexual abuse and recommended that physical signs alone should not be regarded as diagnostic of abuse.<sup>175</sup> It further sounded a note of caution about the then practice of conducting 'disclosure' interviews with children suspected of having been abused, concluding that such interviews were predicated on the assumption that abuse had occurred, and while of some possible therapeutic benefit, were not appropriate in an investigative context where an open-minded approach was needed.<sup>176</sup> Public opinion now became divided on whether events in Cleveland were an indicator of the real extent of child sexual abuse, or whether, as some who gave evidence to the inquiry alleged, the identification of sexual abuse had taken on 'almost the character of a crusade'.<sup>177</sup> It was in the aftermath of the Cleveland report that the changed emphasis of media reporting of child witness reform referred to earlier, became evident. Sexual abuse continued to be a subject which commanded wide attention (as shown in the later inquiries in Rochdale and the Orkneys) but the media nevertheless became less pre-occupied with the subject and there was frequently a more sceptical tone to reports. The degree of public anxiety expressed in the preceding two and a half years was, however, a significant factor in generating demands for child witness reform. In particular, pressure on the government to reduce the incidence of abuse, and to ensure that children were effectively protected, led to calls for an increase in the number and effectiveness of prosecutions of abusers. Improvements in the position of child witnesses was seen as an essential part of this strategy.

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<sup>174</sup> 'Abuse 'enriches child's life'.<sup>174</sup> *The Times* 4.11.1987; Sapsted, D. (1987) 'Home Office approves screens for witnesses.' *The Times* 4.11.1987.

<sup>175</sup> Department of Health and Social Security (1988) *Op. cit.*, note 159, para. 11.30, p. 193.

<sup>176</sup> *Ibid.*, para.s 12.18-12.19, p. 206, and para. 12.34 pp. 207-208.

<sup>177</sup> *Ibid.*, para.s 12.31-12.32, p. 207.

### **Prosecution or diversion?**

As earlier sections have shown, strong arguments could be made for child witness reform on its own merits. Psychological research suggested that the discriminatory rules relating to children's evidence could no longer be justified in the light of current knowledge of child development, while logic suggested that court procedures designed for adults would need some modification if young children were to testify in an optimum manner. However, the reforms were primarily urged not on this basis, but on the grounds that the prevailing arrangements were hampering the prosecution of child abusers. Firstly, prosecutions were believed to be failing because children found the process of giving evidence too much of an ordeal. Secondly, the rules of evidence were thought to be impeding prosecution both because the competency test effectively barred younger victims of abuse from testifying, and because the corroboration rules, in requiring evidence which would provide independent support for the child's allegation, militated against many cases reaching court. It was argued that independent eye-witness evidence could not be anticipated with any degree of frequency as sexual abuse is an offence associated with a high degree of secrecy; furthermore, many offences (gross indecency or indecent assault, for example) would be unlikely to leave forensic or medical evidence. Given these problems, John Spencer, writing in *The Times*, described the rules of evidence as reading like 'a child molester's charter',<sup>178</sup> and Jennifer Temkin, a member of the Pigot committee, was reported as saying the law was allowing perpetrators of offences against young children to go unpunished.<sup>179</sup>

The identification of barriers to the prosecution of perpetrators of child sexual abuse, is not in itself an argument for increasing the rate of prosecutions *per se*, but the two issues became closely intertwined, and calls for a change in prosecution policy were made from an early stage during debates on child witness reform. Speaking in the House of Commons in March 1987, Clare Short, for example, concluded her speech in support of wider reform by saying:

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<sup>178</sup> Spencer, J. (1987) 'Child abuse: the first steps to justice.' *The Times* 3 October 1987.

<sup>179</sup> Gibb, F. (1990) 'Loopholes 'allow abusers to go free'.' *The Times* 2.2.1990. (This is a report of a Mansfield Law Club lecture given by Temkin.)

When one considers the damage that the experience of the [criminal investigation] does to children, one is tempted to conclude that in some cases it is better not to prosecute. I am told by those advising me that that is absolutely wrong. [...] The experts say that prosecution is very important to the child, so that it may have a sense that society is on its side, and very important to the perpetrator so that he may have a sense that this sort of thing is going to be stopped. [...] We need more prosecutions ...<sup>180</sup>

At this time, prosecution policy was characterised by diversion. As was noted in the previous chapter, despite the efforts of purity campaigners at the end of the nineteenth century to promote the role of the criminal justice system in establishing and maintaining desired standards of sexual conduct, even some of the campaign's supporters eventually became doubtful about the effectiveness of deterrence as a means of altering sexual behaviour. In relation to incest, there was in practice a long-standing concern to ensure that the merits of prosecution were carefully assessed, and the proviso that the consent of the Director of Public Prosecutions should be obtained before a prosecution was instituted, (introduced by the Prohibition of Incest Act 1908), has always remained in force. During the early twentieth century there was disquiet about the effects of prosecution on reporting levels, and also about the economic consequences of an incest prosecution for family members.<sup>181</sup> Reservations about the negative effects on children of involvement in a prosecution, and the belief that many offenders were socially inadequate rather than dangerous,<sup>182</sup> were, however, also factors.

Reviewing prosecution practice in 1984, the Criminal Law Revision Committee acknowledged that there was a role for the criminal law in cases of incest, but observed that there was a general consensus of opinion that prosecution was in many cases not an appropriate or helpful means of dealing with the psychological and social problems involved,<sup>183</sup> and that it may cause added distress, and even harm, to the child(ren) concerned.<sup>184</sup> It therefore recommended that :

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<sup>180</sup> *Hansard* 31 March 1987, column 973.

<sup>181</sup> Committee on Sexual Offences against Young Persons (1925) *Op. cit.*, note 57, para. 16, p. 13.

<sup>182</sup> *Ibid.*, para.s 80-84, pp. 58-62.

<sup>183</sup> Criminal Law Revision Committee (1984) *Op. cit.*, note 151, para. 8.8, p. 64.

<sup>184</sup> *Ibid.*, para. 8.43, p. 72.

... the intervention of the criminal law should be as limited as possible in practice [in cases of intra-familial sexual abuse] and principally directed to ending the relationship and protecting any younger children in the family.<sup>185</sup>

This view was reflected in government advice to investigating agencies. The Home Office recommended:

When a case of child sexual abuse has been investigated and it is established there is sufficient evidence to justify prosecution, the police should consider whether there is an acceptable alternative to the prosecution in the interests of the child and the family, such as a caution.<sup>186</sup>

Similarly, the Department of Health stated:

It may be that a treatment and management plan for a known abuser and his family can be achieved by co-operation [...]. There are competing public interests in the handling of criminal offences and child protection. It may be possible for a case to be handled so that the interests of the child prevail over the public interest in dealing with an abuser and the prosecution not proceeded with [...].<sup>187</sup>

As these quotations indicate, the policy of diversion was at this time underpinned by the beliefs that a therapeutic approach would be more effective in cases of child sexual abuse than a deterrent one, and that the victims' interests would be best served by keeping them out of the criminal justice system. However, these beliefs were subjected to increasing challenge as the decade progressed.

As in the late nineteenth century, feminists were among those who advocated increased use of the criminal law. In general terms, Edwards, for example, argued that the selective enforcement of the law in cases of domestic violence or sexual abuse contributed to a cultural climate in which violence against women and children was condoned.<sup>188</sup> Reliance on civil remedies (as in the use of Care or Supervision Orders

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<sup>185</sup> *Ibid.*, para. 8.43, p. 72.

<sup>186</sup> Home Office (1988a) *Op. cit.*, note 168, para. 25, p. 8.

<sup>187</sup> Department of Health and Social Security and the Welsh Office (1988) *Op. cit.*, note 165, para. 6.8, p. 35.

<sup>188</sup> Edwards, S. (1990) 'Violence against women: feminism and the law.' In: Gelsthorpe, L. and Morris, A. (eds.) *Feminist Perspectives in Criminology*. Open University Press: Milton Keynes, p. 149.

as a means of child protection) was said to similarly obstruct the recognition of familial violence as a criminal offence.<sup>189</sup> Feminists primarily addressed violence against women, but in relation specifically to child sexual abuse Adler suggested that prosecution had at least three potential benefits; it would validate children's experiences by making clear the unacceptability of the perpetrator's behaviour; it would demonstrate clearly where responsibility for the abuse lay thus relieving the feelings of guilt felt by many victims; and it would help to reduce the risk of victims themselves subsequently becoming perpetrators. She further argued that:

It is not implausible [...] that the traumatic experience of children in court is in large measure an artefact of the adversarial system, of inadequate and insensitive procedures, and of the appallingly low level of understanding of children and sexual abuse that prevails among judges and lawyers.<sup>190</sup>

Temkin similarly suggested that 'the criminal justice system cannot stop at the portals of the family home';<sup>191</sup> and that reluctance to institute proceedings on the grounds that children may have feelings of guilt or responsibility for the abuse failed to recognise that this problem existed irrespective of there being a prosecution.

Others, however, had reservations. The feminist barristers Elizabeth Woodcraft and Helena Kennedy expressed concern that without a change in sentencing policy, whereby the existing emphasis on custodial punishment would be replaced by therapeutic disposals, a policy of criminalisation risked offenders completing their sentence with their behaviour unchanged,<sup>192</sup> or would reinforce the likelihood of them denying their offence.<sup>193</sup> Edwards cautioned more generally that it was not axiomatic that more laws or more intensive policing would result in predictable, consistent, or

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<sup>189</sup> *Ibid.*, p. 155.

<sup>190</sup> Adler, Z. (1988) 'Prosecuting child sexual abuse: a challenge to the status quo.' In: Maguire, M. and Pointing, J. (eds.) *Victims of Crime: A New Deal?* Open University Press : Milton Keynes, p. 140.

<sup>191</sup> Temkin, J. (1990) 'Child sexual abuse and criminal law - 1.' *New Law Journal* 16.3.90, p. 352.

<sup>192</sup> Woodcraft, E. (1988) 'Child Sexual Abuse and the Law.' *Feminist Review* No. 28, p. 127.

<sup>193</sup> Kennedy, H. (1989) 'The Paedophile and the Court Room Drama: a Distortion of Reality.' In: Farrell, M. (ed.) *Understanding the Paedophile*. Institute for the Study and Treatment of Delinquency: London, p. 14.

beneficial, effects,<sup>194</sup> and suggested that it was not clear that prosecution would prove the best way of responding to sexual abuse.<sup>195</sup>

The increased use of the criminal justice system in cases of child sexual abuse was most consistently advocated by child care professionals. Berliner and Barbieri, for example, acknowledged that there were powerful arguments against criminal justice system involvement,<sup>196</sup> but nevertheless advocated a more robust attitude towards prosecution, claiming:

... the experience of testifying in court can have a therapeutic effect for the child victim. The child can learn that social institutions take children seriously. Some children report feeling empowered by their participation in the process. Some have complained, when the offender pled guilty, that they did not have an opportunity to be heard in court.<sup>197</sup>

However, they affirmed that children may have mixed feelings towards their abuser, and that some children expressed concern that he should receive help rather than punishment. In this they were unusual; reference to any potentially negative social and psychological consequences of prosecution for victimised children and members of their family was largely absent from the child care literature of this period, just as these issues had become marginalised in the psychological literature. Instead, emphasis was placed on the potential benefits of criminal justice system involvement, and the legal and procedural barriers in the way of prosecution. The NSPCC, in its evidence to the Pigot Committee, emphasised that:

Under the current system a substantial number of offenders are never brought to trial, despite the sure knowledge of the professionals involved that they are guilty, because of difficulties in securing admissible evidence. In the Bexley Project sample of suspected child sexual abuse offenders, for example, 78% were not charged and only 9% were charged with and convicted of sexual offences.<sup>198</sup>

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<sup>194</sup> Edwards, S. (1990) *Op. cit.*, note 188, p. 146-149.

<sup>195</sup> *Ibid.*, p. 153.

<sup>196</sup> Berliner, L. and Barbieri, M. K. (1984) 'The Testimony of the Child Victim of Sexual Assault,' *Journal of Social Issues* 40(2), pp. 125 and 128.

<sup>197</sup> *Ibid.*, p.135.

<sup>198</sup> NSPCC (1988) *NSPCC submission to the Home Office Advisory Group on the admissibility of video recorded interviews*. Unpublished report, September 1988, para. 4.6, p. 7.

The Committee commented that the existing low level of prosecutions was tenuous evidence on which to conclude that the criminal justice system was less effective than it should be in dealing with offences against children, but noted that this was a widely held belief among professionals working with abused children.<sup>199</sup> It further remarked:

We [...] received evidence from police officers and social workers that many hundreds of cases cannot be pursued successfully each year because children seem unlikely to make effective or legally competent witnesses under present circumstances. As a result some child victims are left with feelings of anger, resentment, frustration and even guilt which many experts believe could be to some extent dispelled by legal procedures which enabled them to speak fully and freely.<sup>200</sup>

During the early 1990's the NSPCC increasingly argued that children's right to have offences against them prosecuted was being insufficiently enforced. Wattam, in a book published in association with the NSPCC, commented:

In principle, children have the right to justice [...]; however, in practice, it appears that their right to justice is filtered through well-intentioned attempts to prevent them suffering further trauma and distress.<sup>201</sup>

The NSPCC subsequently entitled its continuing campaign for child witness reform 'Justice for Children'.<sup>202</sup>

In the course of parliamentary debates some speakers reasserted the case for diversion. In the House of Lords, Lord Hutchinson, for example, argued:

I have always taken the view that every conceivable effort should be made in an abuse case to divert it from court and not deal with it in the adversarial atmosphere of a criminal trial. [...] I wish that the more strident members of the child abuse lobby (if I may call them that) would put more effort into trying to find some way of not bringing such a matter to court than arousing a great deal of fuss about what happens [there].<sup>203</sup>

<sup>199</sup> Home Office (1989) *Op. cit.*, note 28, para. 1.7, p. 3.

<sup>200</sup> *Ibid.*, para. 2.15, p. 17.

<sup>201</sup> Wattam, C. (1992) *Making a Case in Child Protection*. Longman: London, p. 142.

<sup>202</sup> NSPCC (1993) *NSPCC Launches Justice for Children Campaign*. Press release: 17.3.1993.

<sup>203</sup> *Hansard (Lords)* 22 April 1991, column 40.

However, the impact of the justice lobby on the Crown Prosecution Service has been shown to have favoured prosecution. Research by Morgan and Zedner has indicated that Crown Prosecutors believe the heightened public concern about sexual abuse during the 1980's shifted the public interest factor in the prosecutorial decision away from diversion and further towards prosecution.<sup>204</sup>

In this context, it is relevant to note that reform of the welfare state was a central feature of Conservative policy during the 1980's. Welfare was characterised by the government as encouraging dependency, and it sought to replace many aspects of the welfare state by social and economic arrangements based on rationalist views of order and discipline, and which emphasised individual responsibility.<sup>205</sup> In relation specifically to crime, the government rejected the long-held view that this and other forms of social deviancy are associated with disadvantage, and that the social order can be secured through state action to secure social justice, advocating instead that what is required is the maintenance of firm social order.<sup>206</sup> While the policy of diversion in cases of child sexual abuse was restated in Departmental guidance, the growing influence of demands for the criminal justice system to play an increased role in responding to this problem was nonetheless consistent with the prevailing political climate.

The significance of the contribution to child witness reform of the reconceptualisation of child sexual abuse as a criminal justice, rather than a primarily welfare, problem is moreover highlighted by the differing outcomes of the reform processes in the 1920's and the 1980's. In the former case, when there was a shift away from deterrence and towards treatment, the impetus towards reform faltered and only minor reforms were achieved. By contrast, in the 1980's, when the movement was away from treatment and towards deterrence, a comprehensive series of reforms were introduced.

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<sup>204</sup> Morgan, J. and Zedner, L. (1992) *Op. cit.*, note 145, p. 125.

<sup>205</sup> Rees, S. (1991) *Achieving Power: Practice and Policy in Social Welfare*. Allen and Unwin: London, pp. 50-51.

<sup>206</sup> Phipps, A. (1988) 'Ideologies, political parties, and victims of crime.' In: Maguire, M. and Pointing, J. (eds.) *Victims of Crime: A New Deal*. Open University Press: Milton Keynes, p. 179.

### Professional interests and the reform process

Given that so much of the impetus for reform of the rules and procedures relating to child witnesses came from concern that child sexual abuse was posing a significant social problem, the role played by child care organisations in achieving the reforms, and the response of the legal profession, is deserving of further examination.

Although, as previously outlined, Spencer and Williams actively advocated reform, there is little evidence of widespread concern about child witnesses among lawyers in the mid-1980's. Indeed, the initial response of the legal profession to the government's proposals was cautious and somewhat negative, centring on reservations about the effect of video links or video-recorded evidence on the trial process and the retention of the oral tradition.<sup>207</sup> By contrast, the Police Federation and child care organisations, notably the NSPCC, campaigned assiduously for reform, and a clear picture of their role emerges from reports of parliamentary debates. For example, the amendment on video-recorded evidence debated in the Commons in March 1987 was backed by the Police Federation; the NSPCC; the National Children's Bureau and the Royal College of Nursing,<sup>208</sup> and that debated in the Lords in October 1987, by the NSPCC; the Police Federation; the National Children's Bureau; the Association of Directors of Social Services; and the National Council of Voluntary Child Care Organisations (a body including groups such as Barnados and the Church of England Children's Society).<sup>209</sup> Among those speaking in support of wider reform during these debates were Roger Sims in the House of Commons and Lady Faithfull in the House of Lords, both members of the Executive Council of the NSPCC. Moreover, reference was made by Lord Silkin, (who proposed the amendment in the House of Lords), to the briefing paper he had received from the NSPCC.<sup>210</sup> It is noteworthy that during the latter debate, Lord Hailsham, who claimed that the amendment flatly contradicted all the established rules of criminal procedure, but who nevertheless acknowledged that there was widespread support for

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<sup>207</sup> *Hansard (Commons)* 31 March 1987, column 965; Gibb, F. (1987) 'Lawyers split over court video links.' *The Times* 6.3.87; Williams, G. (1987a) *Op. cit.*, note 101, p. 341.

<sup>208</sup> *Hansard (Commons)* 31 March 1987, column 958.

<sup>209</sup> *Hansard (Lords)* 22 October 1987, columns 274-275.

<sup>210</sup> *Hansard (Lords)* 22 October 1987, column 272.

the amendment's intentions, questioned whether the judiciary had been consulted either on the operation of the amendment or its drafting.<sup>211</sup> His query is pertinent.

It was noted earlier that a striking feature of the reform process was the initial emphasis on securing the admissibility of video-recordings of investigative interviews as the primary means of reducing the stress of a court appearance on child victims of abuse, and the relatively late endorsement of the option of pre-trial hearings. This becomes comprehensible if calls for reform were led by police and social work organisations, with little direct participation by the legal profession. As previously observed, the investigation of child abuse was undergoing substantial change at this time, with the introduction of joint investigation by the police and social services/NSPCC, and the video-recording of investigative interviews. It is understandable that in seeking reform of court procedures for child witnesses, these organisations should have been influenced by operational developments in which they were directly involved, and might not display an immediate familiarity with options suggested by an earlier legal literature. It nevertheless has to be asked why there was no apparent alliance between child protection agencies and legal professionals in pursuing reform.

One answer suggested by the literature is that many of those advocating procedural reform characterised the legal profession as being part of the problem which child witnesses faced, the comments by Adler, quoted earlier, being one example of this. In a comparable vein the Pigot Committee noted:

We are satisfied that a majority of children are adversely affected by giving evidence at trials for serious offences under existing circumstances. [...] We received evidence on this point from paediatricians, psychiatrists, social workers and a range of organisations and individuals with [...] responsibility for child care and the care of victims. This led us not only to endorse the case [...] for relieving the stress upon child witnesses, but also to wonder whether the nature and extent of the problem is fully comprehended by the legal profession [...].<sup>212</sup>

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<sup>211</sup> *Hansard (Lords)* 22 October 1987, column 280.

<sup>212</sup> Home Office (1989) *Op. cit.*, note 28, para. 2.12, p. 16.

There is evidence in parliamentary debates, news reports, and professional publications, of the development of increasing tensions between the legal profession and child protection agencies during the passage of the Criminal Justice Act 1988. The conduct of investigative interviews and their appropriateness for legal purposes became a subject of particular contention. Video-taped interviews began to be used in evidence in civil proceedings while their admissibility in criminal cases was being sought. However, lawyers were critical of what they saw as the leading and highly suggestive interview techniques used by child care practitioners. The latter in turn argued that the legal profession failed to appreciate the extent to which abused children were silenced by the imbalance of power between themselves and their abuser, necessitating the use of facilitative interview methods if they were to be enabled to speak of the offences to which they had been subjected.<sup>213</sup> In June 1988, when Eldon Griffiths, on behalf of the Police Federation and the NSPCC,<sup>214</sup> tabled amendments on the use of video-recorded interviews and the questioning of child witnesses in court by an intermediary, there were a number of acrimonious exchanges. Stuart Bell, having referred in detail to cases of suspected abuse in his constituency in Cleveland, concluded:

It may be that technology and the law are outstripping the skills of those who might carry out video recordings. [...] In Cleveland there was a lack of skill, common sense, and proper approach to family life.<sup>215</sup>

Speaking to the amendment on children being questioned by a prescribed officer rather than by counsel, Richard Holt commented: 'The idea of a qualified social worker being an intermediary frightens the life out of me'.<sup>216</sup> Tony Worthington responded:

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<sup>213</sup> Gibb, F. (1986) 'Child sex abuse: 1. Lawyers and doctors reeling over growing use of video tapes.' *The Times* 16.6.86; Gibb, F. (1986) 'Child sex abuse: 2. Lawyers oppose video questioning.' *The Times* 17.6.86; 'Judicial disquiet expressed over child sex evidence.' *The Times* 16.7.86; Gibb, F. (1986) 'Videotaped interviews in child abuse cases criticised by judge.' *The Times* 16.7.86; Stevens, C. R. and Walsh, E. A. (eds.) (1987) 'Family Law Reports: Special Issue.' *Family Law Reports* 1(4), pp. 269-346.

<sup>214</sup> *Hansard (Commons)* 20 June 1988, column 850.

<sup>215</sup> *Ibid.*, column 863.

<sup>216</sup> *Ibid.*, column 871.

Perhaps we should talk more about the lack of skill among lawyers. They may well have been trained for many years, yet be singularly inept at using their professional skills to obtain the truth from a child.<sup>217</sup>

He concluded: ‘There has been much evidence in recent years that children who have been sexually abused are then further abused by the courts’,<sup>218</sup> to which Ivan Lawrence retorted:

Legal practitioners are not the cause of injustice in our society; the ill-thought-out laws and procedures that are laid down in this place are at the root of injustice.<sup>219</sup>

Pleas for a consensus-based approach to the identification of legally acceptable, child-sensitive, procedural reform were made during the passage of both the 1988 and the 1991 Criminal Justice Acts. In 1987 Lord Hutchinson stressed:

Surely a real attempt could be made to achieve consensus between the [child protection] side and the legal side. Above all, the one point that really matters is the welfare of the child.<sup>220</sup>

Similarly, in 1991, Earl Russell, describing what he termed a clash between ‘right and right’, argued that a balance between the competing claims of those concerned with child welfare and those concerned with the administration of justice, would be difficult to achieve, but suggested:

I have a great respect for the adversarial system but on this issue I do not believe that we shall make progress by adversarial methods. Perhaps the Minister will agree that before the Report stage there is a case for a quiet round-the-table discussion among some of the interested parties to this issue to see whether we can produce a slightly better form of words, with a slightly larger area of general agreement.<sup>221</sup>

The proposal of the Pigot Committee that children’s evidence should be taken in full at a pre-trial hearing might be thought to reconcile the priorities of both the legal

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<sup>217</sup> *Ibid.*, column 865.

<sup>218</sup> *Ibid.*, column 868.

<sup>219</sup> *Ibid.*, column 868.

<sup>220</sup> *Hansard (Commons)* 22 October 1987, column 284.

<sup>221</sup> *Hansard (Lords)* 22 April 1991, column 48.

profession and child protection agencies. The Law Society responded positively to this suggestion,<sup>222</sup> as did the Criminal Bar Association,<sup>223</sup> and the Council of Her Majesty's Circuit Judges.<sup>224</sup> If anything, however, there was evidence of increased inter-professional mistrust during debates on the Criminal Justice Act 1991. Members of the legal profession now acknowledged the need for a more flexible approach when dealing with child witnesses,<sup>225</sup> and were willing to support the introduction of pre-trial hearings. Like the child protection groups, they expressed dismay when the government rejected the Pigot recommendation and proposed that video-recordings of investigative interviews should become admissible in criminal proceedings. The Pigot option was preferred by the legal profession to that of the government, ostensibly because it allowed examination and cross-examination to be undertaken at the same time,<sup>226</sup> while also removing children from the stressful environment of the trial proper, and allowing their testimony to be secured while it was still relatively fresh. It is nevertheless difficult to avoid the conclusion that lawyers' support for pre-trial hearings was in part at least motivated by mistrust of child protection practitioners, and a desire to defend traditional professional preserves. As previously noted, the Pigot Committee envisaged the video-recording of an investigative interview being used in evidence at the pre-trial hearing, but it placed no restrictions on the role of prosecuting counsel in leading the evidence of the child witness. By contrast, the government proposal intended that the recording should replace the child's evidence-in-chief, and stated: 'Where a video-recording is to be admitted under this section [...] that witness shall not be examined-in-chief on any matter which, in the opinion of the court, has been dealt with in his recorded testimony.'<sup>227</sup> It therefore had considerable implications for the role of prosecuting counsel in presenting the Crown's case. The Bar, in particular, was highly resistant to what was seen as a role for social workers in the tendering of evidence. At the 1989 Bar conference, held shortly before the publication of the Pigot report, David Cox,

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<sup>222</sup> The Law Society (1990) *Response to the Report of the Advisory Group on Video Evidence*. Unpublished report, The Law Society: London, para. 10, p. 3.

<sup>223</sup> *Hansard (Lords)* 21 May 1991, column 128.

<sup>224</sup> *Hansard (Lords)* 22 April 1991, column 45.

<sup>225</sup> Gibb, F. (1989) 'Changes urged to spare child sex victims.' *The Times* 2.10.89; *Hansard (Lords)* 21 May 1991, column 128.

<sup>226</sup> See for example, *Hansard (Lords)* 22 April 1991, column 49.

<sup>227</sup> The Criminal Justice Act 1988, Section 32A (5)(b).

chairman of the Criminal Bar Association, is reported to have said that there were many advantages to having the initial interview with a child victim recorded, but that there were serious objections to the use of the recording as a substitute for prosecuting counsel taking evidence from the child in person, due to the 'often unsatisfactory nature of the questioning'.<sup>228</sup> He made a similar point in a letter to Lord Ackner, regarding the Pigot recommendations:

... we shared the dissenting view expressed by Miss Rafferty that evidence should not be prepared by social workers in the form of pre-recorded video taped interviews. We do not oppose the taking of evidence by a judge at a pre-trial hearing in the presence of both prosecution and defence counsel [.]<sup>229</sup>

The Law Society, which supported the majority of the Pigot recommendations, nevertheless criticised the Committee for proposing that a video-recording of an investigative interview should be used in evidence unless its inclusion could be shown to be contrary to the interests of justice, arguing that the case should be made not only for its exclusion, but also for its inclusion.<sup>230</sup>

Thus, while the procedural reforms proposed by the government in the Criminal Justice Act 1991 were criticised by the legal profession and child protection organisations, both preferring the option of pre-trial hearings, there was no alliance between them in pursuing this objective, and it was the NSPCC and the Children's Legal Centre who advised on the amendments on pre-trial hearings debated in the Lords in March and in April 1991.<sup>231</sup>

As previously noted, the Scottish Law Commission had expressed concern that the use of video-recordings as evidence in criminal proceedings risked confusing the investigation of an offence, and securing testimony for use in court. In raising objections to the government's proposal on video-recorded evidence, the legal

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<sup>228</sup> Gibb, F. (1989) 'Changes urged to spare child sex victims.' *The Times* 2.10.89.

<sup>229</sup> *Hansard (Lords)* 21 May 1991, column 128.

<sup>230</sup> The Law Society (1990) *Op. cit.*, note 222, para. 8, p. 2.

<sup>231</sup> *Hansard (Lords)* 22 April 1991, column 33. On both occasions the amendments were put by Lord Mottistone, a member of the NSPCC Executive Council.

profession was not therefore simply defending its professional interests. Nevertheless, professional interests were clearly at stake; while never referred to explicitly during the debate on child witness reforms, it may not be entirely irrelevant that the introduction of video-recorded evidence occurred at a time when the government was seeking to end barristers' traditional monopoly of rights of audience in the Crown and High Courts.<sup>232</sup> For the child protection groups, and particularly the voluntary organisations such as the NSPCC, there were undoubtedly benefits to be gained from playing a highly visible role in influencing the outcome of government reforms.<sup>233</sup> The part played by professional interests in the reform process is furthermore suggested by the development of boundary disputes involving other professional groups, an example being the debate conducted between King and Davies regarding the former's criticisms of a perceived attempt by psychologists and psychiatrists to claim expert status in evaluating children's evidence.<sup>234</sup>

To what extent professional interests influenced the outcome of the reform process is difficult to determine. Clearly, child protection groups played a highly significant role in securing reform both of the rules of evidence and trial procedures. The NSPCC, for example, not only used its influence in both Houses of Parliament, but actively used the media to publicise increases in identified cases of sexual abuse,<sup>235</sup> the low levels of prosecution,<sup>236</sup> and its own campaign to secure child witness reform.<sup>237</sup> While it was not successful in securing full implementation of the Pigot

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<sup>232</sup> Lord Chancellor's Department (1989) *The Work and Organisation of the Legal Profession*. (Cm 570). *Parliamentary Papers 1988-1989*, vol. XLVI: London. See Chapter 5, pp. 20-26, and especially, para.s 5.7-5.8, p. 26.

<sup>233</sup> Tom White, the director of NCH (National Children's Home), notes that involvement in social policy campaigns is a priority for voluntary organisations, as they are closely associated with increased status, influence and income. White, T. (1991) 'Running a campaign: appropriate strategies for changing times.' In: Franklin, B. and Parton, N. (eds.) *Op. cit.* note 73, pp. 189-190.

<sup>234</sup> King asserted that the British Psychological Society submission to the Advisory Group on Video Evidence was in large part concerned with furthering the financial interests of the profession. King, M. (1988) 'Use of Video in Child Abuse Trials: A Reply to the Professional Affairs Board of the Society.' *The Psychologist* May 1988, pp. 167 and 169; Davies, G. (1988) 'A reply to King.' *The Psychologist* May 1988, p. 170. Another dispute was that over research which Vizard said demonstrated that specialists with training in child abuse had a higher success rate in interpreting video evidence than lawyers. Vizard, E. (1990) 'Video shows up victims.' *The Times* 10.7.90; White, R. (1988) 'Interviewing children.' Letter to *The Times* 11.7.90.

<sup>235</sup> For example, Ellis, M. (1987) 'NSPCC records 137% increase.' *The Times* 30.6.87.

<sup>236</sup> For example, Evans, P. (1987) 'Hurd to lift bar on child evidence.' *The Times* 3.10.87.

<sup>237</sup> For example, Ford, R. (1988) 'Criminal checks on child care workers to counter abuse.' *The Times* 18.1.88; 'NSPCC calls for legal reforms.' *New Law Journal* 8.12.89, p. 1659.

recommendations, it regarded the admissibility of video-recorded interviews as ‘an absolute priority in establishing children’s rights’<sup>238</sup> and the achievement of this reform might be seen in large part as an outcome of its efforts. Media support for the reform process was less evident during the passage of the Criminal Justice Act 1991 than it had been during that of the 1988 Act, and the government was therefore perhaps under less public pressure to act. In adopting the introduction of video-recorded evidence, and rejecting the Pigot recommendation of pre-trial hearings, it brought about a further modest procedural reform which drew on existing developments, most notably the introduction of video-links, and policy of joint investigation of child abuse. This had the advantage of minimal expense, as compared with the more fundamental reform recommended by Pigot, but also accorded an enhanced role to child protection agencies in the criminal justice process.

### **Summary**

The concern of this chapter has been to examine the background to, and influences upon, the child witness reforms introduced by the 1988 and 1991 Criminal Justice Acts. It is suggested that a complex range of factors was involved. An important, but essentially unpredictable element in the impetus for reform was the development during the mid-1980’s of intense public concern about child sexual abuse. The attention given by the media to abuse, and to a number of widely publicised failures to secure the conviction of alleged abusers, was a crucial factor in the development of a groundswell of public support for reform of the rules of evidence and the introduction of new trial procedures. At the same time, however, this subjected the reform process to pressures which had implications both for its objectives and for the form taken by the procedural reforms which were introduced.

The child witness reforms had two primary objectives. These were, to address the rules which for more than a century had placed barriers in the way of children’s evidence being heard, thereby enabling more, and younger, children to appear as witnesses in criminal cases; and to reduce the stress of a court appearance for children.

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<sup>238</sup> Sutherland, A. (1990) ‘Striving for justice in court.’ *The Times* 31 January 1990.

The reform of the rules of evidence proved uncontroversial. A Home Office review of research on children's memory and reliability showed there was no basis for the imposition of a rigid age-restriction on child witnesses, nor for a general requirement for corroboration of children's evidence. These conclusions were supported by the Pigot Committee, and the case for reform was accepted by legal professionals, government ministers, and parliament. Over the course of three years the corroboration and competency rules were initially modified and eventually abolished. This brief summary suggests that this aspect of the reform process provides an example of rational, consensual reform. However, a number of points are relevant. Firstly, it is questionable whether these reforms would have been achieved were it not for the level of public demand for overall reform of the criminal justice system's dealings with child witnesses. Secondly, these specific reforms were not associated at this time with contested issues of principle or ideology, and were not seen by professionals who would be affected by their implementation, as having any implications in terms of vested professional interests.

By contrast, the procedural reforms were deeply contested and raised controversies across a range of areas. While the debate on the rules of evidence drew on an established body of empirical evidence, that on procedural reform was more ideological in character. A good case could be made on cognitive and developmental grounds for the modification of court procedures in order to accommodate children's needs, and to reduce the stress experienced by children when testifying. Empirical evidence was becoming available which demonstrated that many children found a court appearance stressful, with implications for the quality of their testimony. However, this was a relatively new area of research; the findings were in many cases tentative, and the long-term effects on children of a court appearance were largely untested. While it could be shown that trial procedures were adult-centric, there was no conclusive evidence that existing court procedures were harmful to children, or that the particular procedural reforms proposed would be more effective than other alternative options. Calls for reform therefore frequently relied on anecdotal evidence

and ideological argument. Of particular importance here was the reconceptualisation of child sexual abuse as a criminal justice, rather than a primarily welfare, problem.

Child protection groups were closely involved in this aspect of the reform process. They campaigned strongly for the introduction of measures to reduce the stress of a court appearance for abused children, but based their case substantially on the proposition that the criminal justice system was ineffective in dealing with the perpetrators of sexual abuse. In suggesting that there was a need to introduce reforms not only to protect children within the courtroom itself, but also to achieve a higher rate of prosecutions generally, they viewed themselves as acting on behalf of victims, arguing that there would be social, psychological, and symbolic benefits to abused children in witnessing the prosecution of their abuser. However, there was no systematic evidence which might have permitted an evaluation of the relative merits of welfare or criminal justice responses to child sexual abuse. Thus they might be seen as recommending a strategy for dealing with abusers, the implications of which for children were not entirely clear. Nevertheless, their arguments attracted considerable support from the media and the general public, and have to be seen as a particularly influential factor in the achievement of the reforms.

In terms of the overall direction of the reform process the reconceptualisation of child sexual abuse as a problem requiring a criminal justice response contributed a third objective to the reforms; the conviction of more perpetrators of abuse. The removal of barriers to children's evidence being put before the courts, and the reduction of the stress of a court appearance for child witnesses - the two objectives referred to earlier - can both be seen as subsumed within this specific objective, and as providing the means by which it was to be achieved. Indeed, Spencer, a leading advocate of reform, was explicit that the reforms he sought were concerned less with children's welfare than with making the criminal justice system more effective in prosecuting child molesters.

From the perspective of child witnesses the reforms would therefore appear to have mixed implications. The reforms as a whole can be seen as having important

democratising features, notably in challenging the long-standing prejudice which child witnesses had faced, and in recognising that children's needs and coping skills differ from those of adults. However, the emphasis on achieving a higher rate of child sexual abuse prosecutions can be viewed as a potentially double-edged sword, and certainly as controversial since it was accompanied by a predilection towards identifying the apparent benefits for children of prosecution, to the disregard of possible negative consequences. Attention focused on the stress children experienced when tendering evidence in the courtroom, and while this was in part an outcome of concern to identify forms of stress amenable to change, it nevertheless drew attention away from the wider effects of prosecution on children's emotional, and social relationships, except insofar as this could be said to be beneficial.

Furthermore, the focus on children subjected to sexual abuse marginalised other child witnesses. By-stander witnesses did not feature at all during parliamentary debates and the procedural reforms were restricted to children appearing in cases involving sexual or violent offences. This emphasis was not unusual, in that discussions of the child witness have always tended to focus on abused children. Nevertheless, children can be called to offer testimony in relation to other offences. Insofar as by-stander witnesses had previously received some attention, as for example in psychological research on children's eye-witness memory, they might be thought to have lost out as a result of the reform process.

Moreover, while ostensibly concerned with children's welfare and rights, the legislation gave no voice to the children themselves; children played no direct part in the reform process, and the legislation gave them no say in the use of the new facilities. The possibility that they may differ in terms of their preferences about the way in which they would testify was given minimal consideration. Reformers' confidence that the introduction of video-links and video-recorded evidence would be in children's best interests resulted in a presumption of the use of these provisions except where this could be shown to be contrary to the interests of justice. This precluded the introduction of a flexible system, capable of accommodating individual needs, such as had been proposed by the Scottish Law Commission.

From the perspective of those working within the criminal justice system the ideological character of so much of the debate on procedural reform might be thought to have introduced particular tensions. The debate took a highly adversarial form, the legal profession and child protection groups adopting polarised positions on many of the issues involved. For both groups questions of principle and professional interest were implicated. The legal profession expressed concern about the effects of video-links and video-recorded evidence on the trial process, particularly insofar as this concerned the oral tradition, cross-examination, and the balance of proof. Finding a balance between the welfare of child witnesses and the rights of defendants proved especially intractable. However, barristers' resistance to the admissibility of video-recordings of investigative interviews as a substitute for evidence-in-chief may also be thought to be related to the implications this would have for their professional practice. To the extent that the eventual reforms achieved were largely attributable to the influence of child protection groups, this might be seen as having implications for the commitment to, and ownership of, the new provisions by the legal profession.

In Part Three, which follows, the implementation of the reforms is examined. In view of the virtually non-existent role of children in the reform process, and the relatively small degree of influence exerted by the legal profession, the focus is on their response to the new provisions. Additionally, the effects of the reforms on the trial process are investigated.

## **PART THREE**

## **PART THREE**

### **INTRODUCTION**

The findings of an empirical study which has been carried out for this thesis are presented in the following three chapters. The purpose of this study was to investigate how the child witness reforms introduced by the 1988 and 1991 Criminal Justice Acts are working in practice. Within this broad objective, however, were a number of more precise aims.

Part Two of the thesis has shown that the achievement of the child witness reforms was linked not only to the growth of significant public anxiety about child sexual abuse (which had been 're-discovered' during the mid-1980's), but also, more specifically, to the reconceptualisation of sexual abuse as a criminal justice, rather than a welfare, problem. The ideological character this gave to the reform debate had important implications for the way in which the difficulties facing children witnesses were expressed; for the solutions proposed to address these difficulties; and for the objectives defined for the legislation which was enacted.

The problems which faced child witnesses were seen as firstly, the barriers placed by the rules of evidence in the way of children's evidence being heard; and secondly, the stresses which children experienced when subjected to the adult-oriented procedures of a criminal trial. These problems were, however, articulated in the context of the perceived failure of the criminal justice system to provide an effective means of prosecuting cases of child sexual abuse. The problems associated with the rules of evidence were thus presented in relation to the impossibility of bringing an abuser to justice, if independent corroboration for the child's allegations was lacking, or if the child was held to be incompetent to testify (that is, too young). Similarly, the stress of a court appearance for child witnesses was described in terms of the ordeal which victimised children endured when required to speak of their abusive experiences in the presence both of the perpetrator and members of the general public. Thus while the reforms had two apparently child-centred objectives; to reduce the stress of a court appearance for child witnesses; and to enable more, and younger, children to become

witnesses; these were constructed in such a way as to facilitate the achievement of a third objective, which was to achieve a higher rate of prosecution in cases of child sexual abuse.

The solutions devised to meet these objectives fundamentally transformed the treatment of child witnesses within the criminal justice system. The competency and corroboration rules were progressively modified and eventually abolished, and as has been shown, this aspect of the reform process proved uncontroversial, in part because abolition was supported by the weight of the available research evidence. By contrast, however, the procedural reforms proved highly contentious. The introduction of the video-link and video-recorded evidence were *protective* measures, designed to circumvent stressful aspects of conventional court practice, and reflected a conception of child witnesses as vulnerable. Although similar systems were in use elsewhere, they represented an untested solution as no research had been conducted into their effectiveness. While their use had been advocated by child care professionals, members of the legal profession had expressed little enthusiasm for the video provisions, and indeed, stood to lose a significant degree of control over the presentation of the Crown's case as a result of their introduction.

### **The aims and objectives of the study**

In the light of the above analysis, the study which will be reported in the following pages was designed with two primary objectives in mind. These were:-

1. To consider the effectiveness of the child witness reforms in meeting their objectives of:-
  - a) reducing the stress of a court appearance for child witnesses;  
and
  - b) addressing the discrimination within the legal system against children's testimony.
  
2. To investigate how, if at all, the ideological complexion of the reform process has structured their implementation.

The research method adopted was qualitative and ethnographic, chosen in view of the richness of the data such studies can supply. It is important to note that a number of the more precise questions which are considered in the course of the study were not pre-determined but arose as a response to the emerging data. However, three specific lines of inquiry were defined before the study began, the aims of which were:-

1. To investigate the post-reform reality of child witnesses' experience of the criminal justice system;
2. To inquire into the attitudes of members of the legal profession towards child witnesses; the reform of the rules of evidence; and the reform of trial procedures; and
3. To document the observable effects of the reforms on the trial process.

These three areas were selected for study in view of the importance of the questions which they raise. For example, the views of child witnesses themselves had not been directly heard in the course of the reform debate; rather, it was the members of child care organisations who had spoken on their behalf. This study therefore asks not only what arrangements were made at court for each child witness and how these arrangements were appraised by the child concerned, but also what congruence there is between children's accounts of what is stressful about a court appearance and the views which have been attributed to them. Similarly, as indicated above, the video-link and video-recorded evidence had not been subjected to empirical evaluation at the time of their introduction and their merits were the subject of some disagreement between members of the legal and child care professions. Their implications for the trial process, and the degree of commitment which barristers would show towards their implementation, were at this time substantially unknown.

### **Fieldwork**

Fieldwork for the study was conducted at a single Crown Court Centre over a seven month period, during which time all cases in which children were listed to give

evidence were identified. The study sample is made up of 16 cases, these being all the identified cases which were completed during the fieldwork period bar two.<sup>1</sup> The majority of the study cases (15) involved sexual offences against children, the exception being a case of murder.

The final hearing of each of the study cases was observed in full. In all, 11 of the 16 cases were dealt with by way of a jury trial, the remaining five cases being resolved by other means. A total of 53 children were listed as witnesses in the full sample, 40 of whom testified in the 11 trials. Of these, 26 gave evidence over the live-link (a video-recording being used as evidence-in-chief in the case of 20 children), while 14 testified in the courtroom in the conventional manner. All but two of the children who were involved in cases which did not proceed to a jury trial attended court on the day of the final hearing in the expectation of being required to give evidence.

The opinions of prosecution and defence counsel about children as witnesses, and the effects of the child witness reforms were sought by way of a questionnaire. Additionally, a number of formal, and more informal, interviews were carried out. All child witnesses for whom a contact address could be obtained were invited to participate in a research interview. In all, 26 children agreed to be interviewed directly by the researcher, and an adult carer volunteered to be interviewed as a proxy for a further seven children.

Anonymised details of the cases, and research participants, are given in Appendices A-C.

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<sup>1</sup> One of the cases which has not been included in the sample was heard during the second week of the longest of the study trials, and so could not be observed by the researcher. The other was heard at a time when she was on leave. See Chapter Seven.

## CHAPTER SIX

### THE BARRISTERS' PERSPECTIVES ON THE REFORMS

Part Two of this thesis has described how the 1988 and 1991 Criminal Justice Acts introduced a comprehensive range of reforms relating to child witnesses, including the enactment of measures which effectively abolished legal rules which had placed barriers in the way of children's evidence being heard by the courts, and the introduction of new procedures permitting children's evidence-in-chief to be given in video-recorded form and their live testimony to be offered over closed-circuit television. The reforms were shown to be an outcome of campaigning by child care organisations, and public concern about child sexual abuse, rather than any pressure for reform from the legal profession. This makes the attitude of lawyers to the new provisions of particular interest, not least because the reforms have significant implications for working practice and procedure in the courts. The present chapter therefore investigates the opinions of practising barristers on the reforms and their implementation. The issues addressed are firstly barristers' views about child witnesses and their evidence, and secondly their assessments of the costs and benefits of the new provisions. The latter are considered from the perspectives of the prosecution; the defence; and the child witness.

#### **Methodology**

Eleven of the 16 contested child witness cases which are examined in the present study were finally dealt with as a jury trial.<sup>1</sup> The data outlined in this chapter is primarily drawn from a questionnaire completed by barristers acting in the sub-sample of trial cases.<sup>2</sup> In all, 19 barristers acted in these 11 cases, 16 of whom completed the questionnaire.<sup>3</sup> Eight were acting for the prosecution when the questionnaire was completed, and eight for the defence.

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<sup>1</sup> Details of all cases involved in the study sample are given in Appendix A.

<sup>2</sup> A copy of the questionnaire is included at Appendix F.

<sup>3</sup> A code for barristers completing the questionnaire; acting in the cases concerned; or otherwise participating in the study, is given at Appendix B.

When fieldwork for the study began, no systematic research had been published on barristers' attitudes towards the child witness reforms. However, Davies and his colleagues were conducting a survey of criminal justice, and child care, practitioners' perceptions of the new provisions, as part of a Home Office evaluation of the introduction of video-recorded evidence.<sup>4</sup> A copy of the questionnaire which Davies was employing was made available to the present researcher, and a number of the questions which it contained were incorporated into the questionnaire which has been used here.

As indicated in Chapter Two, barristers' views were investigated by means of a questionnaire as this minimised the demands made by the research on barristers' time while also providing a systematic means of collecting data. However, a questionnaire provides only limited access to respondents' opinions. Opportunities to supplement the questionnaire data were therefore sought. The fieldwork setting provided openings for the researcher to discuss the new provisions informally<sup>5</sup> with willing practitioners during adjournments, either on an individual basis or within small ad hoc groups.<sup>6</sup> This allowed key issues to be explored in greater detail. Furthermore, over the eight month fieldwork period it became possible to assess whether the views of barristers who appeared in more than one of the cases in the research sample (see Table One, below) altered as they became more familiar with the video procedures. A small number of interviews was also carried out. Three barristers agreed to be formally interviewed, having been approached on the basis both of their anticipated willingness to assist, and the extent to which they were thought to be sympathetic to,

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<sup>4</sup> Davies G, Wilson C, Mitchell R, and Milsom J (1995) *Videotaping Children's Evidence: An Evaluation*. Home Office Publications London.

<sup>5</sup> For the purposes of clarity and specificity a distinction is made between 'interviews' and 'discussions'. Interviews were conducted formally in office settings; lasted between one and one and a half hours; and in four cases were tape recorded. Discussions were informal; usually took place during adjournments in the courtroom or courthouse coffee bar, were relatively short (10 - 20 minutes) and were not tape recorded.

<sup>6</sup> The data collected by this means involved a larger sample of barristers than was the case with the questionnaire. The latter was completed only by barristers involved in cases which went to a jury trial, while the courthouse discussions included barristers involved in study cases which were eventually dealt with by other means than a trial, as well as four barristers who had no involvement in study cases but discussed their views with the researcher from a personal interest in the issues raised by the research. Moreover, one of the three barristers who declined to complete the questionnaire offered instead to talk to the researcher, explaining that he thought some of the issues involved were too complex to reduce to a brief written response. See Appendix B.

or less than sympathetic to, the reforms. Two of these subsequently volunteered written accounts of their views. Two members of the judiciary<sup>7</sup> and two representatives of the Crown Prosecution Service<sup>8</sup> were also interviewed.

The information collected by means of these discussions and interviews is presented separately from that derived from the questionnaire, for the purposes of clarity. It is termed qualitative data, and is used to illustrate specific issues, or to suggest underlying attitudes. Although it cannot be taken as representative of the beliefs of all the practitioners involved in the study, it nevertheless it allows a more complete picture to emerge of the views and experiences of some members of the legal profession whose working practice has been affected by the new provisions. It should be noted that although the number of practitioners expressing a particular view is frequently cited in the qualitative sections, this is for the purposes of specificity only and does not indicate any implicit proportionality between interviewees. Given the nature of a study of this type, the content of interviews and discussions often varied. Unless otherwise indicated, all comments are attributable to barristers.

<b>Barrister</b>	<b>Number of appearances (full sample)</b> Cases: n = 16		<b>Number of appearances (trial sub-sample)</b> Cases: n = 11	
	<b>Prosecution</b>	<b>Defence</b>	<b>Prosecution</b>	<b>Defence</b>
<b>H</b>	1	1	1	0
<b>K</b>	1	1	1	1
<b>J</b>	2	1	1	1
<b>b</b>	0	3	0	2
<b>D</b>	5	0	3	0
<b>E</b>	3	3	2	2

### **Attitudes towards children and their evidence**

The reluctance of the courts to call as witnesses young children under the age of eight, was one of the fundamental questions at issue during the passage of the 1988

<sup>7</sup> Judges J1 (High Court judge, male); J2 (Circuit judge, male).

<sup>8</sup> Reviewing solicitors: CPS1 (female); CPS2 (male).

<sup>9</sup> See Appendix B for the code for barristers.

and 1991 Criminal Justice Acts.<sup>10</sup> The view expressed in 1958 by Lord Goddard in *Wallwork*<sup>11</sup> that the evidence of young children is valueless had influenced court practice for some thirty years and had been re-affirmed in 1987 in the case of *Wright*,<sup>12</sup> only a short time before the publication of a Home Office review of research which concluded that children should not be debarred from giving evidence on account of their age.<sup>13</sup> A willingness to reassess what had become established legal practice was subsequently signalled by the Court of Appeal when, in early 1990, a decision to allow a girl of six to give evidence against her father was upheld.<sup>14</sup> The following year, section 52 of the Criminal Justice Act 1991 effectively abolished the competency test which had provided the justification for rejecting the evidence of young children who were deemed to be incapable of understanding the duty of speaking the truth in court. The extent to which practitioners involved in the present study support these changes, and their attitudes towards the pre-court preparation and reliability of child witnesses, are outlined below.

### **Are some children too young to act as witnesses?**

#### **Questionnaire data**

Barristers who completed the questionnaire were divided between those who gave support to the proposition that there should be a lower age limit below which children should not normally act as witnesses (10), and those who supported individual assessment (6); see Table Two.

<b>Table 2: Is there a lower age limit below which children should be excluded from testifying?</b>	
Barristers: n = 16	
<b>Unqualified support for a lower age limit</b>	7
<b>Qualified support for a lower age limit</b>	3
<b>Preference for individual assessment</b>	6

<sup>10</sup> See for example *The Times* 9.3.87., 4.9.87., 3.10.87., 4.4.88., 20.12.89., 31.1.90., 2.2.90., 28.2.90.; Jones P D H (1987) 'The Evidence of a Three Year Old Child.' *Criminal Law Review* pp. 677-681; Spencer J (1988) 'How Not to Reform the Law.' *New Law Journal* pp. 147-148; Home Office (1989) *Report of the Advisory Group on Video Evidence*. Home Office: London, para. 1.10.

<sup>11</sup> *Wallwork* (1958) *Criminal Appeal Reports* vol. 42, pp. 153-165.

<sup>12</sup> *Wright* (1987) *Criminal Appeal Reports*, vol. 90, pp. 91-98.

<sup>13</sup> Hedderman C (1987) *Children's Evidence: The Need for Corroboration*. Home Office Research and Planning Unit Paper 41: London.

<sup>14</sup> *The Times* 28.2.90 'Child evidence ruling upheld.'

Seven of those who supported the concept of an age-limit expressed this view without hesitation:-<sup>15</sup>

Yes. Certainly five years and under;<sup>16</sup>

Yes, below 4 or 5;<sup>17</sup>

but three qualified their support<sup>18</sup> and indicated some reluctance to generalise:-

Picking any age involves an element of arbitrariness, but I would suggest about 8 years old would be a reasonable lower limit;<sup>19</sup>

Cannot generalise, but below 6 or 7 years I think we should be very careful to ensure that the child appears to be a reliable historian;<sup>20</sup>

Unless corroborated, yes.<sup>21</sup>

Not all of these barristers specified the age below which they thought it would normally be inappropriate for children to act as witnesses, but of the six who did, the range was between 4 and 8 years. Three<sup>22</sup> referred to 7 or 6/7 years, and one<sup>23</sup> to 8 years. Two respondents<sup>24</sup> put the age limit somewhat lower, suggesting 4/5 years, or 5/6 years as a tenable cut-off point. Thus while only one barrister in the research sample still supported what had traditionally been viewed as an appropriate age limit for child witnesses, three had only marginally modified their perception of this downwards.

The concept of an age limit was rejected by six barristers,<sup>25</sup> all of whom said the competence of a child witness should be a matter for individual assessment; the view which had been expressed by the Home Office, and which underpinned the reform of the rules of evidence by the 1991 Criminal Justice Act. Their responses included the following:-

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<sup>15</sup> Barristers A D J L N Q R

<sup>16</sup> Barrister D

<sup>17</sup> Barrister N

<sup>18</sup> Barristers F H P

<sup>19</sup> Barrister P

<sup>20</sup> Barrister H

<sup>21</sup> Barrister F

<sup>22</sup> Barristers H J Q

<sup>23</sup> Barrister P

<sup>24</sup> Barristers D N

<sup>25</sup> Barristers B C E G M K

Difficult, as child needs to be assessed as to age, maturity and knowledge of right and wrong,<sup>26</sup>

Depends on facts of case and child,<sup>27</sup>

Depends on individual child as assessed by the judge.<sup>28</sup>

The issues to be addressed in any assessment of a child witness' competence were indicated by only three respondents,<sup>29</sup> who referred to the need to consider matters of corroboration, maturity, knowledge of right and wrong, and reliability. Likewise, the basis for the view that children below a certain age should not normally be called to act as witnesses, was not made explicit in the replies given. One respondent<sup>30</sup> stated: 'I think it is very difficult for a child below about 7', but the exact nature of the difficulties involved was not identified.

### **Qualitative data**

To better appreciate the reservations about young children acting as witnesses implied by the continued support among some barristers for an age-limit below which children should not normally testify, this issue was addressed in more detail in interviews and discussions. Two barristers, who when responding to the questionnaire had supported an age limit,<sup>31</sup> said when interviewed that in principle the age of a victim should not be a barrier to offences being prosecuted. Nevertheless, one<sup>32</sup> re-affirmed his belief that in practice an age limit for child witnesses is needed. His colleague,<sup>33</sup> however, modified his support for an age limit, saying that any child capable of giving a rational account should be able to act as a witness, even if this means the provision of special facilities to enable the evidence of very young children to be heard and tested. His revised opinion may have been an outcome of his greater experience of the new provisions by the time of the interview, or of the process of reflection

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<sup>26</sup> Barrister C

<sup>27</sup> Barrister E

<sup>28</sup> Barrister M

<sup>29</sup> Barristers C H F

<sup>30</sup> Barrister J

<sup>31</sup> Barristers H N

<sup>32</sup> Barrister H

<sup>33</sup> Barrister N

engendered by the interview itself.<sup>34</sup> However, irrespective of the reason for this, such a shift in attitude was not generally apparent. Although this study suggests that barristers can be sensitive to the stress of a court appearance for children (see subsequent sections of this chapter), there was little evidence during the course of fieldwork of increased familiarity with the revised legal rules on child witnesses resulting in any alteration in the opinions of the majority of barristers who had concerns about young children's testimony.

However, the qualitative data suggests that such concerns may relate less to the question of young children's ability to give an account of their experiences than to practical difficulties which barristers can experience when examining children. A number of barristers<sup>35</sup> and a judge<sup>36</sup> spoke of problems which they had experienced when conducting examinations of very young witnesses. They described in particular occasions when children had responded 'yes' to all the questions put to them, even when this contradicted their previous evidence, and variously ascribed this tendency to age,<sup>37</sup> lack of awareness of what is required at court,<sup>38</sup> suggestibility,<sup>39</sup> young children's inclination to want to please adults by giving as an answer to a question the response the questioner appeared to need,<sup>40</sup> and, on occasions, to the questioning style of counsel.<sup>41</sup> It was not regarded as an insuperable problem, and one barrister<sup>42</sup> said in interview that he thought that a jury would be able to distinguish between the responses of a confused or suggestible child, and one who was unreliable. It was nevertheless seen as making counsel's task in testing the witness' evidence more complex, and was experienced by some as frustrating.

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<sup>34</sup> A characteristic of the non-standardised interview is that it enables interviewees to hear, anticipate challenges to, and reflect on, their beliefs. It is therefore not unusual for the opinions expressed to shift in the course of an interview.

<sup>35</sup> Barristers b L M R

<sup>36</sup> Judge J I

<sup>37</sup> Barrister R

<sup>38</sup> Barristers b M

<sup>39</sup> Barristers L M

<sup>40</sup> Judge J I

<sup>41</sup> Judge J I

<sup>42</sup> Barrister M

Another concern was about the capacity of pre-school children to appreciate the implications of a criminal trial and, especially, the need for witnesses to be truthful in their evidence. One barrister commented: ‘very young children won’t understand the implications of going to court’,<sup>43</sup> and a judge said:

I have no ... inhibition about saying that I would in any event - whatever the change of the law is - have the greatest difficulty in accepting that a child under five was a child whose evidence ought to be looked at as reliable evidence by a jury, unless it is plain from the way the child’s giving her, or his, evidence, that they really know what they are being asked about, and know that this is something that ... it matters for them to say what really happened.<sup>44</sup>

Two interviewees thought children need the capacity to be task centred when in court.

A Crown Prosecution Service interviewee commented:

The videos are very helpful to us, in the sense that we see the child and we can actually see how they’re responding and reacting. I think in particular, and some people would say unfortunately, it leads us to write off some of the cases involving young children, where perhaps on paper they would look OK. But when you actually see them careering round the room or doing somersaults on the chair, and looking more or less, not much more than a toddler, you realise that ... that that’s ... a judge is not going to have that child giving evidence.<sup>45</sup>

Her comment was echoed by a judge who said that he is not happy with video recorded statements in which the child interviewed is shown ‘playing or running around the room’.<sup>46</sup>

For these criminal justice system practitioners, therefore, the issue of children’s competency to act as a witness was not simply a question of whether a child was capable of offering a reasonably coherent verbal account, (although this was regarded as important if a trial was to be conducted effectively). It also involved a range of other factors, most important of which was whether the child had a sufficient

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<sup>43</sup> Barrister M

<sup>44</sup> Judge J1

<sup>45</sup> Reviewing solicitor CPS1

<sup>46</sup> Judge J2

appreciation of the reason for their being asked to give this account, to approach the giving and testing of the account, responsibly. Age was thought to have some bearing on this.

**Should child witnesses receive preparation for their court appearance?**

The issue of child witnesses needing to understand both the seriousness of giving evidence in a criminal trial and the implications this has, raises the question of whether they should be equipped for their court appearance through pre-court preparation.

**Questionnaire data**

Questionnaire respondents were almost unanimous in supporting the proposition that children should receive information about court procedures and the role of a witness before appearing in court, was almost unanimous, see Table Three.

<b>Table 3: Should children receive information about court procedures and the role of a witness before appearing in court?</b>	
Barristers: n = 16	
<b>Affirmative response</b>	12
<b>Qualified affirmative response</b>	4
<b>Negative response</b>	0

Ten<sup>47</sup> respondents replied simply 'Yes', or more emphatically 'Yes', to this question, while two stated:-

Yes, in a way that is easy for them to understand;<sup>48</sup>

Yes, and seeing their video-tape on a day before the trial, perhaps the week before.<sup>49</sup>

The remaining four qualified their support by specifying that any pre-court preparation should be limited or controlled:

Yes, but only to a limited extent. No question of a rehearsal;<sup>50</sup>

<sup>47</sup> Barristers A B C F G J K L P R

<sup>48</sup> Barrister D

<sup>49</sup> Barrister H

<sup>50</sup> Barrister E

Only on a limited basis;<sup>51</sup>

Yes, but in the same way as adults,<sup>52</sup>

Yes, but it should be in pre-determined form to avoid any risk of unwitting influence.<sup>53</sup>

The provision of information is not in itself synonymous with pre-court preparation, and may be thought of as involving no more than, for example, the availability of a relevant leaflet. Thus while some barristers took the question to infer an active form of preparation for children, as evidenced by their responses that there should be safeguards to ensure that this would not result in contamination of the child's evidence, or that it should not involve the child in rehearsing her or his evidence, others may have interpreted it as involving a more restricted concept. Nevertheless, their responses show unequivocal agreement that children should be enabled, by appropriate means, to understand what is involved in a court appearance, and thus become equipped to take on the role of a witness.

### **Qualitative data**

The issue of pre-court preparation, as opposed to the more restricted concept of information-giving, was explored in interviews and discussions. It became clear that the concerns expressed above about the form taken by any preparation of child witnesses were quite widely supported.

Interviewees acknowledged that there can be benefits in child witnesses having an opportunity to familiarise themselves with the demands which would be made on them at court in order to perform in an optimal way when called to testify. They were therefore prepared to support a form of preparation which would be task related. However, reservations were expressed about the arrangements for such preparation and, in particular, the credentials of those providing it<sup>54</sup> and their attitudes towards the criminal justice system.<sup>55</sup> One barrister commented that it should be:

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<sup>51</sup> Barrister N

<sup>52</sup> Barrister M

<sup>53</sup> Barrister Q

<sup>54</sup> Barristers b c D d E M m

<sup>55</sup> Barristers D E M

... out of order for social workers to discuss the procedure at court with children ... Because I think they ... give the wrong impression, very often. And I suspect, unwittingly, sometimes terrify the child unnecessarily.<sup>56</sup>

The involvement of volunteers in child witness preparation was a source of concern to others,<sup>57</sup> although some<sup>58</sup> valued the role being developed at the courthouse by a recently established Witness Support Service, staffed by volunteers. Given the importance that was attributed to the information offered to child witnesses being accurate, some barristers felt that preparation should be undertaken by a single individual who might become known and trusted. The police tended to be identified as having the skills and experience required. The view of one barrister that:

[I]n any one area there's probably a lot to be said for having a single policewoman who is responsible for giving the child witness a general preview of what's going to happen at court<sup>59</sup>

was echoed by two colleagues.<sup>60</sup>

### **Is children's evidence as reliable as that of adults?**

The abolition of the mandatory requirement for corroboration of children's evidence was a central feature of the Criminal Justice Act 1988. In view of the long-standing discrimination against children's testimony by the rules of evidence, the extent to which legal practitioners are now satisfied that children's evidence can be treated in the same way as that of adults, was another key issue addressed.

### **Questionnaire data**

Barristers were divided on the question of the reliability of children's evidence as compared with that of adults.

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<sup>56</sup> Barrister M

<sup>57</sup> Barrister R

<sup>58</sup> Barristers H J

<sup>59</sup> Barrister M

<sup>60</sup> Barristers E H

<b>Table 4: Is children's evidence generally as reliable as that of adults?</b>	
Barristers: n = 16	
<b>Yes</b>	4
<b>Qualified affirmative</b>	2
<b>No</b>	4
<b>Qualified negative</b>	3
<b>An individual matter</b>	2
<b>Uncertain</b>	1

Four respondents simply replied 'No'<sup>61</sup> to the question 'Is children's evidence, in your view, generally as reliable as that of adults?', and the same number replied 'Yes'.<sup>62</sup> Qualified doubts were expressed by three:-

No, as a general rule I do not think it is as reliable but not through any fault of the child but down to the tenderness of their years, and the fact that they do not always have the same capacity for recollecting events;<sup>63</sup>

No, but that is only a common-sense answer. A convincing child witness can be as good as a convincing adult - but jurors who are parents know that a child can sometimes tell lies that they themselves genuinely believe;<sup>64</sup>

I'm not convinced that it is. Children can, I think, be more easily pressured into giving false evidence. On the other hand, I think that their very youth may make juries more inclined to believe them;<sup>65</sup>

while two barristers replied with a qualified affirmative:

It can be;<sup>66</sup>

Once children are of an age to distinguish fact from fantasy I would say in essence, yes. But adults often see other things as important and so tend to ignore or deny the base truth [*sic*].<sup>67</sup>

Others<sup>68</sup> indicated that they found it impossible to generalise on this issue, or believed such generalisations were not helpful, while one wrote:-

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<sup>61</sup> Barristers A C G L

<sup>62</sup> Barristers B E J K

<sup>63</sup> Barrister D

<sup>64</sup> Barrister F

<sup>65</sup> Barrister P

<sup>66</sup> Barrister N

<sup>67</sup> Barrister Q

<sup>68</sup> Barristers H M

I find this a difficult question to answer one way or the other. My experience is that juries tend to act more readily on the evidence of children. (Judging by verdicts).<sup>69</sup>

### Qualitative data

In view of the lack of a consensus on this issue, it was explored further in interviews. When asked to differentiate between a child's evidence and that of an adult, eleven barristers<sup>70</sup> highlighted young children's developmental immaturity and suggestibility as risk factors which have to be taken into account when assessing the reliability of their evidence. The same factors were implicit in a judge's account of his reasoning when deciding to rule inadmissible a video-recording of an investigative interview with a three year old child in a case which he had dealt with in another area:

... it was a hopeless, *hopeless* video. She was saying 'Yes' to anything. [...] She gave four different accounts. And when you looked ... when you saw exactly what happened, each account, which was different, was the result of the way the question was put to her. To the extent that ... I mean .... there were ... there were two accounts which had no abuse involved. Two said, you know, she had been touched; two said she hadn't been touched. Poor little girl. There was no way that you could say that that was, sort of, evidence which could reliably found a ... found a conviction.<sup>71</sup>

From his perspective, the child's account of abuse may well have been true.

However, her contradictory statements, whether the product of uncertainty about the purpose of the interview; uncertainty about what had occurred; embarrassment; or suggestibility, failed to meet the standard of proof required in a criminal trial.

Young children's capacity to engage in lies and fantasies, coupled with their inexperience of legal processes, was another type of problem which led some practitioners<sup>72</sup> to suggest that in practice it is important that there should be a careful evaluation of their statements, irrespective of whether or not they are competent to act as witnesses, (in the sense of being able to make coherent verbal statements), or have the potential to give reliable accounts of their experiences. However, this view

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<sup>69</sup> Barrister R

<sup>70</sup> Barristers b D E F H h J L m P R

<sup>71</sup> Judge J1.

<sup>72</sup> Barristers F L M

was at times expressed in a way suggesting that it was not thought to be shared by some other professionals. A propos of this, the judge referred to above, commented:

... to be quite honest, whatever the experts sometimes try and say, we all know from our own personal experience that children aren't necessarily to be believed. And I think that's a perception which needs to be got across. That members of juries will have children of their own and they know that children can make up stories. And I know that there are many who say "Children just don't lie" but that's just not the experience of ordinary people. And, you know, I mean, that's slightly worrying.<sup>73</sup>

This particular concern was expressed most markedly in the context of child sexual abuse and some interviewees implicitly suggested that this particular problem had taken on the proportions of a moral panic. Nine barristers indicated their belief that there was a current climate of opinion which held that children's complaints of sexual abuse should always be believed,<sup>74</sup> and they furthermore suggested that sexual abuse investigations are frequently approached on the basis that the complaint is well-founded. These barristers acknowledged that where a child makes a serious allegation, investigators should take the complaint seriously. However, some thought that identifying cases of sexual abuse had 'become a sort of crusade',<sup>75</sup> and that as a consequence investigations were not always carried out with the necessary degree of open-mindedness. This led to a concern that an increasing number of false allegations would come before the courts:

Given that children tell lies, even very young children know about sex, false sexual allegations are an everyday occurrence on "soaps" and certain well-known people advocate the view that children "must" be believed, the likelihood of a false allegation is, if anything, greater now than at any stage in our history.<sup>76</sup>

Nevertheless, many barristers themselves felt that the younger the child giving an account of sexually abusive experiences, the more likely the account was to be true:

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<sup>73</sup> Judge J1

<sup>74</sup> Barristers b c d g h K M m R

<sup>75</sup> Barrister M. Barrister b expressed the same opinion.

<sup>76</sup> Barrister M

... you're going to listen very hard to the child and, you know, unless someone is shown to be lying, [have] a fair degree of belief in what they're saying',<sup>77</sup>

I suspect most people start with the assumption that with very young children, they are probably telling the truth',<sup>78</sup>

Difficult to conceive a child under five that's lying.<sup>79</sup>

This led them to believe that a jury would be likely to have a considerable sympathy for a child complainant in an abuse case:

I'd have thought the natural reaction of a jury is to have a fair amount of sympathy for a child in the first place.<sup>80</sup>

The issue of the reliability of children's evidence was therefore seen as a complex one. While only a minority of barristers thought that children's testimony is inherently less reliable than that of adults, there was nevertheless a widespread view that especial care has to be taken when evaluating children's testimony. In particular, emphasis was placed on the risk that younger children, while capable of giving a wholly reliable account of their experiences, may nevertheless not fully appreciate the necessity of so doing when questioned either by a police investigator, or trial barrister. At the same time, some barristers doubted that their concern about this issue would be understood or appreciated by other practitioners, especially in cases involving charges of child sexual abuse. Yet the seriousness of the penalties imposed on those convicted of sexual offences against children; the natural sympathy of jurors with the alleged victim; and the limited nature of the evidence usually available, made such cases, from the barristers' perspective, particularly difficult, and emphasised the importance of the processes by which evidence is brought out in court, and critically evaluated. Barristers' views on the effects of the video-link and video-recorded evidence on these inter-related processes are summarised in the sections which follow.

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<sup>77</sup> Barrister N

<sup>78</sup> Barrister M

<sup>79</sup> Barrister G

<sup>80</sup> Barrister N

## **Attitudes towards the new provisions for children's evidence**

### **Benefits and costs of the new provisions to the prosecution**

#### **Questionnaire data**

In response to an open question about the costs and benefits of the new provisions to the prosecution one prosecuting barrister said there are no benefits.<sup>81</sup> The majority of barristers, however, saw a number of benefits, especially from pre-recorded video statements. Those most frequently referred to are summarised in Table Five, below.

<b>Table 5: Most frequently identified benefits of the new provisions to the prosecution</b>	
<b>Easier for the child to testify</b>	6
<b>Virtual guarantee of having a case to put to the jury</b>	4
<b>Assists case preparation</b>	4
<b>Increases likelihood of prosecution</b>	4
<b>Case easier to conduct</b>	3
<b>Reduces risk of child omitting or forgetting evidence</b>	3

Several barristers<sup>82</sup> commented that they themselves derive a number of practical benefits from the new provisions. Prosecuting counsel know precisely what the child's evidence will be if this is contained in a video-recording, enabling them to make a clear assessment of the strength of the case and the likelihood of the jury accepting the evidence. Charges against the accused can be drafted with precision, opening speeches prepared with confidence, and in many ways cases become easier to conduct:-

The Prosecution are released from their often onerous obligation to conduct a careful examination-in-chief with a child witness;<sup>83</sup>

Obviously easier for Prosecution counsel to play a video than to coax a victim through his/her evidence;<sup>84</sup>

I knew the precise case - there were no surprises;<sup>85</sup>

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<sup>81</sup> Barrister K

<sup>82</sup> Barristers E F H J N P

<sup>83</sup> Barrister N

<sup>84</sup> Barrister F

<sup>85</sup> Barrister H

The prosecution in the normal course of events simply press a button.<sup>86</sup>

However, the main benefit of the new provisions was thought to be their contribution to reducing the stress of a court appearance for child witnesses. Nine of the sixteen questionnaire respondents<sup>87</sup> referred either to children being more relaxed and confident when giving evidence over the live link,<sup>88</sup> or to the admissibility of pre-recorded statements enabling evidence to be received when it otherwise might not.<sup>89</sup>

Easier for the child;<sup>90</sup>

Clearly less distressing for the child and so the child is more likely to come out with the whole story,<sup>91</sup>

Children feel more relaxed and able to express themselves without fear;<sup>92</sup>

Child is more relaxed and confident,<sup>93</sup>

At least the child has a go and is able to give evidence when otherwise might not.<sup>94</sup>

Comments also referred to pre-recorded video statements offering a virtual certainty that the prosecution would have a case to put to the jury. They suggested that replacing a child's evidence-in-chief with a pre-recorded statement means there is no risk of children omitting all or part of their evidence through embarrassment, fear, or memory loss; or of their evidence-in-chief departing in significant respects from their original witness statement.<sup>95</sup> Thus there is almost a virtual guarantee that a submission of 'no case' at the end of the prosecution evidence, will fail.<sup>96</sup>

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<sup>86</sup> Barrister E

<sup>87</sup> In response to Question 1: 'Do you think it was easier or harder for the child to use the TV link than to give evidence in the normal way, or did it make no difference?' the response of barristers was virtually unanimous. See Table II, later in this chapter.

<sup>88</sup> Barristers A B C F G L

<sup>89</sup> Barristers D E N

<sup>90</sup> Barrister C

<sup>91</sup> Barrister F

<sup>92</sup> Barrister G

<sup>93</sup> Barrister A

<sup>94</sup> Barrister E

<sup>95</sup> Barristers D F N

<sup>96</sup> Barristers D J M N

Pre-recorded video makes it easier to get the case in. No risk of the child not coming up to proof or forgetting details;<sup>97</sup>

A virtual guarantee that unless the child is hopeless in cross-examination the case will get to the jury;<sup>98</sup>

Guarantee of the child giving the evidence in the video - i.e. bound to get beyond half time.<sup>99</sup>

Four respondents referred to pre-recorded evidence increasing the likelihood of a prosecution being instituted<sup>100</sup>:-

Pre-recorded video makes it easier to get the case in,<sup>101</sup>

At least the child has a go and is able to give evidence when otherwise might not.<sup>102</sup>

However, barristers were divided on whether this was always in the interests of the child. One commented that the opportunity to know with certainty what a child will say in their evidence-in-chief, and the assessment this permits of the strengths and weaknesses of a case, means that there will be occasions when a decision is made not to proceed:

If there are weaknesses in the evidence these can be seen well before trial and, in a proper case, the child can be spared from the ordeal of a trial which would be likely to be lost.<sup>103</sup>

Others, however, suggested that the admissibility of video recordings is resulting in an increasing number of weak prosecutions going ahead:-

Very often they have a case which would otherwise not get past the close of prosecution;<sup>104</sup>

Children give evidence where they otherwise probably would not.<sup>105</sup>

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<sup>97</sup> Barrister D

<sup>98</sup> Barrister J

<sup>99</sup> Barrister N

<sup>100</sup> Barristers D E N P

<sup>101</sup> Barrister D

<sup>102</sup> Barrister E

<sup>103</sup> Barrister H

<sup>104</sup> Barrister M

<sup>105</sup> Barrister P

While these two statements may be taken to indicate the value of the new provisions in enabling more prosecutions to be brought, they can equally be read as implying that it is doubtful whether this is in the child's, or the public, interest. In the context of other responses given by the barristers concerned, and their comments in interview and discussion, a negative attribution appeared to the researcher, to be the more likely.

The costs of the new provisions to the prosecution, identified by questionnaire respondents, are summarised in Table Six, below.

<b>Reduction of impact of evidence</b>	7
<b>Child unprepared to face cross-examination</b>	3
<b>Harder for jury to assess witness</b>	1
<b>Evidence difficult to follow</b>	1

Fewer costs to the prosecution were identified than benefits. The disadvantage which barristers most frequently noted in response to this question was that of the reduced impact of evidence offered in a pre-recorded statement, or over a television link. Altogether, seven barristers<sup>106</sup> stated that evidence given in this way has less effect than evidence given live in the courtroom before a jury. Comments included the following:-

You lose some of the directness/reality of the evidence,<sup>107</sup>

Cost - loss of emotion - loss of reality - *almost like watching t.v.* - no body language;<sup>108</sup>

The evidence seems a little remote and removed; the 'human' element is lost in not seeing the victim in person,<sup>109</sup>

All ... at the detriment of the Jury actually seeing a convincing live witness.<sup>110</sup>

<sup>106</sup> Barristers B D E F L N Q

<sup>107</sup> Barrister B

<sup>108</sup> Barrister E

<sup>109</sup> Barrister F

<sup>110</sup> Barrister N

This loss of impact was attributed to video technology in general, rather than the live-link specifically, or video-recorded statements. Likewise, it was thought by one barrister that evidence mediated by these technological processes is more difficult for a jury to assess. He commented:

I think juries will find it easier to recall and assess live witnesses.<sup>111</sup>

The other costs which were specified related to pre-recorded statements rather than to the live-link. Three respondents<sup>112</sup> expressed concern that where a video recording is offered in place of a child's evidence-in-chief, the child has no opportunity to acclimatise to in-court questioning before being faced with cross-examination. A further disadvantage mentioned by one respondent<sup>113</sup> was the difficulty of following evidence given in a video recording.

Overall, more barristers identified advantages to the prosecution from the new provisions, than identified costs; see Table Seven below.

<b>Table 7: Benefits and costs of the new provisions to the prosecution</b>	
Barristers: n = 16	
<b>Number of barristers identifying benefits</b>	15
<b>Number of barristers identifying costs</b>	9

While all but one barrister found there to be advantages to the prosecution from the new provisions, only nine identified costs. Two respondents stated there are no disadvantages to the prosecution from the new provisions,<sup>114</sup> and another commented: 'I don't think there is much, if any, disadvantage for the Prosecution.'<sup>115</sup> Four made no reference to there being any costs, identifying only benefits.<sup>116</sup>

<sup>111</sup> Barrister F

<sup>112</sup> Barristers P Q R

<sup>113</sup> Barrister L

<sup>114</sup> Barristers G K

<sup>115</sup> Barrister A

<sup>116</sup> Barristers C H J M

### Qualitative data

In both interview and discussion barristers expressed rather more misgivings about the effect of the new provisions on the prosecution, than was the case in their responses to the questionnaire. A belief that video technology is resulting in juries being distanced from the impact of the evidence appeared to be more widely shared among the practitioners involved in this study than the questionnaire results had suggested.<sup>117</sup>

One barrister explained his view as follows:-

We now of course live in a television age, in which on daily news broadcasts some of the most horrific events from all over the world are presented to us on our television screens within our own homes. I have little doubt that this daily intake of distressing scenes on our televisions may well desensitise members of the jury in appreciating the full trauma of what is being described by the child on the television screen, rather than having the advantage of seeing that child actually giving that evidence to them face to face in court.<sup>118</sup>

His anxiety on this subject was shared by a number of colleagues. For example, a judge reflected:

I feel that this whole process does prevent the child from coming over fully to the jury. I'm a bit troubled by it. ... I know that my clerk and I both felt on the very first case that we did - which was some time ago now, where the defendant was acquitted - that it was mainly because it had sort of depersonalised the child, in a way which meant that the child's real feelings never got across to the jury.<sup>119</sup>

Commenting that he thought juries would love to 'really see' the child witness, this interviewee went on to say that in the courtroom the child 'becomes a person' but over the live link is 'a series of answers'. A sense that children testifying on video and over the television link are somehow perceived by juries as being less real was implicit in this and a number of the comments offered.

Concern was also expressed about the impact of the new provisions on prosecution practice. In interview and discussion, a number of barristers commented that where a

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<sup>117</sup> Barristers b D E F G g H J j K k L M N Q

<sup>118</sup> Barrister M

<sup>119</sup> Judge JI

pre-recorded interview takes the place of evidence-in-chief, the prosecution is precluded from asking questions on matters covered in the interview.<sup>120</sup> This was thought to be frustrating where barristers would prefer to conduct their examination in a manner different to that adopted by the interviewer, or where issues were not covered in the detail barristers would have liked. This belief was expressed with some force by one barrister,<sup>121</sup> who stated that the quality of prosecution evidence is declining as a result of the use of pre recorded evidence. In his view, police officers conducting pre-recorded interviews tend to focus on establishing what has happened, neglecting issues of relevance to a jury, such as the impact on the victim of what had occurred. He contrasted the process of conducting an investigative interview, with that of leading evidence-in-chief. Police officers, he said, are often unaware of precisely what has occurred when undertaking an investigative interview; information about the exact nature, and details, of offences emerges only during the course of the interview, and often in a non-sequential manner. As a result, if video-recorded and offered as evidence-in-chief, the interview can be confusing and difficult to follow, especially in cases of long-standing abuse. Prosecution counsel on the other hand, have all the evidence available to them in advance of the trial, and are in a position to plan the sequence of questioning in order to bring a witness' evidence out to best effect.

Two other barristers<sup>122</sup> likewise noted that in cases involving multiple victims the police may not always be in a position to ask questions of value to the prosecution. For example, evidence demonstrating that one child's testimony will be capable of corroborating that of another, may only emerge in the course of the investigation. There was therefore a belief among some barristers that a pre-recorded interview could straitjacket the prosecution and hamper it by tying it to inadequacies in the investigative interview.

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<sup>120</sup> Barristers D g K P R. Judge J2

<sup>121</sup> Barrister K

<sup>122</sup> Barristers M N

### **Benefits and costs of the new provisions to the defence**

#### **Questionnaire data**

In response to an open question fewer barristers identified benefits accruing to the defence from the new provisions than identified costs; less than half of all respondents specified any advantages. See Table Eight below.

<b>Table 8: Benefits and costs of the new provisions to the defence</b>	
Barristers: n = 16	
<b>Number of barristers identifying benefits</b>	7
<b>Number of barristers identifying costs</b>	11

Two respondents<sup>123</sup> said there are no benefits to the defence in video evidence; one<sup>124</sup> did not answer the question; four<sup>125</sup> referred only to costs; one<sup>126</sup> said there were ‘very few’ benefits, without specifying what these were; and the response of another<sup>127</sup> was difficult to interpret either way. The benefits attributed to the new provisions by the remaining seven barristers are summarised in Table Eight.

<b>Table 8: Most frequently identified benefits of the new provisions to the defence</b>	
<b>Reduced impact of prosecution evidence</b>	3
<b>Prior knowledge of case</b>	3
<b>Child more relaxed</b>	2

Three barristers said that the remoteness of a witness giving evidence over the television link is a material advantage to the defence. All three respondents believed a jury is less likely to be influenced by a witness viewed over a television screen:-

Jury may attach less weight to a video image;<sup>128</sup>

Video and TV evidence is less ‘real’ to a jury who, these days, are used to seeing TV and video fiction;<sup>129</sup>

<sup>123</sup> Barristers E K

<sup>124</sup> Barrister F

<sup>125</sup> Barristers A C Q R

<sup>126</sup> Barrister M

<sup>127</sup> Barrister J

<sup>128</sup> Barrister G

<sup>129</sup> Barrister J

... disadvantage to Prosecution of 'unreality' of witness on screen,<sup>130</sup>

The same number of barristers indicated that case preparation becomes considerably easier when video recorded evidence is available:-

You know exactly what the case is and assuming cross-exam on these issues only - not likely that any fresh evidence is before court;<sup>131</sup>

The main benefit for the defence is easier preparation. You know precisely what the child will say;<sup>132</sup>

They know the precise case without risk of additions being made in court.<sup>133</sup>

Two barristers<sup>134</sup> referred to children being more relaxed when giving evidence over the link, although without indicating precisely how they saw this benefiting the defence. One respondent said this advantage was closely linked with a corresponding disadvantage:-

*A child feels more secure but might not have the same appreciation of the solemnity of the occasion. An untruthful child might therefore be more prepared to persist with an untruthful account.*<sup>135</sup>

Other benefits, although not specified in response to this particular question, were identified elsewhere in the questionnaire. In relation to the defence being assisted by video-recorded evidence in terms of case preparation, one barrister stated:-

One knows the type of character one is going to have to deal with, therefore able to tailor one's approach to cross-examination in advance.<sup>136</sup>

He later reiterated this point in a written paper which he forwarded to the researcher:-

As the precise nature of the child's evidence is known from the outset, the Defence are afforded the opportunity of preparing their cross-examination

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<sup>130</sup> Barrister N

<sup>131</sup> Barrister D

<sup>132</sup> Barrister P

<sup>133</sup> Barrister H

<sup>134</sup> Barristers B L

<sup>135</sup> Barrister B

<sup>136</sup> Barrister N

with more precision and perhaps effectiveness than would otherwise be the case.<sup>137</sup>

These responses suggest that there are three probable advantages to the defence as a result of the new provisions for children's evidence. Any resultant diminution of the impact of a child's evidence-in-chief may be to the advantage of the defendant, while in cases involving pre-recorded evidence, defence counsel are assisted by the knowledge that no new evidence will emerge at the trial, and by the opportunity to plan a detailed cross-examination in advance of the trial itself.

Turning to the costs of the new provisions to the defence, eleven barristers made reference to there being disadvantages, while five<sup>138</sup> did not respond to this part of the question. The costs referred to are summarised in Table Nine.

<b>Harder to cross-examine</b>	6
<b>Increases the likelihood of prosecution/miscarriages of justice</b>	2
<b>Weights the trial in favour of the prosecution</b>	1

Two barristers<sup>139</sup> said that the introduction of video-recorded evidence increases the likelihood of a defendant facing prosecution, as children are now giving evidence in cases which before may not have gone ahead. One<sup>140</sup> went on to say there is now a greater risk of miscarriages of justice, as the protection offered to child witnesses by the new provisions makes it easier for them to lie. The primary concern of questionnaire respondents, however, was the difficulty which it was thought the new provisions place in the way of cross-examination.

Six barristers referred, in their response to this question, to the difficulty of conducting a cross-examination over the television link,<sup>141</sup> while in response to an

<sup>137</sup> Barrister N

<sup>138</sup> Barristers D F J K M

<sup>139</sup> Barristers E P

<sup>140</sup> Barrister E

<sup>141</sup> Barristers A C G N Q R

earlier question<sup>142</sup> seven of the eight barristers acting for the defence when completing the questionnaire, indicated that the introduction of the link had made their task more difficult.<sup>143</sup> Barristers identified two main problems in relation to cross-examination over the link. Firstly, the visual cues which lawyers depend on for assessing demeanour and credibility were felt to be reduced by the limited view of the witness offered by the link. Commenting on this one barrister said:

The person being cross-examined is not physically present and is almost remote from those in court. Equipment varies, but one only sees head/shoulders at best and when important, sensitive matters are touched on, a child's natural inclination is to look down leaving only a view of the top of the head.<sup>144</sup>

Secondly, children were thought to be provided by the link with a degree of immunity from the pressure of cross-examination. Observations included:-

Impact of cross-examination or the reaction to cross-examination is reduced<sup>145</sup>;

She seemed distant and very confident in answering questions<sup>146</sup>.

Barristers' attitudes towards the impact of the television link on the testing of children's evidence were further elucidated by their replies to a question regarding the truthfulness of evidence offered over the link.<sup>147</sup> A majority suggested that with the introduction of the link there is an increased likelihood of children lying; see Table Ten, below.

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<sup>142</sup> Question 2: Did the use of the t.v. link make it easier or harder for you to examine/cross-examine the child, or did it make no difference?

<sup>143</sup> Barristers A C G J M N R. Barrister P was the single exception, stating that in his view there was no difference.

<sup>144</sup> Barrister R

<sup>145</sup> Barrister J

<sup>146</sup> Barrister C

<sup>147</sup> Question 18: Do you think the use of the live link makes it more or less likely that a child witness will tell the truth, or does it make no difference?

<b>Table 10: Does the use of the live-link make it more or less likely that a child will tell the truth?</b>	
Barristers: n = 16	
<b>Easier to lie</b>	9
<b>Easier to tell the truth</b>	1
<b>No difference</b>	4
<b>No response</b>	2

Four barristers said the link makes no difference to the likelihood of a child telling the truth,<sup>148</sup> and two did not reply to the question.<sup>149</sup> However, nine said there is an increased risk of children lying. Although two of these<sup>150</sup> went on to say that the difference made by the link is probably marginal, and a further two<sup>151</sup> noted that at the same time the link makes it more likely that children will be willing to testify, it is nevertheless instructive that only one barrister<sup>152</sup> thought that with the introduction of the link it is now ‘possibly easier [for children] to tell the truth.’

Two additional problems created in relation to the conduct of cross-examination, were identified, these being specific to video recorded evidence. If lawyers acting for the Crown saw children whose evidence-in-chief is offered by way of a video recording as being disadvantaged by going into cross-examination without having had the opportunity to provide a live account of their experiences, some defence lawyers equally felt disadvantaged by this ‘cold start’. Two referred to the difficulty of questioning the child without having had the opportunity to assess the child at the trial, or evaluate how nervous or confident the child was, allowing counsel to adjust his or her approach accordingly.<sup>153</sup> Similarly, the reduction of opportunities to pursue a traditional cross-examination strategy - that of identifying inconsistencies in a witness’ testimony - was noted as a disadvantage which had been created for the defence:-

Video recorded evidence deprives a defendant of the opportunity to see if there are inconsistencies between the previous statement of complaint and

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<sup>148</sup> Barristers J K M Q

<sup>149</sup> Barristers H R

<sup>150</sup> Barristers F P

<sup>151</sup> Barristers B E

<sup>152</sup> Barrister D

<sup>153</sup> Barristers Q R

evidence at trial<sup>154</sup>;

The use of video evidence as opposed to giving evidence-in-chief by TV link gives no opportunity to see whether or not the child can give a consistent account when questioned by prosecution<sup>155</sup>.

### Qualitative data

The hallmark of the trial process is the careful presentation, weighing, and testing of evidence. Given the oral nature of the English trial, advocacy is central to legal practice and may be seen as the characterising skill of the barrister.<sup>156</sup> It was in their accounts of the impact of the new provisions on the role of the defence that barristers offered their most detailed accounts of their understanding of advocacy, and spoke of the demands the reforms are imposing on them to modify established ways of working.

Three barristers<sup>157</sup> explicitly stated that subjecting a witness to a degree of stress is an inherent part of the trial process and assists in eliciting the truth. It appears to have been this belief that underpinned much of the concern that the live link may increase the risk that children will be less than wholly truthful at court, as the following quotation illustrates:

... the [live link] is designed to set the child at rest, and make it easier for them, and so of course it inevitably, unfortunately, makes it easier for the child who - perhaps - comes to court to lie, because they're not walking into court thinking that God is about to strike them down or something, you know, if they tell lies. They're in a, hopefully, more cosy, smaller room, with people saying "Are things all right?" ... [But] part of the reason ... that people dress up in these rather daft clothes, and have judges that sit, you know, fifteen feet higher than anybody else in there, is to intimidate slightly. I mean, that's the whole point really. ... To make it formal, to make it, anybody, let alone a child, appreciate that it's a very serious business. You know, coming to court either to tell the truth or to lie, either one. .... Having said all that, of course, that's not taking into account that it's no doubt fairly intimidating for a child anyway to come to court, whether they're sitting in a little room somewhere or sitting in a sort of forty foot court.<sup>158</sup>

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<sup>154</sup> Barrister Q

<sup>155</sup> Barrister R

<sup>156</sup> Morison, J. and Leith, P. (1992) *The Barrister's World and the Nature of Law*. Open University Press: Milton Keynes, p.23.

<sup>157</sup> Barristers E H N

<sup>158</sup> Barrister N

In contrasting the desire to protect the interests of young children by ensuring they are not subjected to undue stress with the belief that subjecting witnesses to a degree of pressure is a central element of the trial process, this interviewee highlighted a significant factor in his ambivalence towards the video reforms. He went on to suggest that direct contact with the witness is an invaluable aid in evaluating his or her honesty:-

... it's very difficult to lie to someone bold face. People do tend to look the other way and that kind of thing. And of course, that is the other thing [when you are not] actually with the person. You can't really criticise as it were, a kid who's looking at a screen - 'cos they're looking into a camera - for not looking you full in the face. And so [...] it's far more difficult to tell whether [...] they're not telling you the truth.<sup>159</sup>

Other barristers referred in similar terms to their reliance on close observation of witnesses' demeanour, one remarking simply:

You don't only need to know what [the witness is] saying, you need to actually observe how they're saying it.<sup>160</sup>

Barristers were thus concerned at what they saw as their, and jurors', reduced opportunities to observe witnesses' body language when evidence is given over the live link. One commented:-

You don't pick up the body language. Which is how you judge people. It's how you judge people in ordinary day life and you can't do it [on the link].<sup>161</sup>

Another said:-

Although you've got the screen there, it isn't the same. It's like having a conversation with anybody - you're not ... you don't just listen to the words, you listen to, or you watch the way people react. It's so-called body language. And I think it's very important, especially in court. In normal conversation you're not thinking "Well, is this person telling the truth or lying

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<sup>159</sup> Barrister N

<sup>160</sup> Barrister E

<sup>161</sup> Barrister M

to me?" but, I mean, that's the whole essence of what you're doing at court. And ... body language is extremely important for that, and [the link] does largely cloud, if not destroy it, because ... you don't really get an idea of them particularly well.<sup>162</sup>

In relation to the testing of evidence, a number of the legal practitioners<sup>163</sup> involved in this study regarded the cross-examination of young children as an especially difficult process, and some spoke of the problems which they had experienced:-

It is very difficult to actually cross-examine a young child - and, I mean this was a problem whether they gave their evidence live or whatever - because they don't understand what it is you're really, really getting at. I mean, it's a very real art. ... And of course delay, which is one of the great iniquities of our system anyway, means that a child of six or seven - it's a good thing in many ways - will often have forgotten what's happened. So, when you try and cross-examine, you just get "I don't remember" or "I don't know". I mean, you can often get children to say "Well, it didn't happen then did it?" and they'll probably say "No", and yet, you know, they've given a detailed account twelve months earlier of what did happen.<sup>164</sup>

Nevertheless children were not necessarily seen as being at a disadvantage compared to adults when cross-examined:-

... in some ways [children] are at a disadvantage in the sense that they're not as worldly wise, they're not as experienced and therefore if you cross-examine them, they are perhaps open to suggestion that much more and, they can't sort of see good points coming as it were, and avoid them. But on the other hand, of course, it's much more difficult to cross-examine a child in the sense of ... juries are not going to be very sympathetic if you ask kids lots of really "clever clever" questions or try to batter them into submission. Whereas you can get away with that ... with an adult, far more.<sup>165</sup>

A number of other barristers<sup>166</sup> similarly maintained that juries react negatively to the aggressive cross-examination of children. However, in the opinion of one interviewee, a productive strategy available to the defence is that of highlighting inconsistencies in a child's account:-

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<sup>162</sup> Barrister N

<sup>163</sup> Barristers b E h K M m. Judges J1 J2

<sup>164</sup> Barrister M

<sup>165</sup> Barrister N

<sup>166</sup> Barristers D E F H J

The only way you are going to catch a child out, if he or she is lying, is effectively to, you know, go over it all again and get a completely different account. Which in itself doesn't mean a child is telling lies because twelve months later they may have a completely different recollection of the important parts of it. But, it's through showing inconsistencies in the evidence that you're going to cast doubt on it, not by calling the child a liar from the word go.<sup>167</sup>

However, opportunities for the employment of this strategy were thought to be reduced by the use of pre-recorded statements as a child's evidence-in-chief.<sup>168</sup>

Commenting that these problems, while not insuperable, are making the task of cross-examination more difficult, one barrister<sup>169</sup> indicated that perhaps different skills are required when examining witnesses over closed circuit television. However, he was unable to specify what these might involve. Another, acknowledging that the video facilities have meant a loss of control for barristers over both the witness and the presentation or testing of the evidence, remarked simply: 'The art of advocacy is dying on its feet.'<sup>170</sup>

### **Balancing the costs and benefits of the new provisions**

Barristers were not asked in the questionnaire to express an overall view on the way in which they saw the costs and benefits of the new provisions balancing each other out. Nevertheless some of their comments pointed in this direction and a number of them, in interview and discussion, reflected on this topic. While some<sup>171</sup> saw the advantages and disadvantages to the prosecution and defence respectively as relatively equally balanced, others<sup>172</sup> saw the advantages as weighted more in one direction than another. One stated in replying to the questionnaire:-

... there is probably a leaning to the Prosecution. Whether this is right or wrong depends on your view, but most judges give a fair warning to the jury.<sup>173</sup>

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<sup>167</sup> Barrister M

<sup>168</sup> By, among others, barristers b E G Q R

<sup>169</sup> Barrister N

<sup>170</sup> Barrister M

<sup>171</sup> Barristers D L P

<sup>172</sup> Barristers b c d E H M N

<sup>173</sup> Barrister H

### **Benefits and costs of the new provisions to the trial process**

Overall, legal practitioners were rather more positive in their evaluations of pre-recorded evidence than the live link, and saw a number of advantages to children, to the trial process and to themselves from the admissibility of video recordings of investigative interviews. From the perspective of the trial process, an advantage which some<sup>174</sup> practitioners identified was the opportunity the recording provides to evaluate the investigative interview as a whole and also the skills of the practitioner who conducted it. In relation to this, one barrister wrote:-

Whilst there is a natural sympathy for the genuine child victim, great care has to be taken to identify the lying or mistaken child (who can be devastatingly convincing). In this respect the “Social Worker” habit of saying “You’re doing well” when the child makes a “disclosure” is positively dangerous in that it clearly suggests that that is what the interviewers want to hear. ([...] in a recent case I was involved in two young children had lengthy interviews in which they said what a nice man the accused was and he had done nothing wrong - at no stage were they told they were doing well!)<sup>175</sup>

A judge, in a similar vein, remarked:-

I think one of the areas which has undoubtedly caused worry for judges and indeed lawyers generally in dealing with these things, is the concern that there’s a very, very difficult exercise that the child care person has to go through in getting the story out of a little child. And that’s the critical moment at which, you know, the story is either created or is brought out. And the real concern is the extent to which, on occasions, in order to draw it out, those doing the questioning [...] may actually have been creating it. That I think is the area of the greatest ... suspicion by everybody concerned with the criminal justice system ... [W]e’ve all just had too many experiences where you’ve heard the investigating care officer [...] asking questions which so clearly implant the answer in the child’s mind, that you have no confidence. Jolly difficult, I know to bring it out. But you can’t therefore have confidence that that’s what actually did happen.<sup>176</sup>

In providing not only a verbatim record of what was said in the interview, but also a visual record of the interactions taking place and the demeanour of all the parties

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<sup>174</sup> Barristers b g Q R

<sup>175</sup> Barrister M

<sup>176</sup> Judge J1

involved, the video recording was seen as an invaluable aid to the trial process. One barrister wrote:-

Evidence by video recording enables a contemporaneous record to be made which shows precisely how questions were put and in what terms, and how answers came about. Question and answer statements may not contain the entirety of what was said or how things were said.<sup>177</sup>

There is a tension, however, between barristers' appreciation of the enhanced opportunity offered by video-recorded evidence to assess the manner in which the prosecution evidence had been obtained, and their desire to see evidence presented to the jury in a clear and structured way. Three practitioners<sup>178</sup> commented that video-recorded interviews can be difficult to follow. Additionally, while acknowledging the value of a jury hearing a child's original account of their experiences, four<sup>179</sup> also expressed disappointment at what were seen as sometimes rather formal and constrained interviews, querying whether these adequately communicated the children's experiences and evidence to the jurors, or enabled them to feel the full emotional impact of the evidence. Reflecting on the artificiality and remoteness of evidence given by video, a judge suggested it has become more difficult for a jury to evaluate children's complaints:-

I think that there is a sense in which [the] videos become a very mechanical way of getting the evidence out. [...] Now I think that this actually operates to the disadvantage of the children because I think that juries find it difficult to make an assessment of whether or not that child's telling the truth or not in those circumstances. [...] [T]he consequence of doing a video of the evidence-in-chief followed by a video [*sic*] only of cross-examination, is that you get a rather curious picture, because cross-examination ... if properly conducted, may well be so controlled that the child never has an opportunity to get across his or her account again. [...] And the consequence is sometimes, I feel, that this whole process does prevent the child from coming over fully to the jury. I'm a bit troubled about it.<sup>180</sup>

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<sup>177</sup> Barrister R

<sup>178</sup> Barristers K L; Judge J1

<sup>179</sup> Barristers H D K M

<sup>180</sup> Judge J1.

A belief that the new provisions have increased the rate of acquittals was shared by a number of barristers. They thought that the stress of a court appearance has been reduced by the introduction of the live-link and pre-recorded testimony, but nevertheless queried whether the perceived trauma for children of an appearance at court had not been over-emphasised,<sup>181</sup> and expressed misgivings about the overall impact of the new system on the trial process. One barrister,<sup>182</sup> after speaking positively of the benefits of the new provisions for children, admitted: ‘In my heart, I don’t like them’, and explained this comment by saying it has become harder to secure a conviction. Juries, he thought, are less willing to convict on the basis of the evidence of a witness seen on a television monitor.

### **Benefits and costs of the new provisions to the child witness**

If practitioners were sometimes ambivalent about the benefits of the new provisions to the trial process as a whole, they were nevertheless virtually united in seeing them as being of considerable value to children; see Table Eleven, below.

<b>Table 11: Was it easier or harder for the child to testify using the t.v. link than to give evidence in the normal way, or did this make no difference?</b>	
Barristers: n = 16	
<b>Easier to testify</b>	14
<b>Harder to testify</b>	0
<b>No difference</b>	1
<b>Don’t know</b>	1

Fourteen of the sixteen questionnaire respondents said it is easier for children to give evidence over the television link than to testify in the normal way. Of the remaining two barristers, one said that there is no difference,<sup>183</sup> and the other<sup>184</sup> that he did not know. Similarly, in the trials in which pre-recorded evidence was shown, all five prosecution counsel concerned,<sup>185</sup> and four of the five defence counsel,<sup>186</sup> said the use of video evidence has made it easier for the child. Children were seen as being more relaxed when giving evidence over the live link, while the advantages of pre-recorded

<sup>181</sup> Barristers b D E H K M N; Judge J2

<sup>182</sup> Barrister D

<sup>183</sup> Barrister J

<sup>184</sup> Barrister Q

<sup>185</sup> Barristers E F H K L

<sup>186</sup> Barristers G M N P

evidence were thought to be the potential for greater informality in the interview process, and the opportunity to minimise some of the problems resulting from delays in cases reaching trial:-

... the child [is] able to give her account, or his account, if the interviewer is prepared to do it, in the child's own time, and in a way which is less intimidating than having to be brought to court, even if it is to a room which is set apart. ... And then the other thing is, of course, time. The video can take the account of that little boy or girl closer to the time of the events, before things have either fallen out of the child's mind or before you can say that, well, really is this the account of what the child's remembering or is it simply now a fixed memory of something somebody may have said as much as something that they saw.<sup>187</sup> (Judge)

However, in balancing the overall costs and benefits of the new provisions, some legal practitioners<sup>188</sup> came to the conclusion that while the use of the television link and video recorded interviews appears to be a way of facilitating the giving of evidence by children, and may reduce the risk of a court appearance resulting in secondary abuse, nevertheless it is doubtful if the use of these provisions is always in the children's interests. One wrote:-

To my mind, the advantages [...] are largely procedural. Whereas the disadvantage caused by the remoteness of the child witness to the jury, goes to the very heart of the matter, namely whether a jury are more or less likely to accept his or her evidence. I would suggest that this disadvantage [...] outweighs all of the advantages [...] In that although the use of this equipment no doubt lessens the short term trauma to the child, if the result of the use of this equipment is to make it less likely that a guilty person will be convicted of an offence, then this may well be to the more serious long term disadvantage of the child.<sup>189</sup>

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<sup>187</sup> Judge J1

<sup>188</sup> Barristers D E N P; Judges J1 J2

<sup>189</sup> Barrister N

### Future developments

Doubts about the overall impact of the new provisions were reflected in barristers' responses when asked in the questionnaire what further legal and procedural developments they would favour to assist child witnesses; see Table Twelve.<sup>190</sup>

<b>Table 12: What further innovations, if any, would you favour to assist child witnesses?</b>	
Barristers: n = 16	
<b>No further innovations</b>	3
<b>Modify or limit the use of the present system</b>	4
<b>Extend the present system</b>	2
<b>Discontinue the use of the present system</b>	2
<b>Unable to identify any further developments</b>	2
<b>No response to question</b>	3

Three respondents<sup>191</sup> gave no answer to this question, and two<sup>192</sup> were unable to think of any further improvements, one saying the new arrangements have made a big difference and overcome problems from the past.<sup>193</sup> Three<sup>194</sup> said categorically that there should be no further innovations. Of the eight barristers making specific recommendations, a number focused on the need for practical improvements in the operation of the present system. Their proposals included better court listing;<sup>195</sup> improved training for investigators;<sup>196</sup> and a more advanced audio- and video-recording system.<sup>197</sup> Additionally, one barrister who had left this section of his questionnaire blank, subsequently wrote to the researcher outlining a number of practical recommendations:-

<sup>190</sup> Some barristers made suggestions which fall into more than one category. For the purposes of this table, their responses have been interpreted in terms of the predominant direction of their comments.

<sup>191</sup> Barristers D F M

<sup>192</sup> Barristers A P

<sup>193</sup> Barrister P

<sup>194</sup> Barristers B C K

<sup>195</sup> Barristers E N

<sup>196</sup> Barrister R

<sup>197</sup> Barrister H

If the present system is to be retained a number of practical improvements are vital:

The judge asked to make the order allowing the video to be used must view it before doing so. He should also have before him certificates that both sides have watched the video (realistically it should be counsel who has watched them - this will require the earlier delivery of briefs and a longer time for the application to be made);

[...];

A much lower age limit should be imposed - ? about 12;

[...];

Counsel must be involved much earlier. Prosecuting counsel would invariably prefer to call a child witness "live" if the witness is felt able to cope. This in practice is impossible if the child (and more particularly, the parents) has been told she will not have to give evidence in court.<sup>198</sup>

The lack of enthusiasm for the video facilities implicit in this response is reflected in the questionnaire statements of other barristers, including two of those who made some of the practical recommendations referred to above.<sup>199</sup> A preference for a relatively limited use of the video link or video-recorded evidence (or even the discontinuance of their use), was quite widely expressed:-

I think that the tv link on its own makes the child's evidence appear rehearsed and cold. My experience is that such cases often fail before a jury. The use of a video-taped interview is quite different but if that is not available, I would prefer to use the evidence live in court with a screen,<sup>200</sup>

Abolish T.V. and video links [*sic*]and institute a much more efficient system of screening and segregation of child witnesses;<sup>201</sup>

Children should be giving evidence preferably in court with screens (screening defendant). If very young - say below age ten - then video link but not video evidence per se.<sup>202</sup>

Only two barristers made proposals for an extension of the use of the video facilities. One suggested that children might give evidence from home or school by video-link,<sup>203</sup> and another proposed Pigot's system of full pre-court hearings:-

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<sup>198</sup> Barrister M

<sup>199</sup> Barristers H N

<sup>200</sup> Barrister H

<sup>201</sup> Barrister J

<sup>202</sup> Barrister L

<sup>203</sup> Barrister G

If there is to be video recorded evidence the whole should be recorded as soon as the Defence are ready, including cross-examination.<sup>204</sup>

Practical measures which would make the courtroom and trial procedures more child-friendly were the preferred option of a number of legal practitioners. A questionnaire respondent recommended:-

... prompt listing of cases in which child to give evidence - on fixed dates.  
Child to give evidence 'live' in court with fully adequate screens - not artificial amateur ones. Judge/counsel without wigs and robes.<sup>205</sup>

Subsequently, in an interview, the same barrister reflected on the value of the video facilities in reducing the stress experienced by child witnesses, but nevertheless concluded:-

I'm still slightly more in favour of having the geography of the court changed, rather than having all this business with television and videos. [...] sort of a user friendly court. [...] You know, you can have Donald Duck on the wall if they want. [...] Have the accused sat in the little room [remote witness room] watching all of this. [...] So the child can come in, uninhibited, into a vaguely friendly atmosphere as it were.<sup>206</sup>

Another suggested that the trend towards a more interventionist approach by judges would have overcome many of the problems the video facilities had been designed to address:-

I think you [should] make the actual in-court procedure as informal as you can with child witnesses. [...] [M]ore and more judges, in any event, were prepared to help the child remember the evidence if it was quite obvious that the child was not saying anything because they were awe-struck. You know, the odd leading question from the judge to bring the child's mind to the evidence it was thought they were going to give<sup>207</sup>

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<sup>204</sup> Barrister Q

<sup>205</sup> Barrister N

<sup>206</sup> Barrister N.

<sup>207</sup> Barrister M

A judge was similarly of the opinion that a child-centred approach to in-court testimony would be preferable to the system of video-recorded evidence:-

... if one could devise some way [...] of asking the questions [...] by those who are involved in the case itself, in other words by the barristers with the judge there, but in some sort of milieu which would enable the child simply to be there, perhaps with mother and so on, [and] the jury able to see that exercise [...] [t]hat would be a more satisfactory solution.<sup>208</sup>

## Summary

The child witness reforms were underpinned by three primary aims. These were:-

1. To circumvent both the necessity for child witnesses to confront the defendant in the courtroom, and the embarrassment and formality associated with testifying in public, by introducing a system of video links and video-recorded evidence, thereby reducing the stress of a court appearance;
2. To enable more, and younger, children to appear as witnesses, by modifying or abolishing the corroboration and competency rules; and
3. To ensure an increased number of prosecutions in cases of child abuse.

Barristers participating in this study thought the introduction of the live-link, and the use of video-recorded statements as evidence-in-chief, have enabled more children to act as witnesses. However, they were divided on the merits of the new provisions.

A clear majority believed the experience of giving evidence is now a less stressful one for children, and that, with the introduction of video-recorded evidence, the risk of children omitting or forgetting parts of their evidence has been reduced.

Nevertheless, a considerable number had misgivings about the impact of the new provisions on the trial process as a whole. Furthermore, they expressed reservations as to whether the new provisions work in the long-term interests of child witnesses. Many of these barristers suspected that evidence offered over the live-link, or in a video-recorded statement, has less impact on a jury than that given live in the courtroom itself. This concern reflected a belief that there is a degree of artificiality

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<sup>208</sup> Judge J1

involved in presenting a witness on a television monitor, the witness being de-personalised by this process, and their evidence acquiring an air of unreality.

Furthermore, it was thought that the limitations imposed by the 1991 Criminal Justice Act on the control which the Crown has over the presentation of prosecution evidence, have had a detrimental effect. Where evidence is not dealt with in sufficient detail in a video-recording, or where it does not emerge in a clear, logical, sequence, these deficits cannot be remedied at the trial, possibly resulting in the full import of the evidence being lost.

These various concerns led to a suspicion that an increasing number of cases are now being lost, putting in question the benefit of the new provisions to children.

In relation to barristers' attitudes towards child witnesses, it was apparent that many practitioners are sensitive to the demands of a court appearance on children, although a number questioned whether there has not been some exaggeration of the harmful effects which this can have. Furthermore, some thought that difficulties associated with the size, formality, and public nature of the courtroom, and direct confrontation with the accused, could be overcome by introducing more informal procedures for hearing evidence from children, and by modifying the layout of the courtroom, rather than by relying on video-technology to circumvent these problems.

Barristers continued to express caution about young children becoming witnesses, remaining concerned that pre-school children in particular would be unlikely to appreciate the seriousness of a court appearance. A significant number still supported the concept of an age-limit below which children should not normally become a witness. While others conceded that imposing an age-limit may not be appropriate, they nevertheless believed that there has to be an assessment to determine whether an individual child's evidence can be relied upon.

Thus, while there was some evidence of barristers' willingness to consider how the interests of child witnesses can be accommodated within the criminal justice system, it

was less clear that reform of the competency and corroboration rules has prompted a fundamental shift in practitioners' attitudes towards children's evidence.

The next chapter turns to the trial process itself, presenting information based on courtroom observation. The impact of video technology on the stress experienced by children, and its effects on the trial process, are addressed.

## CHAPTER SEVEN

### OBSERVATIONS AT COURT

This chapter is based on all contested criminal prosecutions involving evidence from child witnesses which were heard at one Crown Court Centre over a seven month period.<sup>1</sup> Its aim is to investigate the implementation of the procedural reforms for child witness introduced by the 1988 and 1991 Criminal Justice Acts. The use of the video link and video-recorded evidence in study cases is described, and their discernible effects on the trial process are examined. The extent to which these new provisions have reduced the stress of a court appearance for child witnesses is considered and comparisons are drawn between children who testified in the courtroom and those whose evidence was given from a remote witness room. Additionally, aspects of a court appearance which are potentially stressful for child witnesses but which have not been affected by the reforms, are identified.

#### **Structure of the chapter**

This is a long chapter. To make it more accessible, the topics which are discussed, and the order in which they are addressed, are outlined below.

Firstly, the methods by which data for the chapter was collected are briefly described. Details of the research sample are then given, including the number of cases involved; the way in which cases were finally dealt with; the offences charged; and characteristics (age, gender, etcetera) of the defendants and child witnesses.

The main body of the chapter is divided into two parts and analyses study cases from two perspectives; that of the child witness, and that of the trial process.

The section on child witness perspectives considers three broad topics:

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<sup>1</sup> 20 December 1993 to 18 July 1994

1. Time factors pertaining to the children's involvement in the criminal justice process, including the length of time taken for cases to be processed; delays in starting the final hearing; the length of time spent by children in the witness box or remote witness room; and interruptions occurring during their testimony. Some of these factors are unrelated to the new provisions, and point to limitations of the child witness reforms, while others appear to be associated with the use of video technology.

2. The role of the trial judge and counsel. Irrespective of whether a video-recorded statement by a child witness is admitted in evidence, all child witnesses are required to provide oral testimony at court, whether in the courtroom itself or from a remote witness room. The way in which the trial is conducted, and the manner in which children are questioned, will therefore have a bearing on the effect which criminal justice system involvement has on them. The interventions by judges in the research sample are analysed in order to determine how active a role they played in protecting the interests of child witnesses. The questioning style of counsel is also assessed.

3. Observations of signs of stress shown by children while testifying. The demeanour of child witnesses is described at each stage of their testimony and comparisons are drawn between children who were offered the use of the video facilities and those who were not.

The section on trial process perspectives has two themes. Firstly, transcripts of child testimony are examined to assess what effect, if any, the different methods of presenting evidence can have on the way in which the evidence emerges, and the ease with which it may be followed. Omissions or additions to the testimony offered in court as compared to that given in a statement, are also investigated. Secondly, an account is given of the impact on an observer of recorded and live evidence.

## **Methodology**

Cases in which children or young people were listed as witnesses were identified with the assistance of the Child Liason Officer based at the court. This was a new post which had been established following a request from the Lord Chancellor's Department that all Crown Court Centres equipped with live TV link equipment should nominate a member of staff to:-

promote the welfare of child witnesses when in contact with the Crown Court and to provide a focal point for liason with other agencies involved in these type of proceedings.<sup>2</sup>

Once cases had been identified, access to the case file was provided by the Crown Prosecution Service. This made it possible to track the progress of the case through the criminal justice system and enabled relevant personal details to be collated on the individual children concerned. Additionally, notes were taken of case summaries, statements, recorded case decisions, and communications relating to the welfare of the witnesses.

The final hearing of each case was observed in full and a detailed record made of the proceedings. Opening and closing speeches, video-recorded statements, and oral examinations, were transcribed and supplemented with observations on the demeanour of the witnesses, professionals and jury. The researcher's subjective responses during each hearing were also noted.

## **Details of the case sample**

### **Number of cases in the sample**<sup>3</sup>

Nineteen relevant cases were fixed for trial during the observation period.<sup>4</sup> Three of these were subsequently taken out of the list, two being re-listed at a later date when

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<sup>2</sup> Home Office; Lord Chancellor's Department; and Department of Health (Undated) *Child Witness Pack*. Annex A: Role of the Child Liason Officer. (Circular accompanying the launch on 10.5.1993 of an information pack for child witnesses)

<sup>3</sup> The key to the codes used for study cases is given in Appendix A.

<sup>4</sup> This suggests that the Crown Court concerned was relatively busy in terms of the number of child witness cases with which it dealt. The Home Office does not collect data which would allow all cases involving evidence from children to be identified. However, the Lord Chancellor's Department collected statistics on the use of the television link during 1993 and 1994. This showed that in 1994,

they were observed and the data they yielded included in the sample. The third case, which had not been re-listed six months after the conclusion of the observation period, was dropped from the sample.

Two of the remaining eighteen cases were not included in the sample as they could not be observed. One was heard while the researcher was engaged in observation of another case, while the second was fixed for trial when she was on holiday. The final sample is thus made up of sixteen cases.

### **Eventual disposal of the cases**

Although all the cases in the study sample had been listed for a jury trial, a number were resolved in other ways. Table One below indicates how cases were finally dealt with.

<b>Table 1: Manner in which cases were finally resolved</b>	
<b>Late Guilty plea - as charged</b>	1
<b>Late Guilty plea - reduced charges</b>	3
<b>Prosecution discontinued</b>	1
<b>Jury trial</b>	11

As shown above, five of the 16 cases in the sample did not proceed to a jury trial. In all but one case this outcome was arrived at following a period of legal argument immediately before the trial was scheduled to begin. The children who had been listed as witnesses in these four cases were in the courthouse waiting to give evidence while the legal arguments were heard. The single exception was a case in which the defendant was due to stand trial on four counts of rape, three counts of indecent assault, and one of sexual intercourse with a girl under sixteen. Six weeks before the date fixed for the trial a pre-trial hearing was held at which the charges were reduced

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of 52 Crown Court Centres, 15 dealt with more than 20 cases during the year; 14 dealt with between 10 and 20 cases; 17 dealt with less than 10, and 6 recorded none. A small number of courts were extremely busy, four courts between them dealing with a total of 311 cases. Personal communication: Criminal Operations Branch, Lord Chancellor's Department, 2.3.1995.

to five counts of indecent assault, to which the defendant then entered a plea of guilty. A reading of the Crown Prosecution Service file, and discussions with the reviewing solicitor and counsel concerned indicated that this outcome was a result of considerable negotiation between the CPS; the Police; and prosecution and defence counsel, and that the welfare of the two complainants involved was a significant factor in the discussions which had taken place. However, the case is atypical in relation to the overall sample in the extent to which the charges were reduced; the amount of information held by the Crown Prosecution Service regarding the personal circumstances of the complainants; and the determination of those involved to avoid a trial if at all possible.

### **The offences involved, and their outcomes**

All but one of the cases in the full sample involved sexual offences against children or young people, the exception being a case of murder. The seriousness of the charges are in themselves an indicator of the potentially stressful nature of the cases for the children concerned.

The term 'child sexual abuse' encompasses a wide range of behaviours and offences, many of which are included within the sample.<sup>5</sup> Between one and three victims were involved in the majority of cases, but one defendant was charged with assaults against fifteen children, one of whom was too young to be called as a witness. Details of all charges involved in the sub-sample of trial cases are given in Table Two, below. (The number of offences per indictment ranged from one to twenty-two.)

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<sup>5</sup> The sample provides no examples of organised network abuse, but otherwise covers the broad spectrum of child sexual abuse.

<b>Table 2: Charges involved in the cases which went to a jury trial</b>	
Cases: n = 11	
<b>Incest</b>	1
<b>Buggery</b>	3
<b>Attempted buggery</b>	1
<b>Rape</b>	13
<b>Sexual intercourse with a girl under 13</b>	7
<b>Attempted intercourse with a girl under 13</b>	1
<b>Sexual intercourse with a girl under 16</b>	5
<b>Indecent assault</b>	36
<b>Indecency with a child</b>	6
<b>Murder</b>	1
<b>Actual bodily harm</b>	1

The time scale over which the sexual offences had been committed varied widely. Three cases involved a single sexual assault while others concerned a number and variety of offences perpetrated against the complainant(s) over years. The periods of time over which offences had been committed, (as shown in the indictment), is given in Table Three.

<b>Table 3: Period of time over which sexual offences were committed</b>		
<b>Time scale</b>	<b>All cases in sample n = 15</b>	<b>Cases in trial sample n = 10</b>
<b>Single assault</b>	3	0
<b>1 - 2 months</b>	2	2
<b>2 - 3 months</b>	1	1
<b>2 years</b>	3	2
<b>3 years</b>	3	2
<b>4 years</b>	1	1
<b>5 years</b>	1	1
<b>6 years</b>	1	1

As the Table indicates, none of the cases involving a single assault went to a jury trial, all three being resolved by a late guilty plea. Three cases reaching trial concerned offences committed over a relatively short period, but the majority dealt with long-term abuse. Only one of the cases involving long-term abuse was resolved by a late guilty plea and, as has been described, this only occurred after the charges were substantially reduced.<sup>6</sup>

The outcomes of the eleven trials are indicated in Table Four.

<b>Table 4: Outcome of trials</b>	
n = 11	
<b>Guilty</b>	7
<b>Not guilty</b>	4

The jury were directed by the judge during the course of certain trials to enter a verdict of not guilty in respect of individual charges, but nevertheless every case involved a jury verdict on the majority of, if not all, charges. In terms of the full research sample of 16 cases, the conviction rate was 68.75 per cent. Taking the contested sexual offence cases alone, the rate of convictions to acquittals was 60 per cent.<sup>7</sup> This is higher than that found in a Home Office study undertaken at approximately the same time, which found that nationally in trials involving child witnesses, acquittals slightly outnumber convictions.<sup>8</sup>

<sup>6</sup> One case of long-term abuse was discontinued on the advice of the trial judge, the evidence being thought to be insufficiently consistent.

<sup>7</sup> Convictions in the contested sexual abuse cases were higher than the national average for all contested cases in the Crown Court in 1994. Overall, 60% of defendants who pleaded not guilty to all counts were acquitted (representing 17% of all of those dealt with). Lord Chancellor's Department (1995) *Judicial Statistics: Annual Report 1994*. (Cm 2891). HMSO: London, Table 6.8 p. 67.

<sup>8</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom, J. (1995) *Videotaping children's evidence: an evaluation*. Home Office Publications Unit, London. In this study, undertaken between 1 October 1992 and 30 June 1994, it was found that nationally 48% of all trials involving child witnesses\* resulted in a late guilty plea. Of the remaining cases 22% resulted in a conviction and 27% in an acquittal, 3% having some other outcome. (p. iii) A subset of 93 trials were observed, of which 46% resulted in a conviction and 48% in an acquittal. (p.34). Note\*: the term 'all trials involving child witnesses', as used in this report, is ambiguous. The study focuses on child abuse prosecutions. All the data presented refers to this category of cases and it does not cover, as the term suggests, all trials in which children gave evidence.

### **The defendants**

Eighteen male defendants were involved in the full case sample, seven of whom entered a late guilty plea.<sup>9</sup> There are no female defendants in the sample. One man had originally faced trial with a female co-defendant, but the charges against the two were severed, and those faced by the woman were subsequently discontinued. In the trial sub-sample, ten defendants were white and one, Afro-Caribbean. One required an interpreter during his trial, being deaf, but otherwise none had a recorded, or apparent, disability.

The ten defendants charged with sexual offences against children were all known to their victims. The relationship between the defendants and complainants is shown in Table Five.

<b>Table 5: Relationship of defendant to complainant (abuse trial sub-set)</b>	
Defendants: n = 10	
	<b>Number of children concerned</b>
<b>Natural father</b>	1
<b>Adoptive father</b>	1
<b>Step-father/mother's co-habitee</b>	6
<b>Blood relative</b>	2
<b>Relative by marriage</b>	1
<b>Friend's father</b>	12
<b>Babysitter</b>	1
<b>Neighbour</b>	2

As Table Five indicates, the cases represent both intra- and extra-familial abuse. One defendant was charged with assaults on children from his immediate family and also on children outside it, this case accounting for all twelve children listed above in the category 'Friend's father'.

<sup>9</sup> One case concerned three co-defendants, all of whom entered a late guilty plea on the morning of the trial. (Case 15) See Appendix A: Code for Cases.

### **The child witnesses**

Fifty-three children and young people were recorded as witnesses in the case files for the full sample.<sup>10</sup> Of these, 40 gave evidence during the course of the eleven trials, 26 being complainants and 14, by-stander witnesses. Eleven of the 13 children who were not eventually required to give evidence, were complainants. Of these, seven were involved in cases which were resolved by means of a late guilty plea; in two cases charges were severed,<sup>11</sup> and in two cases the charges were discontinued at an early stage although the prosecution continued in respect of other complainants.

It is notable that while an objective of the child witness reforms was to make it possible for more, and younger, children to act as witnesses, the children giving evidence in these trials were all aged seven or above. The full sample includes one child aged five and one aged three.<sup>12</sup> However charges in respect of the five year old were discontinued,<sup>13</sup> and those against the three year old were prosecuted on the evidence of other witnesses, this child having been aged eighteen months when the offences against her were committed.

In the trial sub-sample adolescents slightly outnumber the children aged twelve or under, there being 21 children aged thirteen years and above, and 19 aged twelve years or below.

Table Six shows the way in which the children's evidence was given, analysed in terms of the age and witness status of the children.

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<sup>10</sup> The code used to identify the children and young people concerned is given at Appendix C. Note: In the murder trial police statements had been taken from sixty-four young people, of whom thirty-eight were originally listed as witnesses. This number was subsequently reduced, and in view of the size of the case, the researcher worked from the final witness list.

<sup>11</sup> In one case this was because the defendant entered a guilty plea in relation to one complainant but a not guilty plea in relation to another; in the second case a co-defendant was involved in two charges, while the first defendant faced a total of twenty-two charges. In this latter case the charges against the second defendant were discontinued when the first defendant was convicted of the substantive charges against him.

<sup>12</sup> Children 7 and 20.

<sup>13</sup> This child was one of three complainants involved in a case of extra-familial sexual abuse. The CPS file indicates that a decision was taken not to proceed with charges in respect of her a) because there was some doubt about her ability to give cogent evidence (the police interview had been terminated when she became too distracted to continue), and b) because her parents indicated that their daughter showed no ill-effects as a result of her experiences, but that they were concerned about the effect on her of a court appearance.

<b>Table 6: Children by age, witness status and mode of evidence</b>						
<b>Age in years</b>	<b>Video-recorded evidence n = 20</b>		<b>Live evidence by TV link n = 6</b>		<b>Conventional n = 14</b>	
	<b>Victim</b>	<b>Witness</b>	<b>Victim</b>	<b>Witness</b>	<b>Victim</b>	<b>Witness</b>
<b>7</b>	2	0	1	0	0	0
<b>8</b>	2	0	0	0	0	0
<b>9</b>	5	0	1	0	0	0
<b>10</b>	4	0	1	0	0	0
<b>11</b>	1	0	1	0	0	0
<b>12</b>	1	0	0	0	0	0
<b>13</b>	1	0	1	0	0	2
<b>14</b>	2	0	0	0	0	0
<b>15</b>	1	0	0	0	0	0
<b>16</b>	0	0	1	0	0	8
<b>17</b>	1	0	0	0	0	3
<b>18</b>	0	0	0	0	0	1

As the Table indicates, there was a clear distinction between those child witnesses who were complainants, and those giving other evidence, in terms of the way the children testified. All the complainants, irrespective of their age, gave evidence over the television-link, this being supplemented in the case of 20 of the 26 complainants by the use of pre-recorded evidence in place of their evidence-in-chief.<sup>14</sup> By contrast, all of those giving evidence other than that concerned with personal victimisation, testified in the conventional way. As can be seen from Table Six, all of these latter witnesses were adolescents, the majority being aged sixteen years or above. Nevertheless, a number of them fell within the categories covered by the new provisions. Section 32 of the Criminal Justice Act 1988, as amended by the Criminal

<sup>14</sup> In all cases where pre-recorded evidence was available, this was used. The children giving live evidence-in-chief over the television link had all given question and answer statements.

Justice Act 1991, permits evidence to be given by live television link where the child is aged under fourteen in cases of violence, and where the child is under seventeen in cases of sexual offences.<sup>15</sup> These age limits are extended by twelve months if the child's evidence is in the form of a video-recorded statement, and the child was under the specified age limit when the recording was made. No distinction is made in this section of the Act between children against whom the offence was committed and other child witnesses.<sup>16</sup> Given that all the complainants, including those aged sixteen and seventeen years, gave their evidence over the live-link, it would therefore appear that witness status rather than age was the determining factor influencing the use of the new provisions.

The majority of the children giving evidence were girls. Table Seven, below, shows the child witnesses analysed by witness status and gender.

<b>Table 7: Child witnesses by witness status and gender (Trial sub-sample)</b>			
<b>Victim</b>		<b>Witness</b>	
<b>Male</b>	<b>Female</b>	<b>Male</b>	<b>Female</b>
1	25	4	10

The low representation of boys in the complainant sample is surprising. Recent research suggests that while the prevalence rate of sexual abuse is difficult to determine, the extent to which boys are abused is much greater than was once thought, and probably occurs on a scale of one abused boy to every 2-4 abused girls.<sup>17</sup> However, there is no difference between the trial sample and the overall sample in this respect. Of the full sample of 53 children, of whom 37 were alleged to have been the victim of sexual abuse, 35 are girls.

<sup>15</sup> Section 32A(7) Criminal Justice Act 1988 as amended by the Criminal Justice Act 1991.

<sup>16</sup> The Notice of Transfer provision introduced by the 1991 Criminal Justice Act explicitly refers to both groups of children: s53(1)(b) Criminal Justice Act 1991. This is not the case in s32 CJA 1988, but this nevertheless implicitly includes child complainants *and* by-stander witnesses by referring simply to 'child witnesses'.

<sup>17</sup> Watkins, B. and Bentovim, A. (1992) 'The Sexual Abuse of Male Children and Adolescents: A Review of Current Research.' *The Journal of Child Psychology and Psychiatry* 33(1), p. 239.

One child in the full sample had been assessed as having learning difficulties,<sup>18</sup> and one is partially deaf.<sup>19</sup> Otherwise none of the children suffer any disability. Fifty-two children are white European, and one, Afro-Caribbean.<sup>20</sup>

### **Child witness perspectives**

A primary objective of the new provisions for children's evidence is to reduce the occurrence of unjustifiable stress factors thought to have an adverse effect on both the child and his or her evidence. The causes of stress experienced by children acting as witnesses have been attributed to three sources: the impact of observing or experiencing the crime itself; stress factors associated with the pre-trial investigation; and those attributable to the trial process.<sup>21</sup> Some of these factors are not amenable to improvement through legislative reform or changes in professional practice, but many are, including delays in cases reaching court; the re-scheduling of cases; confronting the accused; the size and public nature of the courtroom; examination and re-examination; and children's lack of knowledge about court.<sup>22</sup> The central strategy of the reforms is one of protection, circumventing the conventions of open court through the introduction of the video-link and pre-recorded statements.<sup>23</sup> In providing a means of giving evidence without having to appear in the courtroom and face the defendant directly, the video facilities were thought likely to lessen children's fear of court, and to reduce the risk of their evidence being impaired by inhibition, anxiety or embarrassment attributable to the formality of courtroom procedures and exposure to the public gaze. At the same time, it was anticipated that the introduction of Notice of Transfer provisions<sup>24</sup> would reduce delays in cases reaching court and consequently diminish the psychological effects associated with delay. Likewise, the introduction of pre-recorded video evidence in place of evidence-in-

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<sup>18</sup> Child 33

<sup>19</sup> Child 53

<sup>20</sup> Child 50

<sup>21</sup> Spencer, J. R., and Flin, R. (1990) *The Evidence of Children: the Law and the Psychology*. Blackstone Press: London, p. 287.

<sup>22</sup> *Ibid.*, pp. 289-297 and p. 298.

<sup>23</sup> Davies, G. and Westcott, H. (1995) 'The Child Witness in the Courtroom: Empowerment or Protection?' In: Zaragoza, M. S., Graham, J. R., Hall, G. C. N., Hirschman, R., and Ben-Porath, Y. S. (eds.) *Memory and Testimony in the Child Witness*. Sage: London. p. 212.

<sup>24</sup> Section 53, Criminal Justice Act 1991

chief was in part intended as a response to the problem of children's recall fading over time.

In the following sections the effects of the new provisions on children's experiences within the criminal justice system are assessed insofar as these could be deduced from case files and observation of the eleven trials. The focus is on apparent sources of stress, including those amenable to improvement through the reforms, and those which the reforms do not address. The data is grouped into three categories; time factors; professional roles; and observation of witnesses.

### **Time factors**

Three sources of stress for child witnesses attributable to time factors have been identified by psychologists: the time spent waiting for cases to reach court; delays attributable to the re-scheduling of cases; and the length of time spent by children waiting at court to give their evidence.<sup>25</sup> No data was collected for this study on the latter issue during the observation period, although it was discussed with those children who took part in research interviews, and their responses are included in Chapter Eight. However, information on the length of time it took for cases to reach court, and any re-scheduling of the cases, was collated from Crown Prosecution Service files. Data was also collected on two additional issues which case observation suggested were significant; the overall time taken to hear an individual child's evidence, and the number and length of adjournments during, or disruptions of, the child's testimony.

### **Time taken for cases to be processed**

The time taken for cases involving offences against children to reach a final hearing has long been seen as a source of stress to the children concerned,<sup>26</sup> but research has suggested that such cases take longer to be dealt with than other criminal prosecutions. Between 1980 and 1987 the average waiting time from committal to trial for criminal cases in England and Wales fell from 17.3 weeks to 12.3 weeks,

<sup>25</sup> Spencer, J. R. and Flin, R. (1990) *Op. cit.* note 21, pp. 289 -290

<sup>26</sup> Gibbens, I. and Prince, J. (1963) *Child Victims of Sex Offences*. Institute for the Study and Treatment of Delinquency: London, pp. 3 and 20.

although by 1994 it had risen again to 16.7 weeks.<sup>27</sup> In child witness cases, however, average waiting times of 9.7 months between committal and the start of the final hearing have been found in Scotland for children giving their evidence over the live-link, and 9.1 months for those testifying conventionally.<sup>28</sup> In England and Wales, Davies and Noon found an average of 10.5 months between the accused being charged and the start of the trial.<sup>29</sup> These studies include only cases in which the defendant initially entered a plea of not guilty, making comparison with average waiting times difficult. Nevertheless, delay in child abuse prosecutions has been acknowledged as a problem, as shown by the introduction of the Notice of Transfer procedure by the Criminal Justice Act 1991. This permits the Director of Public Prosecutions to move certain child witness cases directly to the Crown Court, bypassing magistrates' court committal proceedings,<sup>30</sup> and was clearly intended to speed up the passage of such cases through the court system. The effectiveness of the 'speedy progress' policy in child abuse cases has subsequently been investigated by Plotnikoff and Woolfson, whose study sample included both contested and non-contested cases. The researchers found an average of 182 days (26 weeks) between committal and the start of the final hearing for pre-Act cases, and 125 days (18 weeks) for cases post-dating the Act.<sup>31</sup> This suggests that average waiting times in child abuse prosecutions have been reduced and are now very close to the national average, although they nevertheless continue to take slightly longer to be processed than other cases.<sup>32</sup>

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<sup>27</sup> Lord Chancellor's Department (1995) *Judicial Statistics England and Wales for the Year 1994*. (Cm 2891). HMSO: London, p.69. Note: Waiting times tend to vary with plea and with circuit. On average defendants who pleaded guilty in 1994 waited 14 weeks while those who pleaded not guilty waited 21.4 weeks. The shortest average waiting times for defendants pleading guilty were in the Wales and Chester circuit (10.3 weeks); the longest for defendants pleading not guilty were in the North Eastern circuit (28 weeks) - Table 6.17 p.71.

<sup>28</sup> Murray, K. (1995) *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials*. The Scottish Office Central Research Unit, HMSO: Edinburgh, para 6.6 p.59.

<sup>29</sup> Davies, G. M. and Noon, E. (1991) *An Evaluation of the Live Link for Child Witnesses*. Home Office: London, p. 31.

<sup>30</sup> Section 53, Criminal Justice Act 1991.

<sup>31</sup> Plotnikoff, J. and Woolfson, R. (1995) *Prosecuting Child Abuse: An Evaluation of the Government's Speedy Progress Policy*. Blackstone: London, p. 27.

<sup>32</sup> *Ibid.*, pp. 28-31. The researchers point out that child abuse prosecutions continue to compare poorly with the recommendations on waiting times made by the 1990 Working Group on Pre-Trial Issues. The Working Party recommended waiting times of 56 days for defendants on bail and 42 for those in custody between first appearance and committal, and 112 and 56 days respectively between committal and final hearing, and the recommendations were taken forward in a National Implementation Plan.

Data on the length of time it took for cases in the present study to be processed is offered below, but the way in which waiting times have been measured differs slightly from that adopted in the studies reported above. It is standard practice to describe waiting times in terms of the time taken from committal to final hearing. However, data is included here on the time taken from the start of each investigation to the final hearing, reflecting the study's concern with the perspective of the child witness. For children or their carers the criminal justice process begins with the police investigation and interview rather than committal, and it is important to acknowledge the time scale involved as this is lived by the child. Table Nine, below, therefore shows the time periods from investigation to final hearing, and from committal to final hearing in the sub-sample of trial cases.

<b>Trial number<sup>33</sup></b>	<b>Investigation to final hearing</b>	<b>Investigation to committal</b>	<b>Committal to final hearing</b>
<b>1</b>	91	20	71
<b>2</b>	69	43	26
<b>3</b>	83	17	66
<b>4</b>	49	14	35
<b>5</b>	60	7	53
<b>6</b>	81	22	59
<b>7</b>	74	22	52
<b>8</b>	41	21	20
<b>9</b>	51	23	28
<b>10</b>	71	17	54
<b>11</b>	80	20	60
<b>Average time</b>	68.2 weeks	20.5 weeks	47.6 weeks

As the Table indicates, there was a wide range in time scales among the trials, cases taking between 41 and 91 weeks from investigation to trial; between 7 and 43 weeks

<sup>33</sup> See Appendix A: Code for Cases.

from investigation to committal; and between 20 and 71 weeks from committal to final hearing. One case was dealt with in full in less time than it took another to reach committal.<sup>34</sup> Nevertheless, the figures give some indication of the implication for children of involvement in the criminal justice system, only two cases in this sample being resolved in less than year, and four (36%) taking more than 18 months. Notice of Transfer provisions had not been used in any of the eleven cases, but the research by Plotnikoff and Woolfson suggests that this is not unusual.<sup>35</sup> The reasons for the variations in the time taken for cases to be processed were not always clear from the information available in case files, but so far as could be ascertained, it appeared that they were attributable to a range of factors, rather than any individual issue.

In terms of the time taken to reach committal, the complexity of the investigation sometimes acted as a contributing factor in delay, but this was not always the case. For example, the case taking the longest time to reach committal involved enquiries in another jurisdiction, raising a number of legal issues which may have contributed to the delay. However, the case involving the largest number of complainants, and which involved a complex and extensive investigation, reached committal relatively quickly.<sup>36</sup> Custody time limits, which are intended to ensure the speedy processing of cases in which unconvicted defendants are held in custody appeared, overall, to make little difference to the rate at which cases progressed. Four cases<sup>37</sup> were subject to these time limits. One of these took the shortest time to reach committal,<sup>38</sup> and all but one<sup>39</sup> reached committal in under the average time for the overall sample. Nevertheless, all four cases exceeded the sample average for the time from committal to final hearing.

Turning to the waiting time between committal and final hearing, all the cases in the sample had been allocated a fixed trial date. Re-listing was a significant factor in introducing delay, but was not the only one. Four of the eleven cases were taken out

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<sup>34</sup> Trials 8 and 2

<sup>35</sup> Plotnikoff, J. and Woolfson, R. (1995) *Op. cit.* note 31, p.48. This study reports that the provision was used in only 11 of the 100 eligible cases reviewed.

<sup>36</sup> Trial 7

<sup>37</sup> Trials 5 7 10 11

<sup>38</sup> Trial 5. This case involved a defendant with no previous convictions.

<sup>39</sup> Trial 7

of the list shortly before the date which had been fixed,<sup>40</sup> and another case went to a re-trial,<sup>41</sup> the jury having failed to reach a verdict when the case was first heard. As Table Nine shows, however, these two factors did not account for all the cases exceeding the average time from committal to final hearing.

<b>Table 9: Trials taking more than fifty weeks from committal to final hearing</b>		
<b>Trial number</b>	<b>Time in weeks: committal to final hearing</b>	<b>Time in weeks: length of postponement</b>
<b>1</b>	71	25
<b>3</b>	66	29
<b>5</b>	53	21
<b>6</b>	59	35
<b>7</b>	52	0
<b>10</b>	54	0
<b>11</b>	60	24

As this Table indicates, two cases taking a year from the date of the committal to reach trial, involved no postponement of fixed trial dates. While one was a difficult case requiring on-going investigation (including the identification of additional complainants after the committal date), and the co-ordination of a large number of witnesses, the other<sup>42</sup> was relatively straightforward, the most apparent cause of delay here appearing to be the defendant's dissatisfaction with those representing him, which led to several changes in the defence team.

Where cases were postponed, this was in the majority of instances at the request of the defence, who were not ready for the trial.<sup>43</sup> However, one case was re-listed because the allocated trial date conflicted with the dates of examinations to be taken by several of the adolescent witnesses.<sup>44</sup> The average length of time taken for a case

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<sup>40</sup> Trials 3 5 6 11

<sup>41</sup> Trial 1

<sup>42</sup> Trial 10

<sup>43</sup> Cases 3 5 6

<sup>44</sup> Trial 11

to be re-listed was 26.8 weeks, suggesting that listing itself presented a significant problem. Certain trials were scheduled to be heard by a High Court Judge,<sup>45</sup> which introduced another element of delay. Additionally, Crown Prosecution Service interviewees<sup>46</sup> suggested that the necessity for cases to be heard in the one courtroom equipped with live link facilities was posing problems and contributing to the growth of a backlog of child witness cases.

Overall, a range of factors appeared to contribute to waiting times, amongst which the difficulty of co-ordinating the different agencies, departments and individuals concerned, in the absence of anyone with clearly designated responsibility for this task, was another element. Notice of Transfer provisions were not used in any of the cases studied. Nevertheless, given the number of potential sources of delay, it would seem unlikely that this reform, focusing as it does on only one aspect of the court process, would have significantly reduced waiting times.

#### **Delays on the first day of the final hearing**

From the perspective of child witnesses the time taken for cases to reach their final hearing was extremely long and for a number of the children concerned this was exacerbated by delays on the first day of the trial. The children in the cases involving only one or two children as witnesses were all required to be at the courthouse at least an hour before the trial was scheduled to begin. However, nine of the eleven cases in the jury trial sample had a delayed start. The length of these delays is shown in Table Ten, which follows.

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<sup>45</sup> Trials 7 9 11

<sup>46</sup> CPS Reviewing Solicitors 1 and 2

<b>Table 10: Delay in beginning trials</b>	
Cases: n = 11	
<b>Length of delay</b>	<b>Number of cases delayed</b>
1 hour	1
1.5 hours	1
3 hours	1
4.5 hours	1
24 hours	4
50 hours	1

As this Table shows, almost a half (5) of the cases going to a jury trial were delayed in starting by twenty-four hours or more. Although the length of the postponement was in most of these cases identifiable by lunch time, (at which point child witnesses were advised and allowed to return home until the following day), the impact on children of such delays has to be considered.

The most significant factor contributing to a delayed start was the involvement of the trial judge in another case, or sometimes, cases. This occurred in six of the eleven trials, and tended to be due either to an earlier trial extending beyond its allocated time, or to 'floating' cases being fitted into the judge's list. In these instances it was clear that the administrative arrangements of the court had priority over the interests of the child witness.

An additional factor in some cases was the need to resolve legal issues before the case began, which in two cases contributed to an overnight postponement, and in one case necessitated the hearing of a *voir dire*. Some of these matters, for example, defence requests for disclosure of Social Service records, or arguments about prejudice to the defence arising from delay in bringing the case to court, might have been dealt with on an earlier occasion, and again appeared to point to the system's needs (or those of the individuals working within it) having precedence. In other cases the start of the trial was deferred to allow photocopying of documents, discussion with expert witnesses

or clients, perusal of case materials, or other matters which might be thought of as case preparation. However, some contributing factors could not have been anticipated. For example, in one case it proved impossible to put together a jury on the first day of the trial, two juries being sworn in and subsequently having to be discharged, by which point there were insufficient jurors-in-waiting available to allow a third to be identified.

### **Length of children's testimony**

Three of the forty children who gave evidence at court, testified on more than one occasion. One child gave evidence at three hearings; an old-style committal, a trial and a re-trial. Another testified during a *voir dire* before giving evidence the following day at the trial; and a third testified twice in four days, the jury who initially heard the case being discharged by the trial judge part way through his summing up and a re-trial being held immediately. In this section an estimate is made of the length of time taken by each child's evidence, but this focuses on the child's evidence during the final hearing, ignoring previous appearances in the witness box. Table Eleven shows the time taken by evidence given in full live over the tv link; Table Twelve summarises the same information for children whose evidence included a video-recorded statement; and Table Thirteen presents data on children who testified in the conventional manner. The Tables show the time spent by each child providing actual testimony during evidence-in-chief and cross-examination, and (printed in italics) the chronological time taken by each stage of evidence, where this was different, (as a result, for example, of disruptions or adjournments). Similarly, the total time spent on each child's evidence is shown separately, as adjournments sometimes occurred *between*, rather than *during*, evidence-in-chief and cross-examination. Marginal differences between the sum of the time spent on the two main stages of evidence giving and the estimated total time reflect, in the majority of cases, the time spent on competency assessments and re-examination, rather than adjournments. In cases where competency assessments were very brief, or non-existent, and there was no re-examination, the sum of the time spent on examination-in-chief and cross-examination, and the time taken overall, may be the same. Children are referred to in the Tables by their code number.

<b>Table 11: Time taken by evidence given live over the link</b>			
<b>Child number</b>	<b>Examination-in-chief</b>	<b>Cross-examination</b>	<b>Total time</b>
44	23mins	19mins	2hrs 09mins
4	32mins	47mins/50mins	1hr 50 mins
6	34mins	33mins	1hr 14mins
1	14mins	22mins/50mins	1hr 05mins
5	24mins	26mins	54mins
45	10mins	15mins	30mins
<b>Average</b>	23mins	27mins	1hr.17mins

Children giving live evidence over the link spent a maximum of 1 hour 19 minutes responding to questions, and a minimum of 25 minutes, although the overall time taken varied between 2 hours 9 minutes, and 30 minutes. The average time spent on cross-examination tended to exceed that spent on examination-in-chief, the range for cross-examination being 15 to 47 minutes, while that for examination-in-chief was 10 to 34 minutes. In only two of the six cases was cross-examination briefer than evidence-in-chief. As the Table indicates, there were relatively few adjournments which disrupted children's testimony, and none of these were during evidence-in-chief; such adjournments as occurred took place more often between the two stages of evidence.

<b>Table 12: Time taken by evidence which included a video-recorded statement</b>			
<b>Child number</b>	<b>Evidence-in-chief</b> * indicates that tapes were edited.	<b>Cross-examination</b>	<b>Total time</b>
11	*1hr.27mins/23.57	2hrs.35mins/4.33	28hrs 42mins
8	1hr.24mins/23.20	1hr.03/2.31	26hrs 01mins
18	*2hrs.04mins/3.14	1hr 15mins	4hrs 30mins
10	1hr.29mins/3.24	50mins	4hrs 16mins
19	*1hr.36mins/2.06	43mins	3hrs 53mins
34	1hr 05mins	1hr.15mins/2.25	3hrs 25mins
41	*38mins	38mins	2hrs 38mins
9	26mins/0.45	19mins	1hr 06mins
21	33mins/0.45	7mins	56mins
22	*36mins	9mins	52mins
23	41mins	7mins	51mins
30	*23mins	21mins	49mins
26	33mins	5mins	44mins
29	35mins	5mins	42mins
31	32mins	6mins	42mins
32	23mins	4mins	29mins
28	*18mins	2mins	28mins
24	20mins	5mins	28mins
27	*19mins	2mins	23mins
25	15mins	2mins	22mins
<b>Average</b>	47mins	30mins	4hrs.07mins

As this Table shows, there was a much greater variation in the overall time taken by a child's evidence where pre-recorded evidence was used than was the case where the evidence was given live over the link, and in some cases the time taken increased substantially. Children spent a maximum of 4 hours 2 minutes providing evidence and a minimum of 17 minutes, the range for examination-in-chief being 2 hours 4 minutes

to 15 minutes, and that for cross-examination being 2 hours 35 minutes to 2 minutes. In a number of cases the overall time taken by the child's evidence far exceeded the time taken by the actual testimony, primarily as a result of technical problems; adjournments for legal argument; and lunch or overnight adjournments. Nevertheless, disregarding this, the use of pre-recorded statements increased the average time spent on evidence-in-chief. Whereas an average of 23 minutes was taken by the evidence-in-chief of complainants who testified live over the link, that of complainants whose evidence included a pre-recorded statement took an average of 47 minutes. The increase in the average time taken by pre-recorded evidence-in-chief was in part attributable to the number and length of interviews of a small number of complainants, but it also appeared to be related to the different questioning styles adopted by investigative interviewers and barristers (this issue is discussed in more detail later in the chapter). In all, twenty-six video-recordings were shown; two children's evidence each required the playing of three recordings (two as evidence-in-chief and one during cross-examination),<sup>47</sup> and two children were the subject of two recordings shown as evidence-in-chief.<sup>48</sup> The video-recordings varied in length, the full recordings ranging from 94 to 15 minutes; (six exceeded an hour; the average time taken was 39 minutes). For the purposes of the trial a number of recordings were edited, either because material had been held to be inadmissible, or because it was felt to be irrelevant. In one case editing reduced the length of the recording substantially (from 94 to 40 minutes), but in the majority of cases recordings were shortened by only a few minutes. The longest recording played in court lasted 80 minutes. One child<sup>49</sup> was excused from the remote witness room by the judge while her first recording (edited from 73 to 68 minutes) was played, as she became extremely restless, leaving the remote witness room without warning on three occasions. Another child was allowed to remain at home on the day her recorded testimony was shown.<sup>50</sup>

The time spent on cross-examination of complainants whose evidence was given in full live over the link, and those whose evidence included a pre-recorded statement,

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<sup>47</sup> Children 18 19

<sup>48</sup> Children 10 11. A third child (child 30) had been the subject of two video recordings, the first of which was not shown in court.

<sup>49</sup> Child 19

<sup>50</sup> Child 11. (This contributed to the overall length of time taken by this child's evidence).

was broadly the same, taking an average of 27 minutes and 30 minutes respectively. However, while cross-examination of the former group tended to take longer than their evidence-in-chief, the time taken by cross-examination of the latter group exceeded that of their evidence-in-chief in only two cases. More than a third (7) of cross-examinations of complainants whose evidence included a pre-recorded statement, were very brief, lasting five minutes or less.

<b>Table 13: Time taken by evidence given conventionally in the courtroom</b>			
<b>Child number</b>	<b>Examination-in-chief</b>	<b>Cross-examination</b>	<b>Total time</b>
48	57mins/2.07	26mins	2hrs 38mins
49	27mins	8mins	35mins
51	25mins	1min	26mins
53	8mins/0.15	3mins	18mins
14	10mins	5mins	15mins
50	10mins	1min	11mins
12	8mins	3mins	11mins
36	0	5mins	11mins
17	5mins	5mins	10mins
13	2mins	7mins	10mins
16	4mins	4mins	8mins
37	0	4mins	8mins
15	5mins	2mins	7mins
52	6mins	0	6mins
<b>Average</b>	12mins	5mins	24mins

The time taken by evidence given live in the courtroom tended to be considerably less than that given over the live-link, (whether given orally or including a pre-recorded statement). Children whose testimony was offered conventionally spent a maximum of 1 hour 23 minutes and a minimum of 4 minutes responding to questions. An average of 12 minutes was spent on examination-in-chief, and an average of 5 minutes

on cross-examination. The overall time taken exceeded 35 minutes in only one case.<sup>51</sup> It may be significant that this group of children was comprised solely of witnesses, while those who testified from the remote witness room were all complainants.

Two children<sup>52</sup> gave no evidence-in-chief despite being called by the prosecution. They were immediately tendered to the defence and subsequently re-examined. The defence chose not to question one witness.<sup>53</sup>

Taken together these figures indicate that the use of pre-recorded statements may increase the overall time taken by an individual child's testimony. It is relevant that children whose evidence included such statements but whose overall evidence was dealt with in under an hour, were co-complainants in a case involving a large number of children. Given the attention which has been paid to cross-examination as a source of particular stress to child witnesses<sup>54</sup> it is noteworthy that more than half of all cross-examinations (24 of 40) lasted less than ten minutes, and the majority of these (18) were completed in five minutes or under. However, many of the children whose cross-examination was brief were those involved in the case having the largest number of complainants, while others were those giving eye-witness or supporting testimony.

### **Interruption of children's testimony**

Interruption of children's testimony was defined for the purposes of this study as the closing down of the live-link while a child was in the process of giving evidence from the remote witness room, or a request to a child to leave the witness-box temporarily where s/he gave evidence in the conventional manner. Brief interjections during a child's evidence, for example requests from the trial judge for a response to be repeated or for a witness to speak up, or technical problems which were resolved without closing down the live link, were not counted.

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<sup>51</sup> Child 48. The overall time taken by this child's testimony included an adjournment for lunch taken part way through his evidence-in-chief.

<sup>52</sup> Children 36 37

<sup>53</sup> Child 52

<sup>54</sup> See for example, Spencer, J. R. and Flin, R. (1990) *Op. cit.* note 21, pp. 71-72, 226, 296.

Half of all the children who gave evidence over the television link, whether live or including pre-recorded evidence, had their testimony interrupted,<sup>55</sup> while only two of the fourteen children who gave evidence in the courtroom itself experienced any suspension of their testimony. This finding reflects in part the brevity of the testimony given by the children who gave evidence in the conventional way as compared with that of those testifying over the live-link, and the absence of technical equipment with its associated problems, when taking their evidence. Table Fourteen summarises the reasons for the interruptions which occurred.

<b>Reason</b>	<b>Video evidence</b> Children: n = 10	<b>Live-link</b> n = 3	<b>Conventional</b> n = 2
<b>Administrative</b>	1	1	0
<b>Point of law</b>	7	0	1
<b>Take verdict in another case</b>	1	0	0
<b>Child distressed</b>	3	2	0
<b>Child needs toilet</b>	3	1	0
<b>Child restless</b>	1	0	0
<b>Child tired</b>	1	0	0
<b>Interpreter tired</b>	0	1	0
<b>Adjourn - lunch</b>	8	1	1
<b>Adjourn - o/night</b>	2	0	0
<b>Technical problem</b>	17	1	0
<b>Fire alarm</b>	1	0	0

As this Table shows, exactly a third of all interruptions (18 of 54) were the result of technical difficulties with the video equipment. Other frequent causes of interruption were adjournments for lunch; adjournments for legal argument; and short breaks to allow children to recover from distress or tiredness, regain concentration, or visit the

<sup>55</sup> Three of the six children who gave live evidence over the link, and ten of the twenty children whose testimony included pre-recorded evidence.

toilet. While many of these breaks during a child's testimony were brief, lasting between five and ten minutes, others lasted up to an hour, while lunch adjournments invariably took between an hour and an hour and a half. In one case a trial judge adjourned the case for lunch an hour early in order to avoid a child's evidence being started and then interrupted. This, however, was an isolated example of a child's interests taking precedence over the court's routines.

Interruptions such as those described above may be thought of as unfortunate, but not especially significant. However, a series of such occurrences may disrupt children's concentration or add to existing stress, particularly when associated with other forms of delay. The way in which an accumulation of stressful incidents can occur is illustrated by a case which suffered amongst the worst overall delay and disruption. This involved a defendant charged with offences associated with long-term intra-familial sexual abuse. A video recording had been made of the allegations of the complainant, Penny,<sup>56</sup> who was aged fourteen years at the time of the final hearing. Problems initially arose when the start of the trial was delayed. The case was scheduled to begin on a Monday morning, but the preceding Friday was put back by a day as the trial judge had not begun his summing up in another case. On the Tuesday morning the case was delayed a further half day as the summing up was taking longer than anticipated. The judge eventually became available at 4.00 in the afternoon, at which point defence counsel made an application for disclosure of Social Service Department records. Expressing his irritation that this application had not been made earlier and indicating that he was not prepared to read the records in his own time, the judge adjourned the case until noon on the Wednesday to allow himself time to peruse the files.

The complainant had spent all of Tuesday at the courthouse waiting to give evidence. Penny was finally called to the remote witness room at 12.26 on the Wednesday, despite the fact that the court normally adjourned at 1.00 for lunch and her evidence-in-chief was known to include a fifty-five minute video-recording. It rapidly became apparent, however, that a lunchtime adjournment in the middle of the recording would

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<sup>56</sup> All names which are used in the text are pseudonyms.

not be Penny's only problem. The sound quality of the recording was extremely poor, and within the first ten minutes of the video equipment being switched-on three attempts had to be made to adjust the volume, one of which involved Penny's contact with the courtroom being broken while the problem was discussed.

At 1.00 the court adjourned for lunch, resuming at 2.20p.m. During the afternoon difficulties with the video-recording continued. Much of Penny's interview was inaudible because the low volume of Penny's voice and that of her interviewer was obscured by tape hiss and extraneous traffic noise. This problem was exacerbated when the sound of a prolonged dog fight taking place outside the room in which the investigative interview was conducted, masked everything else on the tape. At 2.30p.m. exclaiming: 'I think this is farcical', the judge, with no explanation to Penny, switched off the live-link and retired, asking counsel to consider what should be done. He returned twenty minutes later and at the request of the defence it was decided to continue playing the video-recording to its end. Connection with the remote witness room was re-established at 3.15p.m. when the tape was resumed. Although the tape continued to be largely inaudible there were no further interruptions until 3.45p.m. when the tape concluded.

At this point the judge told Penny he would adjourn in order to consider the effect of the tape. During the rest of the afternoon he returned to the courtroom only to take the verdict in his earlier case, and, at 4.35p.m, to adjourn Penny's case until 10.30a.m. the next morning

The following day when the case resumed, the difficulties of the previous day were the subject of legal argument. The judge indicated that he had been able to take notes of Penny's evidence on only one of the three charges faced by the defendant, and the stenographer likewise had been unable to take a record. It was eventually decided to ask Penny to give live evidence-in-chief on the two counts on which the judge had no note. She was re-called to the remote witness room at 11.30a.m. and concluded her evidence-in-chief at 2.27p.m. Penny was unaware that evidence relating to the first count was inadmissible, and this led on a number of occasions to prosecuting counsel

having to ask her not to continue with the evidence she was recounting. There also continued to be technical problems, defence counsel's monitor failing to function just as he was to open his cross-examination.

That the events of Wednesday were stressful to Penny is suggested by the fact that when she was shown in the remote witness room during the afternoon she was wearing spectacles which she had not worn in the morning. There were a number of problems with loud feedback when the video-recording was switched off but the connection with the remote witness room remained live, and Penny could be seen with her hands pressed to her ears and her face screwed up in pain. The usher who accompanied her reported that during the afternoon's adjournments Penny appeared distressed and had two nosebleeds. This case had a number of unusual features, but the technical problems which were experienced all recurred in other cases. Nor was the inadequacy of some aspects of case preparation, which the case points to, unique.

### **The role of the judge and counsel**

Psychological research has suggested that the single greatest fear of child witnesses is seeing the accused in court.<sup>57</sup> However, cross-examination has also been identified as a significant source of stress. Spencer and Flin have suggested that young children are unlikely to understand the concept of testing evidence which is implicit in cross-examination, and may interpret critical questioning as implying disbelief.<sup>58</sup> It has also been argued that cross-examination is sometimes used to destroy rather than to test children's evidence.<sup>59</sup> Likewise, the unfamiliar nature of the language used in the courtroom has attracted criticism,<sup>60</sup> and defence tactics, such as the juxtaposition of unrelated topics, have been said to lead to children becoming disoriented or confused.<sup>61</sup>

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<sup>57</sup> Davies, G. (1992) 'Protecting the Child Witness in the Courtroom.' *Child Abuse Review* 1(1), p. 37.

<sup>58</sup> Spencer, J. R. and Flin, R. (1990) *Op. cit.* note 21, pp. 71-2.

<sup>59</sup> *Ibid.*, p. 296

<sup>60</sup> Brennan, M. and Brennan, R. (1989) *Strange Language: Child Victims under Cross-examination*. Riverina Murray Institute: Australia, p. 3.

<sup>61</sup> Spencer, J.R. and Flin R. (1990) *Op. cit.* note 21, p. 226.

As discussed in Chapter Five, a primary objective of the procedural reforms was to reduce the stress associated with a court appearance, especially children's fear of confrontation with the accused, and apprehension about speaking publicly of personal and distressing experiences. However, in rejecting the recommendation by the Pigot Committee for children's evidence to be given in full at a pre-trial hearing,<sup>62</sup> the government made it a requirement that children should attend court for live cross-examination. No proposals were made during the passage of the child witness reforms for cross-examination to be regulated in any way. However, subsequently, the Royal Commission on Criminal Justice has acknowledged that harassment or intimidation of witnesses can occur in an adversarial system, and has recommended that the judiciary should adopt a more interventionist role in preventing any bullying of witnesses,<sup>63</sup> particularly where they might be considered vulnerable.<sup>64</sup> In view of this, data was collected for the present study on the frequency and nature of interventions by judges while children were testifying. The questioning style adopted by counsel during live examination of child witnesses is also examined.

### **Interventions by the judge**

In one of the eleven cases in the research sample which went to a jury trial, the judge made no intervention while children gave their evidence. Interventions in the ten remaining cases are summarised in Table Fifteen, on the following page.

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<sup>62</sup> See *Hansard (Lords)* 22 April 1991 columns 51-53, and *Hansard (Lords)* 21 May 1991 columns 137-140, for a record of the debates which took place on this issue..

<sup>63</sup> The Royal Commission on Criminal Justice (1993) *Report of the Royal Commission on Criminal Justice*. (Cm 2263). HMSO: London, para. 12, p. 3.

<sup>64</sup> *Ibid.*, para. 43, p. 129.

<b>Child inaudible</b>	15
<b>Ensure jury/defendant can see/hear child</b>	4
<b>Request that child move to ensure visibility on monitor</b>	1
<b>Offer distressed child a short adjournment</b>	4
<b>Clarify whether child understands what is happening</b>	1
<b>Support child in making his/her point</b>	1
<b>Clarify apparent misunderstanding between child/counsel</b>	2
<b>Put supplementary questions to child</b>	4
<b>Clarify meaning of question put to child</b>	5
<b>Request that counsel use less formal language</b>	1
<b>Halt questions which are repetitious/unproductive</b>	1
<b>Request that counsel ask questions more slowly</b>	1
<b>Correct mistake by counsel</b>	2
<b>Legal objection to line of questioning</b>	2
<b>Excuse child from watching video recording</b>	1

As the Table indicates, only a minority of interventions focused on the welfare of the child witness, the majority being concerned with ensuring that evidence was audible, or that questions or responses were understood. In some instances, nevertheless, the concern of the judge to ensure clarity of communication was of benefit to the child. Thus a number of interventions addressed apparent misunderstandings developing between the child witness and counsel, while others invited barristers to reframe questions whose meaning was unclear. In one instance, where a ten year old was being cross-examined on inconsistencies in his account and was becoming frustrated by requests from defence counsel that he be more specific about the number of occasions on which he had been assaulted, he eventually burst out 'LISTEN!', at which the judge intervened, commenting to counsel: 'He wants you to listen to him'.<sup>65</sup> While only a brief intervention, the recognition this provided of the child's stress appeared to allow him to become more settled.

<sup>65</sup> Trial 1

Interventions focusing directly on the child's well-being included four occasions on which the judge halted questioning when a child had become distressed and appeared in need of some respite.<sup>66</sup> In another instance the judge suggested that a child should be allowed to leave the remote witness room while the remaining section of a video-recording was shown, as she had become distracted and restless. One barrister was asked to put his questions in simpler language and another concluded his cross-examination when the judge intervened, indicating that the questions were becoming repetitive. Nevertheless, in another case where the barrister was asked to reduce the speed of his questions, the judge appeared less concerned with the effect of the rapid barrage of questions on the child than on his own ability to take a full note. There were no interventions focusing on bullying or intimidatory tactics by counsel, but (as will become apparent below), the use of such tactics was only infrequently observed.

Supplementary questions put to the witness by the judge primarily focused on ensuring the fair conduct of the trial. For example, in one case in which a child gave live evidence over the link and had failed, despite the best efforts of the prosecutor, to give an account of an assault which she had described in her original statement, the judge intervened at the conclusion of the examination-in-chief and tried to create a further opportunity for the evidence to emerge:

Judge: Did anything else happen in the house that you have not told us about?

Witness: No.

Judge: Because, like Mr Spender told you, you don't have to be embarrassed. Did anything else happen?

Witness: No.

Judge: Are you sure?

Witness: Yes.<sup>67</sup>

In another case, a seven year old girl seemed lost and disoriented during cross-examination, and when eventually asked by defence counsel: 'When you say Peter did naughty things, you're not telling the truth are you?', replied quietly, 'No'. In

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<sup>66</sup> In another instance where the case was adjourned for this reason, it was at the suggestion of defence counsel.

<sup>67</sup> Trial 3

response to the prosecutor's enquires during re-examination as to whether she had understood the previous gentleman's questions, she remained silent. The judge then intervened, saying:

Judge: You told us Peter pulled your pants down?

Witness: Yes.

Judge: Is that true?

Witness:: Yes.

Judge: You're sure that's true?

Witness: Yes.<sup>68</sup>

The questions put by the judge were short, direct, and framed in language a seven year old could understand, allowing her to clarify her testimony. From observation of the trial sample as a whole, however, it appeared that while judges were clearly prepared to intervene, they nevertheless tended to restrict their interventions to a minimum, appearing reluctant to trespass on counsel's freedom to conduct an examination as s/he thought best. This was highlighted by occasions when issues within the remit of the trial judge were raised not by the judge, but by counsel.<sup>69</sup>

### **Barristers' communication styles**

The psychological literature on children's evidence suggests that the way in which oral examinations are conducted in court will affect both the quality of the child's evidence and the likelihood of the child being disturbed by the experience. Children's ability to understand the questions which they are asked, and their purpose, has been linked to whether they testify up to or below their potential, and it is argued that this in part reflects the range of communication skills which the barrister is able to deploy.<sup>70</sup> At the same time it is suggested that the manner in which examinations are conducted is related to the amount of stress experienced by the child.<sup>71</sup> In only partially adopting the recommendations of the Pigot Committee on pre-recording children's evidence, restricting this to the examination-in-chief of restricted categories

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<sup>68</sup> Trial 7

<sup>69</sup> For example, one instance when counsel requested an adjournment for a distressed child; four where counsel raised legal objections to lines of questioning, and one when counsel asked for an adjournment to obtain technical assistance to improve the sound quality of a video recording.

<sup>70</sup> Murray, K. (1995) *Op. cit.* note 28, para. 7.24, p. 87.

<sup>71</sup> Spencer, J. R. and Flin, R. (1990) *Op. cit.* note 21, p. 296.

of witnesses, the Government ensured that live testimony would continue to be required from all child witnesses. The way in which barristers conduct examinations of child witnesses therefore continues to be of importance.

If children are to comprehend the questions they are asked in court it would seem logical that the questions put to them should employ vocabulary and grammar commensurate with the child's age and stage of development. The language conventionally used in court by barristers has been shown in recent research to be unfamiliar to young children,<sup>72</sup> one study suggesting that twenty-five percent of all examinations involve questions up to half of which are inappropriate to the witness' age.<sup>73</sup> Highly stylised expressions, ('I put it to you'; 'I suggest to you'), or complex grammatical forms such as negative constructions ('Did not Peter refuse to give you money for the shoes you wanted?'; 'When you were asked if you were expecting him to be alone, you said you thought your Aunt would be there too. *Is that not right?*'), or nominalisation ('When the hitting occurred' rather than 'When Michael hit you'), have been cited as examples of language in daily use in the courtroom which would be unfamiliar and puzzling to children.

In view of this an assessment was made of the age-appropriateness of the grammar and vocabulary employed in live examinations of child witnesses, and the extent to which barristers accommodated themselves to each child's linguistic style. The former were evaluated on a five-point rating scale devised by Davies and his colleagues,<sup>74</sup> grammar and vocabulary being assessed in declining order as either: mostly age-appropriate; more than fifty per cent age-appropriate; fifty per cent age-appropriate, less than fifty per cent age-appropriate, and virtually none age-appropriate. The extent to which barristers accommodated themselves to the child's linguistic style was evaluated on Davies' three point scale; extensive accommodation, partial accommodation and limited accommodation.

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<sup>72</sup> Brennan, M. and Brennan, R. (1989) *Op. cit.* note 60; Graffam Walker, A. (1993) 'Questioning Young Children in Court: A Linguistic Case Study.' *Law and Human Behaviour* 17(1), pp. 59-81

<sup>73</sup> Davies, G. and Noon, E. (1991) *Op. cit.* note 29, pp. 55-56.

<sup>74</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom, J. (1995) *Op. cit.* note 8. Assessment schedules were supplied to the researcher by the second author.

Barristers' questions to each of the 40 children were individually rated per examination. Subsequent analysis showed that in 39 per cent of cases barristers asked mostly age-appropriate questions, and in the remaining 61 per cent of cases asked more than fifty percent age-appropriate questions. This finding cannot, however, be seen as especially encouraging as the rating 'more than fifty percent' represents quite a modest achievement. Turning to accommodation to children's linguistic style, which were again individually rated per examination, 36 per cent of barristers showed extensive accommodation, and 64 per cent showed partial accommodation.

Observation of trials suggested that most barristers modified their approach when examining child witnesses, tending to ask children shorter questions than adults, and, (somewhat less frequently), including everyday vocabulary in place of formal expressions. Nevertheless, examples of the use of stylised grammar or vocabulary could be found in almost all live examinations. It was interesting to note that while barristers usually clarified their question when a child's response suggested s/he may not have fully understood it, there were also occasions when an ambiguous response was tacitly accepted. These latter cases tended to occur in cross-examination, suggesting that a tactical decision was involved. The following exchange occurred at the end of the cross-examination of an eleven year old girl:

Barrister: Any touching you think he did of you wasn't deliberate - do you understand?

Witness: No.

Barrister: It was accidental?

Witness: *Response inaudible.*

Barrister: And it's wrong to say he touched your private parts?

Witness: *Response inaudible, but appears to be indicating agreement.*<sup>75</sup>

The cross-examination concluded at this point. The first of the three questions put to the child asked two questions not one, and it is unclear from her response whether she was indicating that she *was* touched deliberately or that she had not understood the question. Although defence counsel asked two further questions, the ambiguity of this first response was not clarified as the ensuing responses were inaudible, and the child was not asked to repeat them. The intonation of her final inaudible response

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<sup>75</sup> Trial 7

suggested she may be agreeing with counsel's proposition 'And it's wrong to say ...', but it was impossible to be certain. The ambiguity of this final response was further heightened by the fact that there were instances when children indicated their belief that 'telling on someone else' is wrong. It is possible that this child may have interpreted the question in this sense, but again it is not possible to know. Barristers are thinking on their feet when conducting a live examination and it is unreasonable to expect that examinations will always be conducted in text book style. Nevertheless, in this and a number of other instances, it appeared that counsel may have concluded that an element of ambiguity would assist the defendant's case.

The question of tactical decisions also arose when considering the extent to which barristers' communication styles might be termed child supportive or unsupportive. In order to evaluate the latter issue a rating scale was devised which draws on those aspects of lawyers' practice which have been described as child unsupportive by psychologists,<sup>76</sup> and on recommendations which have been made about strategies which might assist children when giving their evidence.<sup>77</sup> Strategies which have been rated here as child supportive were short questions; introducing topics (or signalling new ones); giving an explanation of the objective of a line of questioning; checking the child's understanding of words or questions; establishing whether the child understood the underlying inference of a question; providing information to trigger memory; acknowledging stress; and providing reassurance. Child unsupportive strategies included long or multiple questions; the juxtaposition of questions on unrelated topics; failing to check a child's understanding of terms or inferences; failure to clarify an ambiguous response by the child; interrupting the child; the employment of a tactical sequence of apparently innocuous questions; and facetious or sarcastic comments on the child's responses. Transcripts of all live examinations-in-chief and cross-examinations were evaluated on a ten point scale, ten being rated as most child supportive, and one, least unsupportive

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<sup>76</sup> In particular, the rating scale of unsupportiveness developed by Kranat and Westcott (which itself draws on that of Brennan and Brennan). Kranat, V.K., and Westcott, H. L. (1994) 'Under Fire: Lawyers questioning children in criminal courts.' *Expert Evidence* Vol 3 pp 16-24.

<sup>77</sup> Drawing in particular from: Saywitz, K. (1995) 'Improving Children's Testimony: The Question, the Answer and the Environment.' In: Zaragoza, M. S., Graham, J. R., Hall, G. C. N., Hirschman, R.; and Ben-Porath, Y. S. (eds.) *Memory and Testimony in the Child Witness*. Sage: London, pp. 118-9.

Assessing transcripts on this scale, the mean for prosecuting counsel was found to be 6.9 (range 6-9), while that for defence counsel was found to be 5 (range 4-7). The relatively low overall score achieved by prosecuting counsel suggests that child supportive communication skills could be improved. However it is of interest that defence counsel were not found especially unsupportive. The way in which the scale is constructed makes it unlikely that defence counsel would score as highly as those prosecuting, as the strategies rated as child unsupportive are most likely to occur during cross-examination. This finding therefore provides some support for the claim made by barristers that they try to avoid upsetting child witnesses during cross-examination as this would antagonise the jury.<sup>78</sup> The following example is an extract from the opening of a cross-examination of a fifteen year old girl:

Barrister: You probably understand already who everyone is, but I'm going to ask you questions because I represent the man you call Mick. You know that what you say happened, he says didn't?

Witness: Yes.

Barrister: Some of the questions I'll ask aren't very friendly but I'll keep them short. Do you understand why I have to ask?

Witness: Yes.

Barrister: The first question I'll ask is a personal one. Sometimes you would visit Mick's mother - Grandma May?

Witness: Yes.

Barrister: Please understand Polly, I'm not here to pass any judgement about any boyfriends you've had, but do you remember that once when you were twelve you went to see Grandma May and you had a lovebite on your neck? Do you remember that?

Witness: No. I had a scratch. It wasn't a lovebite.

Barrister: Where was the scratch Polly?

Witness: Just below my ear.

Barrister: How did you get a scratch there?

Witness: I can't remember.

Barrister: I'm not here to criticise or embarrass you. If it was a lovebite, please tell us. Was it?

Witness: No.<sup>79</sup>

The opening questions of the cross-examination do not relate directly to the evidence previously given by the witness but concern a subject which is raised in order to cast

<sup>78</sup> Spencer, J. R. and Flin, R. (1990) *Op. cit.* note 21, p. 296. See also, Chapter Six.

<sup>79</sup> Trial 5

doubt on her character. This may be thought likely to cause the witness distress. Nevertheless, the way in which the questions are put include strategies to offset some of the discomfort of the process, and which would be rated as child supportive - for example, providing information on counsel's role; prefacing a series of questions with an introduction indicating the subject to be covered; and acknowledging the embarrassing nature of the questions. This approach to cross-examination was widely reflected in the research sample.

Examples of overtly hostile or aggressive cross-examination were rare and involved only two barristers. One of these conducted cross-examinations of three children in two separate cases, and used irony and sarcasm as a way of casting doubt on the children's testimony in all three cases. Opening one cross-examination, he remarked to the fourteen year old witness: 'What I want to do is go over one or two matters. I shan't be nasty. I might look fearsome but it's not true.' Nevertheless, the cross-examination involved a number of exchanges of which the following is a representative example:

Barrister: I think there's a suggestion on the video that your dad came into your room and said 'Melanie, out!'  
 Witness: Yes.  
 Barrister: That's the room you share with the twins?  
 Witness: Yes.  
 Barrister: So they would have heard?  
 Witness: They're heavy sleepers.  
 Barrister: He shouted?  
 Witness: It was sort of quiet.  
 Barrister: So a quiet sort of shout? *Neutral tone*  
 Witness: Yes.  
 Barrister: The heavy sleeping twins didn't hear the quiet shout? *Ironic tone*  
 Witness: No.<sup>80</sup>

The witness, who had never indicated that her father had *shouted*, resisted this suggestion when it was first put to her, but appeared unable to reject counsel's version when her evidence was made to appear foolish. In considering whether the barrister concerned adopted his strategy inadvertently or as a matter of conscious

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<sup>80</sup> Trial 4

choice, it may be relevant that advocacy is held by lawyers to involve the dual facets of information and persuasion.<sup>81</sup> In putting evidence before a court, the barrister is concerned to influence the way in which the evidence is perceived. This issue was further highlighted by the second barrister in the research sample who adopted what might be termed an oppressive cross-examination technique. In this case the trial judge, after a lunchtime adjournment which occurred part way through the complainant's cross-examination, took steps to encourage the defence barrister to adopt a discrediting approach, remarking (before the jury returned to the courtroom): 'Do not feel inhibited in using the tactic of "giving her some rope", as it were.' The extracts given below were among a number of similar sequences of questions and responses which then followed:

*Example one*

Barrister: Have you had boyfriends in the past?

Witness: Yes, sir.

Barrister: Quite a few?

Witness: Yes, sir.

Barrister: Were there occasions when you would bring them home?

Witness: Yes, sir.

Barrister: Occasions when you brought them home and your mother was out?

Witness: Only once, sir, and nothing happened.

Barrister: What?

Witness: I didn't have sex with him, sir.

Barrister: I didn't ask you that, Cynthia.

*Example two*

Barrister: Does it amount to this, Cynthia. You can't help us at all about why you have never shouted out when you have been raped?

Witness: No, sir.

Barrister: Can you help us?

Witness: No, sir.

Barrister: Has Rodney ever been physically violent to you, when you have been raped?

Witness: Once, sir.

Barrister: When?

Witness: I don't know. *Mutters* I don't put a ring round, on the calendar.

Barrister: What? Would you repeat that?

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<sup>81</sup> Morison, J. and Leith, P. (1992) *The Barrister's World and the Nature of Law*. Open University Press: Milton Keynes, p. 5. Note: A further example of an examination by the same barrister, which raises similar issues, is included in the section on signs of stress shown by children during cross-examination.

Witness: I DON'T PUT A RING ROUND ON THE CALENDAR.

Barrister: Do you think some girls do, Cynthia?<sup>82</sup>

In this case there appeared to have been a strategic decision that the witness (who was aged twelve years at the time) would be found sufficiently unsympathetic by the jury to reduce the risk involved in subjecting her to an openly denigrating cross-examination.

While providing some support for recommendations that barristers should develop greater skill in communicating with children, the examinations observed for this study suggest that within an adversarial system there may be tensions between the needs of children and the role of the advocate. A barrister's failure to question children in a supportive or facilitative manner may not invariably point to a lack of skill, but rather reflect a conscious decision to show the witness in a particular light, or otherwise influence jurors' responses to the child's testimony.

### **Observations of stress in child witnesses**

A primary concern of the new provisions is, nevertheless, the reduction of undue stresses experienced by child witnesses when appearing in court. In order to evaluate the effectiveness of the procedural reforms in this respect an assessment was made of the demeanour of child witnesses at each stage of their testimony, to determine the level of stress involved. For the purposes of initial evaluation, symptoms of stress were defined as tearfulness, anger, restlessness/fidgeting, confusion, and loss of concentration, as these are indicators which psychologists conducting research in this area, have employed.<sup>83</sup> Table Sixteen, below, presents data on the number of children exhibiting these signs of tension, comparing children whose evidence included a pre-recorded statement, those who gave evidence-in-chief over the live link, and those who testified in the conventional manner in open court.

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<sup>82</sup> Trial 8

<sup>83</sup> See for example, Murray, K. (1995) *Op. cit.* note 28, para. 6.33, p. 67; Sas, L. (1991) *Reducing the System-induced Trauma for Child Sexual Abuse Victims through preparation, Assessment and Follow-up*. The London Family Court Clinic: Canada, p. 59.

<b>Table 16: Number of children showing signs of stress</b>			
	<b>Live link</b> Children: n = 7 <sup>84</sup>	<b>Link/video recording</b> n = 19	<b>Conventional</b> n = 14
<b>Anger</b>			
Examination-in-chief	0	0	0
Cross-examination	3	3	0
<b>Crying</b>			
Examination-in-chief	2	3	0
Cross-examination	3	3	0
<b>Restlessness</b>			
Examination-in-chief	0	3	0
Cross-examination	1	1	0
<b>Confusion</b>			
Examination-in-chief	1	0	0
Cross-examination	2	4	0
<b>Loss of concentration</b>			
Examination-in-chief	1	2	0
Cross-examination	1	1	0

As the Table indicates, none of the defined indicators of stress were shown by the fourteen witnesses who testified in open court. It is important to bear in mind that these witnesses were, on average, older than the those in the two other groups; tended to give evidence for a shorter time; and, unlike the children who testified from the remote witness room, were not themselves the victims of the offences in question. For these reasons, findings in relation to the two groups testifying over the live link, and those who testified in open court are discussed separately.

### **The complainants**

As Table Sixteen shows, relatively small numbers of children showed overt stress while giving their evidence, most maintaining a high level of self control, and displaying considerable task-centredness and concentration. This is not to say that the experience of giving evidence was stress free for the children concerned. Ushers who accompanied children in the remote witness room indicated that many of those who had been relatively composed while giving evidence, began to cry once their evidence was concluded. The ushers also described indicators of tension in the body language

<sup>84</sup> Note: For the purposes of this section, Penny, whose case is described in a preceding section, has been classed as giving evidence by live-link, as her video-recorded evidence was inaudible.

of some children which could not be seen by those in the courtroom as the television monitors displayed only an image of the child's face. Nevertheless, the findings point to the strength of the children, and their commitment to undertaking an unchosen and stressful task. In order to begin to identify factors which may have contributed to the difficulty experienced by some children in coping with the degree of stress they faced, the observations on which Table Sixteen is based are described in more detail below.

In all, fifteen of the twenty-six complainants (57.7%) gave evidence without succumbing to stress. Eleven of the children in this group gave evidence relating to extra-familial abuse, and nine of these were cross-examined for less than ten minutes. The absence of the emotional dilemmas which may be involved in testifying against a close relative, is clearly of significance. Equally, the restriction of cross-examination to a limited number of issues, and avoidance of prolonged questioning on any one subject, appeared important factors. Nevertheless, four of the children who gave their testimony in a highly task-centred manner had been subjected to intra-familial abuse. While one was cross-examined for only fifteen minutes, the remaining three girls were questioned for between thirty-eight and seventy-five minutes. In all three cases cross-examination focused on demonstrating that the complainant had a motive to lie about what had occurred, which might be thought potentially to be an especially stressful form of questioning. It is therefore of interest that while defence counsel in two of these three cases rated relatively highly on the child supportiveness questioning style scale, with scores of six and seven respectively, the third achieved a rating of only four. Individual factors such as the vulnerability or resilience of the child concerned, and the degree of parental or other support available to them, must inevitably be thought to contribute to the way in which children are able to cope, or not to cope, with stressful experiences which they encounter. However, further elucidation of these issues is assisted by examination of instances when children showed overt stress during their testimony. Cross-examination is dealt with first.

#### Stress shown in cross-examination

As might be expected, signs of stress were most apparent in children during cross-examination, although again, a majority stood up well to this process. Analysis of

transcripts of questioning which provoked distress or anger in children suggests there was a high degree of context specificity to these episodes. Nevertheless, three potentially significant factors emerge. Children who appeared particularly distressed during their evidence were those subjected to questioning designed to arouse feelings of shame or personal responsibility; those whose personal circumstances left them especially vulnerable; and children faced with questions which appeared to exceed their cognitive ability.

Given the association found by some studies between barristers' questioning style and children's observed demeanour in court,<sup>85</sup> it is noteworthy that the cross-examination which evoked an especially high degree of distress in the witness, (and which was one of the most uncomfortable to observe), was conducted by a barrister who achieved a high rating on the child supportiveness questioning style scale, his manner being both courteous and gentle, and his questions being straightforward, and including explanations and reassurances. The cross-examination was, however, long (questioning taking 2 hours 35 minutes over a 4 hour 33 minute period), and achieved a quality of remorselessness in the detailed attention it paid to every potential weakness in the complainant's account. It was also of a nature likely to be distressing to the witness, focusing on casting doubt on her character and, by implication, her allegations. The defence team had available to them diaries and letters in which the complainant had recorded sexual fantasies about a number of men and boys, including school teachers and fellow pupils. They also had evidence of a number of active sexual relationships on her part. The adolescent girl concerned made a spirited defence of her behaviour, rejecting defence suggestions that sexual abuse is invariably intolerable to the victim by claiming: 'I didn't hate it necessarily, no. It became a way of life. I got money out of it. I got things out of it.'<sup>86</sup> and, pressed on her sexual activity, stating: 'Something has got to have made me that way. That's not normal for a young girl.' Nevertheless, she was frequently reduced to distraught episodes of crying by the issues which she was obliged to address.

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<sup>85</sup> Davies, G. M. and Noon, E. (1991) *Op. cit.* note 29, p. 62; Murray K (1995) *Op. cit.* note 28, p. 68. The latter report also refers to Cashmore, J. and De Haas, N. (1992) *The Use of Closed Circuit Television for Child Witnesses in the ACT*. A Report for the Australian Law Reform Commission and the Australian Capital Territory Magistrates' Court, p.60.

<sup>86</sup> Trial 6

Questioning which, as in the above case, was likely to evoke feelings of personal responsibility, humiliation, or shame in the complainant appeared to have greater potential for arousing distress than suggestions of lying. Another adolescent witness, who had acknowledged in a relatively composed way during her evidence-in-chief that she had received treatment for a sexually transmitted disease and had given birth to a child while underage, nevertheless broke down under defence suggestions that she had offered the defendant sexual favours in return for money. While adolescent complainants whose behaviour did not conform to the stereo-type of innocent victim were especially vulnerable to this type of cross-examination other, and younger, children could also be led into feelings of shame, as the following example drawn from the cross-examination of a nine year old girl illustrates:

Barrister: Looking back, Jenny, is this right? Did you see Mr Baker's willy when Sally pulled his pants down?

Witness: Yes.

Barrister: But you never pulled his pants down?

Witness: No.

Barrister: You're not as naughty as Sally, are you?

Witness: No.

[ ... ]

Barrister: You told [prosecuting counsel] Sally touched Mr Baker's willy and then you said no-one else touched it, but then you told [prosecuting counsel] you kissed it. Why did you do it? You don't *do* that kind of thing.

Witness: *Looks down. Inaudible.*

Barrister: Did Sally kiss his willy?

Witness: No.

Barrister: I want to go back to the broken fence. Did you and Sally and Tanya break the fence?

Witness: *Silent.*

Barrister: Do *try* and remember, Jenny. It's important to me. Did you ever say anything to a grown-up about Mr Baker because you didn't want to be blamed about the fence? Do you understand?

Witness: Yes.

Barrister: Has Sally ever said to you 'Let's say we kissed Mr Baker's willy?'

Witness: No.

[ ... ]

Barrister: Jenny, if I can put it this way, you never did kiss Mr Baker's willy?

Witness: Jane [police officer] says that I did. On the piece of paper.

[statement]

Barrister: Someone called Jane says you did?

Witness: Yes.

Barrister: But you can't remember?

Witness: No, but I -

Barrister *Interrupting* You wouldn't kiss someone's willy, would you?

Witness: No.

Barrister: And no-one asked you to, Jenny?

Witness: *Silent.*

Barrister: Did someone ask you? Jenny, did you kiss his willy?

Witness: No. *Looks away. Her face is flushed.*<sup>87</sup>

The child examined in this extract showed no overt signs of stress other than her silences, and the flush which spread across her face when she turned away from the camera. As two questions preceded her final response it is not clear whether she was confirming that she had not been asked to kiss the defendant's willy, or stating that she had not in fact kissed it. The issue was not clarified, as defence counsel chose to understand the statement as a retraction. However, the tenor of this cross-examination (with its use of adult authority and reliance on eliciting feelings of wrong-doing in the child), makes it questionable whether, if the complainant *was* recanting her allegation, this was attributable to her being led by defence counsel into an acknowledgement of the truth, or to the stress created by the questioning and an associated desire to reject the negative personal attributions which it involved.

The defence in all ten cases of sexual abuse argued that the complainants' allegations were untrue, whether the result of misinterpretation of an essentially innocent event, or deliberate fabrication. A number of complainants were able to reject such suggestions without undue distress, as in the following brief example:

Barrister: Lots of things were making you feel badly about Michael?

Witness: Yes.

Barrister: But what you told them at school about Michael trying to kiss you and have sex with you was not true?

Witness: *It is true.*

Barrister: You were trying to get back at him for what he had done to you and to your Mum. [physical assaults and controlling, dominant behaviour]

Witness: No.

*Barrister sits, concluding cross-examination.*<sup>88</sup>

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<sup>87</sup> Trial 3

<sup>88</sup> Trial 9

It is notable that the three complainants who were most distressed by suggestions that their allegations were untrue were the two girls in the research sample who had been rejected by their mother following disclosure of their abuse, and a complainant who testified to incest. This lends weight to the likelihood of the personal circumstances of the witness having a significant bearing on the impact of specific lines of questioning.

A third source of stress involved failure by defence counsel to acknowledge developmental limitations in children's cognitive capacities. It is questionable whether younger children in particular are able to recall their experiences with the degree of specificity sometimes required of them by the criminal justice system. The following cross-examination was halted by the trial judge when the ten year old witness began to cry. Although the question which prompted the child's tears accused him of lying, it followed a series of questions in which the child was asked to account for inconsistencies between his oral evidence and the statement he had given to the police almost two years earlier. He attempted to respond as directed but his answers suggest he found the task extremely difficult:

Barrister: Now you are saying [in the police statement] that it had happened about five times.

Child: Yes. That was only at Whipsnade Road.

[...]

Barrister: How many times did it happen at Cowley Road?

Child: Three. Five and three is eight.

Barrister: Three times. How many times in the bathroom?

Child: Twice.

Barrister: How many in the bedroom?

Child: Once.

Barrister: Are you sure about that? No question of a mistake?

Child: *Silent. Looks up to the right. Chews his lip.* I think so, yeah.

Barrister: You've had a long think about that.

Child: LISTEN!

Judge: *intervenes; says to counsel:* He wants you to listen to him.

Child: It happened once before my bath, once after my bath and once in the bedroom.

Barrister: Was the time in the bedroom the time with the towel?

Child: Yes.

Barrister: And not the time you were in bed asleep wearing pyjamas and George came in and woke you up?

Child: He did that once, yeah. No, twice, sorry.

Barrister: So it happened more than once in the bedroom?

Child: Yes.

Barrister: You didn't remember that when you had your long think.

Child: *Silent.*

Barrister; I'm sorry, I'm having to suggest that you are not telling the truth.

Child: It is true. *His face crumples in tears.*<sup>89</sup>

The case in which this child appeared had taken almost two years to reach its final hearing, and concerned offences which had begun when the complainant was aged six. In these circumstances it is questionable whether he could realistically be expected to be specific about the number of occasions on which he had been assaulted. Yet this was the task with which he was faced.

The loss of concentration, restlessness and confusion exhibited during cross-examination by a number of children appeared primarily to be related to tiredness. Nine<sup>90</sup> of the twenty-six children giving evidence of personal victimisation waited until after 3.00p.m. to be called to the remote witness room. Six of these were aged eleven years or under. The expressions of tiredness on the faces of a number of the younger children when seen on the court monitors suggested that the concentration demanded by watching pre-recorded statements was no less fatiguing than giving live evidence-in-chief. While some children were able to remain task-centred during cross-examination, despite the length of time they had been waiting at court, a small number showed signs of confusion in their responses. This was also the case with an older adolescent whose cross-examination was the longest in the research sample. The girl concerned initially gave detailed responses to defence questions, backing up her answers with specific information about dates, events or persons. However as the examination progressed and she was put under increasing pressure, her recall of some of the more precise aspects of her evidence became confused. In most cases she spontaneously corrected any errors, but her demeanour indicated increased tension, and there were times when she angrily persisted in a mistake despite the efforts of defence counsel to enable her to correct it.

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<sup>89</sup> Trial 1

<sup>90</sup> Children 4 6 10 18 21 22 27 28 45

### Stress shown in evidence-in-chief

The new provisions have particular implications for children's evidence-in-chief. The evidence which is required to prove a charge of child sexual assault is of a kind likely to cause the victim embarrassment and pain. The live television link and pre-recorded statements were both introduced as a means of reducing the stress experienced by children faced with the task of offering such evidence. It is therefore relevant that only a minority of complainants showed the identified signs of stress.

A comparison of evidence-in-chief offered orally over the live-link and that contained in pre-recorded statements of complaint, indicates that stress was shown by proportionately more children in the former group than the latter. Nevertheless, only two of the seven children giving oral testimony cried during their evidence-in-chief, their tears beginning in both cases with their initial recall of the offences. While it is difficult to draw firm conclusions from such small numbers, it is possible that children who survive this particular moment may be more likely to retain control of their emotions during the remainder of this stage in their evidence.

There was only one example of loss of concentration in children giving live evidence-in-chief over the link, this being a seven year old girl who was not called to give evidence until 3.20p.m. Although initially appearing co-operative and helpful, she relatively quickly showed signs of tiredness and confusion and was unable to provide evidence supporting the charges faced by the defendant. The remaining children in this group testified in a relatively composed manner. Two children were initially silent and unresponsive to attempts by counsel to lead evidence on the offences, but in both cases the children answered when the questions were reframed, or deferred.

Observation of pre-recorded statements showed that while the majority of children were relatively self-possessed during the interview, a number showed signs of anxiety other than those which had been designated for the purposes of initial analysis. Given the timing of the recorded interview, however, some indication of tension might be expected. The video-recorded statement is made by police officers and social workers as part of their investigation of suspected offences against a child. Investigative

officers are advised that the interview 'should broadly equate with a witness statement of the first detailed account given to the police and should be conducted as soon as is practicable'.<sup>91</sup> The statement is therefore recorded at a time which is experienced as highly stressful by children.<sup>92</sup> Most notable of the stress symptoms shown in recordings was a rigid posture maintained by children for much, or all, of the interview. Three children<sup>93</sup> remained immobile throughout interviews lasting 30 minutes, 45 minutes and 1 hour; one girl was the subject of a second brief interview, lasting 5 minutes, and on this occasion had a more relaxed demeanour. However, an adolescent who was also the subject of two recordings,<sup>94</sup> lasting 1 hour 34 minutes, and 27 minutes respectively, sat stiffly throughout both interviews, never once looking at the interviewer. She was in tears when the first recording began, and cried silently throughout the interview, but made only minimal movements, the first occurring 30 minutes into the interview when she briefly wiped her eyes. The rigidity of her posture was echoed by a lack of intonation in her voice. It was noticeable that her manner in the two recordings was in marked contrast to her demeanour during cross-examination which, while indicating considerable tension, nevertheless displayed spontaneity and a range of emotions. A further two children<sup>95</sup> sat rigidly for a considerable time at the beginning of the interview; one, for example, sat stiffly on the edge of her seat for the first 20 minutes, at which point she briefly relaxed against the back of the chair but almost immediately resumed her original position, maintaining this for a further 10 minutes.

Another indicator of tension which occurred in three of the recorded interviews was restlessness. One child<sup>96</sup> indicated twice to the interviewer that she was feeling tired, and, receiving no response, eventually commented 'I'm getting a bit fed up', reinforcing this with sighs, foot shuffling and silences. In another recording, the

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<sup>91</sup> Home Office in conjunction with Department of Health (1992) *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings*. HMSO: London, para 1.7 p.6.

<sup>92</sup> Wade, A. and Westcott, H. (in press) 'No easy answers: children's perspectives on investigative interviews.' In Westcott, H. and Jones, J. *Perspectives on the Memorandum. Policy, Practice and Research in Investigative Interviewing*. Arena: Aldershot.

<sup>93</sup> Children 9 22 26

<sup>94</sup> Child 11

<sup>95</sup> Children 8 19

<sup>96</sup> Child 18

child<sup>97</sup> began to yawn after 27 minutes of questioning. When her increasing weariness was ignored she gradually became unco-operative, yawning more noisily, failing to respond to questions, or, pressed to answer, responding crossly: '*I don't know*'. The interviewer persisted with questions for 45 minutes after the child's first indications of tiredness, only concluding the interview when the child demanded to go to the toilet. It is perhaps relevant here that children who gave live evidence were offered brief adjournments if they appeared tired or distressed, whereas recorded interviews involved no such respites. The greater average length of recorded interviews appeared to be another factor affecting children's concentration. It was also noticeable that children tended to be asked to provide more specific detail about offences in recorded interviews than was the case when they were questioned in court. Prosecuting counsel indicated to the researcher that once sufficient evidence had been given to support the charge(s) a decision could be made not to continue a specific line of questioning, especially if this was likely to distress the child. Police investigators, being in a different position, and not having the opportunity to assess jurors' reactions to the child's testimony, pursued evidence more exhaustively. On occasions this appeared to contribute to the stress of the interview.

The response of children in the remote witness room to the playing of video-recorded evidence could not be observed by the researcher as it was visible only on the judge's monitor. However, it was apparent that this itself may become a source of stress to some children. Two children left the witness room without warning while their video-recorded statements were being shown, and one was eventually excused from watching the recording. A third witness was allowed to remain at home when two recordings relating to her case were shown.

### **The witnesses**

Eight of the young people who gave witness evidence testified in cases of sexual abuse, while six gave evidence in a case of murder. In the sexual abuse cases two of the witnesses<sup>98</sup> gave no evidence-in-chief, being immediately tendered to the defence

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<sup>97</sup> Child 19

<sup>98</sup> Children 36 37

and then questioned by prosecuting counsel during re-examination. In both cases defence counsel took the witnesses through their statement, asking leading questions which required only positive or negative responses. The remaining six young witnesses who gave evidence of sexual abuse were asked open questions during examination-in-chief, to which they gave relatively detailed answers. The following is a representative example:

Barrister: I want to move on now to March 1993. I think you and Sarah were together in a German class and she became upset. Can you tell us about what happened?

Witness: Well, Sarah started to cry. I was sitting behind her and I tried to calm her down. She was saying that she was worried that she was pregnant and she wasn't sure if it was Dean's - her boyfriend - or Michael's.

Cross-examination of these witnesses focused on clarifying particular aspects of their evidence; there were no examples of challenging questions, such as suggestions that their account was fabricated or mistaken. Some witnesses spoke in rather quiet tones, but otherwise there were no signs of undue stress in their demeanour; indeed a number gave their testimony in a relatively assured manner.

It was noticeable that although all the witnesses were directed to address their responses to the jury rather than to the questioner, they would invariably watch counsel closely while they were being questioned. This enabled a degree of informal communication to be established between witness and barrister, including occasional smiles and jokes. Almost all child witnesses (including complainants), answered questions literally, not appearing sufficiently confident to provide information other than that which was specifically requested from them. However, there were instances when witnesses testifying in the courtroom would use the rapport established with counsel to signal that information would be forthcoming if the question were reframed. The following example is taken from the murder trial; the witness having just described seeing the defendant sitting on a log in a playing field some time before the murder took place:

Barrister: Did he have anything in his hands?

Witness: *Looks directly at counsel and smiles:* There was nothing in his hand. *Emphasises final word.*

Barrister: Was there anything near him?

Witness: Yes, there was a knife in a sheath on the ground by his side.

In this case, the verbal hint which the witness gave the prosecuting barrister was reinforced by pointed eye-contact and a smile, and appeared to be facilitated by their physical proximity in the courtroom. Barristers were frequently observed to use a light hearted comment or joke as a way of putting child witnesses at ease, whether they testified in the courtroom or over the live-link. However, the more interactive communication described above was never observed with children giving evidence from the remote witness room, suggesting that it may have been hampered by the link, possibly because of a difficulty in establishing direct eye-contact.

A rather different perspective on the stress of acting as a witness was presented by the murder trial. Again, the demeanour in court of the six young witnesses concerned showed none of the indicators of stress which had initially been identified for the purpose of analysis. Nevertheless, it was apparent both from observation, and from records held by the Crown Prosecution Service, that the case aroused considerable anxiety in a number of potential witnesses, the main feature of which was fear of retaliation from the defendant's family and associates. It was evident from the Crown Prosecution Service file that at least one adolescent had sought legal advice on his obligation to act as a witness, a solicitor having written to the CPS indicating his intention to apply for his client's statement to be read out in court rather than given in person, as the boy concerned had been threatened and was in fear of his life. At the final hearing a change of plea by the defendant ensured that much of the prosecution's evidence could be agreed, thus reducing the number of live witnesses required.<sup>99</sup> Nevertheless, the case had to be briefly adjourned when the prosecution were advised that the first two adolescents the Crown wished to call were terrified of coming into court and were refusing to appear.

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<sup>99</sup> On the first day scheduled for the final hearing of the case the defendant entered a plea of guilty of manslaughter on the grounds of diminished responsibility. The case was adjourned for the Crown to consider this plea, which was eventually rejected. The Crown Prosecution Service file contained statements taken from 64 individuals, 38 of whom were listed as witnesses. At the final hearing live evidence was called from 6 young people and a number of adults including older adolescents, police officers and experts. Witness statements from 14 young people were read out in court.

Although all six young witnesses eventually testified, all but one showed a degree of reluctance to repeat in court evidence which had previously been given to the police. This inhibition was most apparent in those who had been closely involved with the defendant or who lived in the same neighbourhood. Faced with this situation, the prosecuting barrister appeared to modify his strategy according to his assessment of each individual. The witness whose demeanour in court indicated the highest level of anxiety was the Crown's key witness; an adolescent boy who had been a friend of the defendant and whose police statement had included a graphic eye-witness account of the murder. In the witness box he looked pale and unhappy; spoke in a low voice, and averted his eyes from everyone present. He was led gently through the early stages of his evidence but had not looked once at the prosecutor by the point at which it was necessary for him to repeat his account of the murder. The following is the account he then gave. Having described the victim being brought to the ground by a number of youths, he was asked what happened next:

Witness: Philip [defendant] came and said 'Move away' or summat like that. At first they [youths] didn't move, but then they did.

Barrister: What did Philip do?

Witness: Pulled his knife out from the side of his trousers.

Barrister: What did he do with it, then?

Witness: He started chopping with it.

Barrister: He started chopping with it. Where was the chopping going?

Witness: At the lad on the floor.

Barrister: In what direction?

Witness: Into his hands.

Barrister: What was the lad on the floor doing?

Witness: Covering his face.

Barrister: What is the next thing you remember?

Witness; He [defendant] drew his knife back. *Demonstrates.*

Barrister: What happened then?

Witness: That's all I saw. They've got my statement wrong.

In this case the prosecutor accepted that the witness had given as much evidence as he wanted to about the incident, and responded calmly: 'Alright', moving on to other issues. It was striking that after this exchange the boy began to glance occasionally at the questioner, and his demeanour became more relaxed, such that he was later able to describe the effect of the incident on him, and provide more details of what had occurred. With another witness, the prosecutor adopted a different strategy, applying

a degree of pressure when the witness indicated he could not remember what had happened, suggesting that he think carefully and reminding him 'This is a serious matter'.

Observation of the interactions between witnesses and counsel in the courtroom suggested that a skilled advocate will be resourceful in assessing witnesses, judging when to offer reassurance, attempt to establish trust, or instil anxiety. The presence of the witness appeared to have some advantages for the establishment of rapport between witness and barrister, with implications for the quality of the evidence elicited. Equally, however, it became apparent from observation that the focus on child sexual abuse complainants in discussions of the stress of a court appearance, may have obscured the needs of other children and young people acting as witnesses. While the demeanour of the witnesses in the sexual abuse cases suggested that giving evidence in the courtroom is not invariably traumatic for young people, (and pointed to the possibility that giving eye-witness testimony may in some cases be an empowering experience, enhancing feelings of responsibility and self-esteem), it was evident that for some of those giving evidence in the murder trial, the experience was both disturbing and frightening. The anxiety experienced by these particular young people appeared to be related primarily to the nature of the evidence they had to give, and their fear of the consequences of testifying, rather than being a product of the courtroom *per se*. However, given that the live-link is designed to assist child witnesses in cases of violent as well as sexual offences, it is of interest that there was no indication in the CPS file that an application for the link had been considered.

### **Trial process perspectives**

The ability of witnesses to communicate accurate and complete evidence is held to be crucial to the truth-seeking purposes of the criminal trial.<sup>100</sup> A primary concern of the government in introducing the video-link was to protect children from direct

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<sup>100</sup> Myers, J. E. B. (1992) 'Steps towards forensically relevant research.' In: Goodman, G. S., Taub, E. P., Jones, D. P. H., England, P., Port, L. K., Rudy, L., and Prado, L. *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*. Monograph of the Society for Research in Child Development, 57(5), p.143. Murray makes the same comment, quoting Myers: Murray, K. (1995) *Op. cit.* note 28, p.77.

confrontation with the defendant,<sup>101</sup> in part because it was thought that the sight of the accused might inhibit children from testifying openly. Likewise, pre-recorded evidence was supported on the grounds that it would allow the courts to hear what children had to say about offences at the time these came to light, so overcoming the problem of children's recall fading over time.<sup>102</sup> These reforms can therefore be seen as intended to improve the reliability and completeness of children's testimony.

In the following sections children's evidence in study cases is analysed in terms of its completeness; its consistency; and its effect on an observer, in order to consider whether qualitative differences exist between evidence which is given over a live-link, in a video-recording, or in the courtroom,

### **Putting the evidence before the court**

The access to Crown Prosecution Service files which was given to the researcher enabled a comparison to be made between evidence given at court and that contained in witness statements.<sup>103</sup> The process of comparison highlighted four ways in which evidence heard at the trial might vary from that given previously; it might be forgotten; omitted; supplemented; or be contradictory or otherwise inconsistent. Table 17 summarises cases in which substantial variations in evidence occurred.

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<sup>101</sup> Home Office (1987) *The Use of Video Technology at Trials of Alleged Child Abusers*. Consultation paper issued by the Home Office 8.5.1987: London, pp. 3 and 7.

<sup>102</sup> See for example, Spencer, J. R. and Flin, R. (1990) *Op. cit.* note 21, p.161; McEwan, J. (1990) 'In the Box or on the Box? The Pigot Report and Child Witnesses.' *The Criminal Law Review* p. 364; *Hansard (Lords)* 22 April 1991 col.45.

<sup>103</sup> Files contained the full witness statement where this had been given in conventional question and answer form, but had only a short written summary of video-recorded evidence. Comments on video-recordings therefore rely primarily on the recordings as shown in court, (some of which had been edited).

<b>Table 17: Variations in children's statements and court testimony</b>			
	<b>Link only</b> Children: n = 7	<b>Link+recording</b> n = 19	<b>Conventional</b> n = 14
<b>Evidence forgotten</b>	1	1	0
<b>Evidence omitted</b>	2	0	5
<b>Evidence added</b>	2	1	1
<b>Evidence inconsistent</b>	3	8	0

The distinction made here between inconsistent evidence and evidence which was omitted or forgotten involves value judgements which will be made more explicit below. In overall terms, there was a wider range of variation in the evidence given by closed circuit television and by pre-recorded statement, than was the case in evidence offered conventionally. However, the nature of the testimony itself has to be taken into account in understanding this finding.

#### **Evidence which appeared to have been forgotten**

There were two cases in which complainants appeared to have lost almost all recall of the offences allegedly committed against them by the time of the final hearing. One involved relatively minor incidents of extra-familial abuse which appeared at the time (from the child's witness statement) to have aroused her curiosity rather than to have caused her distress. The complainant, who was aged seven at the time of the final hearing, gave oral evidence-in-chief over the live link and proved unable to offer any evidence which would support the charges against the defendant. Such details as she provided were highly inconsistent with her previous statement. While she did not say that she could not remember what had happened to her, her re-iterated assertions that the defendant had done 'rude things', and visible efforts to be helpful and bring to mind what had occurred, suggested that this was a *problem of memory rather than false allegation*. The case had taken more than eighteen months to reach court, and the girl concerned had waited until 3.20p.m. to begin her testimony, having been at court all day. She was clearly very tired. However, the judge was obliged to direct

the jury to enter verdicts of not guilty in relation to all the charges which concerned her.<sup>104</sup>

The second case involved a nine year old girl whose evidence-in-chief took the form of a video-recorded statement. During the competency assessment conducted by the trial judge she was asked 'Are you going to tell us the truth?', and replied cheerfully: 'If I can - if I can remember'. The judge laughed, responding: 'You can only tell us what you can remember. The important thing is not to tell lies'. The video recording was then shown, in which the girl gave a detailed and explicit account of an indecent assault by a non-family member. However, during cross-examination, asked if she was sure this was what had occurred, she replied uncertainly: 'I think so. I'm not sure'. The judge intervened, querying if she was alright as she looked anxious and unhappy, and she answered apologetically: 'I can't remember very much'. Asked if the video-recording had reminded her, she said: 'I just tried to push it out of my mind, and forgot all about it'.

There are clear similarities between the two cases, both involving offences of extra-familial abuse which appeared to have been largely forgotten by the victims when the cases eventually reached court. However, while the first case resulted in a not guilty verdict the second concluded with the defendant's conviction. Although this verdict may in part be attributed to the girl concerned being one of a number of children subjected to similar assaults, this was also the position in the former case. The crucial factor appears to be that the jury in the first case were denied the opportunity to consider the charges by the complainant's inability to recall her experiences, while in the second, the existence of the complainant's pre-recorded statement allowed them to hear evidence of the assault. It would appear that the jury placed considerable reliance on the evidence in the recording, although their verdicts on the individual charges indicated that each child's testimony was subjected to critical examination.<sup>105</sup>

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<sup>104</sup> There were additional charges in respect of another child.

<sup>105</sup> The majority of charges against the defendant were found proved, but not guilty verdicts were returned in relation to some children and some charges.

### **Evidence which was omitted**

In cases involving video-recorded evidence the witness has no opportunity to omit any of his or her testimony, the only excluded material being that which the court deems inadmissible or irrelevant.<sup>106</sup> Observation of live evidence-in-chief given at trials suggested, however, that there are occasions when evidence is omitted by witnesses not because it has been forgotten but as a result of the witness' reluctance to provide it.

Five of the six prosecution witnesses in the murder case failed to include in their oral testimony at court information which they had previously given to the police. In particular, prosecution barristers had difficulty eliciting evidence regarding the fatal blows struck by the defendant, or the content of subsequent conversations he had participated in, in which he was alleged to have spoken of what he had done. As discussed earlier, fear of the consequences of giving this evidence seemed to be a significant factor inhibiting the accounts witnesses gave in court. By contrast, in the sexual abuse cases, it appeared probable that some discrepancies between oral and evidence and previous statements were a product of feelings of shame. It was noticeable, for example, that the younger complainants had particular difficulty recounting offences in which they had performed sexual acts on the defendant, as distinct from those in which he had performed sexual acts on them. Four children aged between seven and eleven at the time of the trial, had given statements to the police which included details of occasions on which they had masturbated the defendant. Only two of the children, however, repeated this evidence at court. Of these, one child made efforts in her oral evidence to minimise her responsibility for what had occurred: ('Sometimes he'd put my hand on his private parts and I'd try to pull it away'), but was otherwise consistent in what she said on the matter. The second child gave a negative response to counsel's first attempt to elicit the evidence, and while stating in a whisper 'I kissed his willy' when a second opportunity was created, subsequently recanted this statement during cross-examination. (See earlier

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<sup>106</sup> Explaining to the jury why the recorded statement had been edited, one prosecuting barrister said the material which had been excluded was 'something which would confuse the jury or - forgive the expression - rubbish'. He then modified this statement saying: 'Any jumps in the tape are not trickery but have been made at the request of the defence and with the agreement of the court, with a view to not worrying you with what you might call extrinsic material'.

quotation). The small numbers involved make it difficult to draw firm conclusions, but nevertheless the omission of this evidence by two children together with the demeanour of the remaining two children, support the possibility that feelings of shame or wrong-doing may have inhibited the children from giving a complete account of their experiences, rather than this being a lapse of memory.

### **Evidence which was added at the trial**

There were examples of supplementary evidence being given at the trial irrespective of whether children gave evidence conventionally, or benefitted from the new provisions. Of the four children in this category, the amplified statements made by the eye-witness who gave oral evidence in the courtroom appeared to be to the benefit of the prosecution, lending greater credence to her account. By contrast, the provision of additional evidence by complainants in the sexual abuse cases invariably resulted in the defence casting doubt on the reliability of the children's testimony. Three complainants<sup>107</sup> gave oral testimony at court of assaults which they had not referred to when originally questioned by the police, in one case during examination-in-chief, and in the remaining cases during cross-examination. From the perspective of this study the point of this finding is that the new provisions do not guarantee that children's evidence at court will not differ from that given previously, whether the evidence-in-chief is pre-recorded or given orally at the trial. However, the accounts given at court of more assaults than were described at the time of the criminal investigation raise important questions about the way in which evidence of abuse is currently obtained, particularly in view of the finding that children's credibility can be undermined as a result of fresh allegations emerging at the trial.<sup>108</sup>

### **Inconsistencies in evidence**

Examining counsel frequently indicated to witnesses that they did not expect them to remember all the details of what they had seen or experienced, accepting that their

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<sup>107</sup> Note: One of the two children listed in Table 17 under the category 'Link only', is Penny, whose video-recorded statement was played in court but proved to be inaudible, necessitating that she give live evidence-in-chief.

<sup>108</sup> Child protection specialists argue that children provide details of abusive experiences in an incremental manner over time, their earliest accounts often being tentative and incomplete: Sorenson, T. and Snow, B. (1991) 'How Children Tell: The Process of Disclosure in Child Sexual Abuse.' *Child Welfare* Vol LXX No.1, p.12

memory of the events concerned would probably have faded. On occasions, however, defence counsel appeared to seize on inconsistencies in a witness' testimony as a basis for cross-examination. The following example occurred in the trial of a defendant charged with long-term abuse of the complainant:

Barrister: When the police lady asked you near the beginning of the video to tell her what it was all about and you said abuse, she asked you to say what had happened and you said 'He got in [bed] with me once and that's when he got me'. Do you remember that?

Witness: Yes.

Barrister: Now, if he's been doing it for ages and ages, how did you come to say 'He got in with me once' because it sounded as if it had only happened once. How come you came to say that? Do you understand?<sup>109</sup>

Arguably, defence counsel's attention to this inconsistency in the child's account could be said not only to reflect his responsibility to test the case against the defendant but to assist the court, in that everyday speech is often uttered loosely and expressively, lacking the clarity required by the adjudication process. Nevertheless, given that this was the child's initial response to the police officer, and she went on to describe many abusive experiences to which she had been subjected over a period of years, there is also a sense that the barrister concerned felt obliged to query relatively minor inconsistencies in order to make some sort of a case for his client. In estimating the occurrence of inconsistency for the purposes of this study, discrepancies such as that described above were not included, only more substantial alterations in accounts being noted. Among the inconsistencies counted, however, are included examples of inconsistencies which were essentially peripheral to the issues in the case.<sup>110</sup> For example, an adolescent who was missing from home when her original statement was made, told the police that she had run away because she was beaten by her father and sexually abused by her uncle. During her Uncle's trial she retracted her statements about her father. By the time of the court case, she had given birth to a child and was receiving considerable assistance from her parents in addition to being dependant on them for a home. These circumstances may be thought to have

<sup>109</sup> Trial 5. Subsequently, the same barrister, asking the witness to describe a conversation she had had with her mother, commented: 'I don't expect you to remember exactly, but what did you say?'

<sup>110</sup> However, these were used by the defence to cast doubt on children's reliability and hence on the whole of their evidence.

some bearing on her denial in court of having been subjected to beatings by her father. Despite this, and the little relevance the retraction had to the facts of the case (other than the extent to which it could be said to go to the complainant's credibility), considerable emphasis was nevertheless placed on it by defence counsel.

What is striking is that the occurrence of inconsistency in the testimony of children giving live evidence-in-chief at the trial, and those whose evidence included a pre-recorded statement, is almost exactly the same (42.8% and 42.1% respectively). Five children in the latter group had made no complaint of abuse when originally interviewed by the police and in two cases a video-recording of the negative interview was shown in court during cross-examination of the child. Likewise, the only case in which a child retracted her original statement at court (as opposed to having forgotten or repressed the memory of it) involved a ten year old who had been interviewed on video. In the video-recording she described the defendant pulling her skirt up to her neck. It is difficult to construe her account as an indecent assault; (she said she had not been touched; the defendant's hands had stayed on her skirt), but charges may have been brought in respect of her because of the overall number of complainants in the case. At the trial she was asked by defence counsel 'He never did touch you, did he?', and responded 'No'. Re-examination proceeded as follows:

Barrister: You say he didn't touch you?

Witness: No.

Barrister: Did he do anything you didn't like?

Witness: Yes.

Barrister: What?

Witness: He picked me up.

Barrister: What else did he do, if anything?

Witness: Nothing.

Barrister: You saw the video, and on the video you say he lifted your skirt up to your neck. Did he do that?

Witness: I can't remember.

[...]

Barrister: You know when your video was made - I know it was a long time ago - were you telling the truth or lying?

Witness: Lying.

Barrister: Do you know what I am saying?

Witness: Yes.

Barrister: When you say he lifted your skirt up, was that true or not true?

Witness: Not true.<sup>111</sup>

Subsequent responses given by the child in answer to questions by the judge suggested that she may have felt left out when she heard her friends at school talking of the defendant's behaviour towards them; it appeared possible that this may have influenced her account to the police.

Overall, the verdicts reached in the various trials suggest that the weight attached to inconsistencies by juries depended on how these were viewed in the light of the evidence as a whole. Guilty verdicts were reached in the case of two of the three children in this category who gave evidence over the live link, and five of the eight children who had been interviewed on video.<sup>112</sup> The method by which the evidence was given did not appear to be a significant factor.

Viewed as a whole the findings reviewed in this section suggest that the evidence given at court by some children will continue to vary from that given to the police, irrespective of the manner in which their evidence-in-chief is put before the court. The requirement that children whose evidence-in-chief is given in the form of a video-recorded statement attend court for cross-examination, ensures that no child is exempt from giving oral testimony. The possibility of children forgetting, or otherwise substantially changing their evidence, thus remains open. Nevertheless, the introduction of pre-recorded evidence appears to have altered the balance of the trial process in two ways. Firstly, it ensures that the court hears evidence which the child, for whatever reason, may be inclined to omit. Secondly, this study provides some evidence that juries are prepared to convict on the testimony contained in video-recordings, despite the child having little or no recall of the offences by the time of the trial.

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<sup>111</sup> Trial 7.

<sup>112</sup> In the case of four children the defendant was convicted of all charges, and in the remaining case, was convicted of one of two charges.

## Hearing, understanding, and responding to the evidence

### Understanding the evidence

Criminal cases are as much concerned with issues of fact as matters of law,<sup>113</sup> and in particular, those facts which have to be proved if the defendant is to be convicted of the offences with which he is charged. In framing the indictment, lawyers are obliged to devise a hypothesis of the case which fits as much of the evidence as possible into a coherent whole, while being consistent with legal rules and theory. In the majority of cases in this sample, the Crown Prosecution Service sought the advice of counsel in drawing up the indictment. Advice was sought in particular on the interpretation to be placed on statements made by complainants in the child sexual abuse cases, and the specific charges which would most accurately reflect the child's allegations. A process of reconstruction will invariably be involved when translating a witness' account into the legal context, but there appear to be particular difficulties in child sexual abuse cases. Children, (like adults), do not invariably talk in an evidentially sound manner.<sup>114</sup> This problem is heightened when dealing with child sexual abuse as not only may young children lack an understanding of sexual matters and the vocabulary to describe these, but culturally the language commonly used for talking about sex is especially allusive and imprecise.<sup>115</sup> Consider, for example, the following evidence given by a ten year old child as summarised by the trial judge:

She said he pulled her pyjama bottoms down and she felt something fat and long on her bottom. He put it in her bottom, he went up and down, then she felt something soggy. She pulled her pyjama bottoms off, crept out to the bathroom, wiped her bottom and put some knickers on. A clear account, which you have to evaluate, of the defendant *putting his penis near her vagina* and ejaculating.<sup>116</sup> [Emphasis added].

The broad interpretation to be placed on this account, is, as the judge states, quite clear. From the legal perspective, however, the account has some problems, hence perhaps the cautious phrase 'putting his penis near her vagina'. To prove a charge of rape or intercourse there has to be evidence of vaginal penetration, and while the

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<sup>113</sup> Boon, A. (1993) *Advocacy*. Cavendish: London p. 46.

<sup>114</sup> Wattam, C. (1991) *Truth and Belief in the 'Disclosure' Process*. NSPCC: London p. 18

<sup>115</sup> *Ibid.*, p. 25.

<sup>116</sup> Trial 7.

child's statement 'put it in my bottom' might be thought to infer this, it is open to other interpretations.<sup>117</sup> In this context, video-recorded evidence can raise particular problems. Commenting on this the same trial judge remarked in his summing up:

There are advantages in some ways to seeing children give evidence on video in an atmosphere very different from a courtroom, but there are also drawbacks. The jury is not able to see the children as well as they would like and some details of what is said are lost, partly because of the way it is said - because of the confused way the stories come out.<sup>118</sup>

As indicated in Chapter Six, prosecuting counsel will have prior knowledge of the evidence a witness may be expected to give at a trial, allowing the evidence to be led (insofar as possible) in a coherent and logical manner, and following as closely as possible the facts which have to be established and proved. Investigative interviewers, by contrast, are involved in an exploratory process, and may have no forewarning of what their enquiries will establish. As previously stated, interviewers are advised that the video-recorded statement 'should broadly equate with a witness statement of the first detailed account given to the police and should be conducted as soon as is practicable'.<sup>119</sup> However, while question and answer statements are in practice often taken once initial interview has established what the witness will say, video-recorded interviews by contrast are a record of the investigative interview itself.<sup>120</sup> As a result, evidence may not always emerge clearly and sequentially. Section 32A (5) (b) of the Criminal Justice Act 1988 prohibits prosecuting counsel at a trial from questioning a child 'on any matter which, in the opinion of the court, has been dealt with in his recorded testimony',<sup>121</sup> thus if a child's allegations do not emerge clearly from the recording, this cannot be rectified by the Crown. The implications of this for the trial

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<sup>117</sup> In this particular case the prosecution put alternative charges of attempted intercourse and indecent assault, to cover for the possibility of the jury of the jury not being persuaded that penetration had occurred.

<sup>118</sup> Trial 7.

<sup>119</sup> Home Office in conjunction with Department of Health (1992) *Op. cit.* note 91, para. 1.7, p.6.

<sup>120</sup> Personal communication: West Yorkshire Police Child Abuse Unit.

<sup>121</sup> Since the fieldwork for this study was undertaken, this prohibition has been modified. Section 50 of the Criminal Justice and Public Order Act 1994 amends Section 32A to allow the prosecution to examine a child witness on matters covered in the child's video testimony if, in the opinion of the court, they are not dealt with 'adequately' in the recording. [ Note: There was one case in the research sample in which the Crown were able to identify evidence additional to that given in the recorded interview, thus creating an opportunity for prosecuting counsel to put a number of questions to the witness. (Trial 6)]

process were evaluated by analysing the ease with which children's allegations could be followed from video-recordings.

In the case of offences committed over a relatively short time-scale, video-recorded evidence was straightforward to follow, and appeared to raise no problem other than that of specificity referred to above, which is not exclusive to such testimony.

However, it proved to be more difficult to follow children's accounts of long-term abusive experiences when these were given in pre-recorded form. Seven recordings fell into this category and were analysed.<sup>122</sup> Table 18 below indicates the numbers of recordings which proved difficult to follow.

<b>Table 18: Disjointed or confusing evidence in video-recorded statements</b> n = 7	
<b>Difficult to follow</b>	2
<b>Somewhat difficult to follow</b>	2
<b>Relatively clear</b>	3

Investigative interviewers are encouraged to elicit a free narrative account of their experiences from child witnesses before moving on to questioning in order to clarify ambiguous aspects of the account (if any) and attempt to obtain specific details helpful to a prosecution.<sup>123</sup> Free narrative accounts were obtained in only three of the seven recordings, and it may be significant that in two cases the recordings concerned were assessed as relatively clear and easy to follow. The free narrative establishes the scope of the interview and alerts the investigator to the issues to be addressed. In some cases what the child says may be very brief, and this was the case in the recording which included a free narrative but was assessed as difficult to follow, the seven year old concerned stating simply: 'In bed, at bed time, he did ... he put his hands on our botty'. Nevertheless, within this one statement is encoded considerable

<sup>122</sup> A further 12 children were shown on the trial indictment to have been abused over a long-term period. In their cases, however, examination of the recordings suggested that the abuse itself was relatively short-term but had been put in the wider time-scale as it could not be dated accurately and all twelve children had been subjected to extra-familial abuse by a defendant simultaneously charged with long-term abuse of his step-daughters.

<sup>123</sup> Home Office in conjunction with Department of Health (1992) *Op. cit.* note 91, para. 3.12, p. 17.

information. In the two remaining cases the free narrative summarised the child's experiences and the interview then followed a comprehensible sequence, this being in one case:

1. Initial general discussion to put the child at ease;
2. Definition of the purpose of the interview;
3. Free narrative - generalised account from the child of her experiences and the way in which her abuse came to light;
4. Questions about the structure of the child's family and layout of her home;
5. Questions about the frequency of the abuse;
6. Questions about a particular incident of abuse drawing a specific description of penetration from the child;
7. Questions about the last time abuse occurred;
8. Questions about the first time abuse occurred
9. Questions to establish the progression of abuse from digital penetration to intercourse;
10. Questions to establish the quality of the child's relationship with the defendant (threats and bribes);
11. Questions about the wider relationships within the child's family;
12. Questions clarifying the way in which the child's relationship with the defendant had changed;
13. Questions about how and why the child's abuse had come to light.<sup>124</sup>

While the movement from a particular episode of abuse, to the last incident and finally to the first incident meant that the child's story did not emerge in a linear sequence, it was nevertheless possible for a listener to follow the child's account in this recording. In other cases, however, the interview appeared to have little structure, moving between a variety of issues in no apparent order, and returning to individual incidents in an arbitrary manner which could become extremely confusing. It was primarily this lack of structure which made it hard to obtain a clear picture of the child's experiences from the four recordings classed as difficult, or somewhat difficult, to follow. In two cases, however, this was exacerbated by the interviewer's failure to clarify confusing aspects of the children's statements. In one interview, for example, the child described an occasion when the defendant had exposed himself to her, and a second incident in which he had made her drunk when, the following morning, having a vague memory of having been sick during the night, she discovered vomit beside the defendant's bed. She then went on:

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<sup>124</sup> Video-recorded interview with child 9.

It just happened one more time and er ... then he ... one more time when he tried to do it properly but I think I were only nine then and I weren't ready and it wouldn't go up and he just said 'Never mind, next time'. I said 'There won't be a next time' and I were drunk and I didn't know what was happening. See, he always seemed to get me drunk first and I went upstairs to bed and he came upstairs in my room and said 'Melanie, out!'. I said 'No, I'm going to sleep, leave me alone'. He says 'Melanie, out', and I come and er ... it was then we went in his bedroom and he tried it again and it wouldn't happen, wouldn't go. So I says, 'Dad, now I'm going to bed' and I went to bed and er ... then I started me period and he didn't do it anymore.<sup>125</sup>

The child's statement: 'It just happened one more time', following the description of two earlier incidents, suggested that there had been three occurrences in all.

However, the statement '... he always seemed to get me drunk first' could be taken as an indicator of more frequent abuse. The interviewer, however, assumed that there had been three incidents and went on to ask questions about the way the child had dealt with her experiences. She then attempted to locate the third incident in time, discussed why the child had not told her mother, and established details of the family's history and structure. Eventually returning to the third incident when attempted penetration had occurred, the interviewer asked a series of questions to elicit a more detailed account. This time the child described the incident as having taken place in the living room. This discrepancy was not picked up by the interviewer who was focusing on obtaining a more explicit account from the child of what she meant by 'it wouldn't go up'. Following further discussion the interviewer recapped what the child had told her, conflating the two different accounts of attempted penetration. The child accepted the interviewer's summarised statement of there having been three occasions when her father had behaved inappropriately towards her. When the case came to trial the defendant was charged with one count of indecency and two of attempted intercourse. It was not made explicit when the trial began whether the latter charges referred to the child's descriptions of having twice been in the defendant's bed (only one of which accounts had included an allegation of attempted penetration), or to her accounts of attempted penetration in both the bedroom and the living room. By way of an opening, prosecuting counsel said merely: 'When she was seven her father invited her to suck his penis. Then, later, he tried to get his penis

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<sup>125</sup> Trial 4.

inside her', concluding: 'No amount of speech making by me will help you in your estimation of this girl. You will know when she has been cross-examined whether you believe her or not'.<sup>126</sup> The discrepancies in the child's recorded interview created a weakness in the prosecution case which was subsequently made much of by the defence, to the latter's advantage.

### **The impact of the evidence**

#### Telling a story

Law manuals suggest that it is not enough for evidence in a criminal trial to be presented in a coherent manner, relating closely to the charges.<sup>127</sup> If a jury are to be convinced by the prosecution or defence theory of the case, they will have to be provided with sufficient contextual detail to develop a story-line which is both plausible and recognisable to them.<sup>128</sup> Comparing the quotation from a video-recorded interview in the previous section with earlier quotations from examinations of child witnesses in court, it will be apparent that there are significant differences between these, the account in the video-recording being expressed in a more naturalistic and conversational style than those given at court. This suggests that a strength of pre-recorded evidence, if this is typified by naturalistic accounts, will lie in its close association with elements of story-telling. It is therefore of interest that while some video-recordings had been edited at the request of the defence in order to delete inadmissible statements (such as those undermining the character of the defendant), such excisions were not always sought. As a result, evidence which normally would not have been allowed, was heard by the jury. The following quotation illustrates this point:

Interviewer: What sort of man is Gerald?

Child: When he's drunk he comes in and beats us all up. He gave me younger brother black eyes. We had to go to school and say nowt. But our neighbour, Sally, reported him. He'd come in shouting and bawling. She reported him and these people came round, social workers I think. They looked at us and they walked off, but they said that if we were beaten up again we'd go into

<sup>126</sup> The jury unanimously acquitted the defendant.

<sup>127</sup> Boon, A. (1993) *Op. cit.* note 113, p. 62.

<sup>128</sup> *Ibid.*, p. 62. Note: The concept of the role of the story in legal judgments was influentially expressed by Bennett, W. L., and Feldman, M. S. (1981) *Reconstructing Social Reality in the Courtroom*. Tavistock: London.

care. She reported it again because she heard all the noise. Shouting and swearing. He'd beat my mum up, pushed her down the stairs. Once he dragged her all the way from [where we lived] to [the next village].

A structurally satisfying story creates persuasive links between setting, character, means and motive.<sup>129</sup> In the trial from which the above quotation is taken, the defendant faced charges of long-term sexual abuse. The inclusion of the child's account of domestic violence will have contributed to the picture which the jury were able to build up of life in her home and might be thought to have powerfully reinforced her specific complaint. Had she given live evidence, however, the admissibility of such statements would undoubtedly have been challenged by the defence on the grounds of their prejudicial effect.

As indicated in the previous section, however, some video-recorded statements were difficult to follow. A further problem arose when the attitude of interviewers towards the children they were questioning set up a sub-theme at variance with the primary account being elicited. There were two cases in the research sample in which interviewers adopted a brusque and disbelieving stance towards adolescent complainants. In one of these, which involved a girl whose school attendance had begun to deteriorate at approximately the same time that she alleged her abuse had begun, the interviewer's challenging style of questioning on the issues both of the girl's schooling and her abuse, created the impression that she believed she was dealing with an unreliable adolescent. As a result, the interview risked triggering stereo-types of the problem teenager in a viewer's mind. It is therefore of interest that when the trial was heard it had to be halted part way through the judge's summing-up, when a juror passed a note to the judge asking why the case had been brought, and expressing concern that a man could have been subjected to 'eleven months of torment' on the basis of the evidence which had been heard. The reasons for the juror's opinion cannot be determined, but it is possible that the style of the girl's interview may have been a contributing factor. Interestingly, in the re-trial which followed, the balance of the trial changed substantially, when the defendant went into the witness box and materially altered his evidence, opening himself up to a

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<sup>129</sup> Bennett, W. L., and Feldman, M. S. (1981) *Op. cit.* note 128, p. 10.

damaging cross-examination by the prosecution. The prosecuting barrister indicated privately to the researcher that without this development he would have expected the case to be lost. Bennett and Feldman have argued that in some cases true accounts may be disbelieved because of structural inadequacies in their presentation, while false accounts may be believed due to the skilful juxtaposition of internally consistent symbols which fit with the normative assumptions of the jurors.<sup>130</sup> The above case provides some support for this theory.

#### Listening, watching and concentrating

Field notes written at the time of the trials suggest that in some instances video-recorded evidence places greater demands on the concentration of jurors and observers than evidence given in the courtroom or over the live-link. In the five trials in which children gave evidence by closed circuit television there are only two notebook references to jurors failing to watch the television monitors, both occurring during the same trial. It is possible that in one case the jurors' responses indicated embarrassment for the child, as three jurors were observed to look down at the floor while the nine year old witness described having 'kissed' the defendant's 'willy'.

By contrast, there are references to jurors gazing into space, or exhibiting indications of tiredness (for example, rubbing their eyes and yawning) in three of the five trials which involved video-recorded evidence. Additionally, the researcher noted a number of occasions when she had difficulty concentrating on the recordings. Analysis of all of these instances suggests that in part this was a problem of tape and interview quality. Comments on apparent loss of concentration or tiredness in jurors occur in particular in relation to three recordings, one of which lasted 40 minutes during which time the child remained motionless and rigid. The remaining two recordings were those which appeared over-long, the children concerned becoming restless, (and in one case, highly resistant to continuing with the interview). It is perhaps relevant that it was during the playing of the latter recording that the trial judge decided to allow the child concerned to leave the remote witness room until she was required for cross-examination, commenting a propos of his decision: 'It is, to put it mildly, unrealistic

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<sup>130</sup> *Ibid.*, p. 6, and pp. 64-65 among others.

for a young child to be expected to sit watching that sort of video. It doesn't exactly grab the attention'.

The researcher found that the unchanging visual focus in video-recorded interviews made them difficult to watch. All but two recordings had been made with a single fixed camera which allowed no alteration of shot or focus. Additionally, the size of the screen image was extremely small, making it impossible to distinguish facial expressions or other characteristics. The latter problem had been resolved in the most recently recorded videos observed, which had a close-up picture of the child's face inset in one corner. However, the inset image disrupted the overall picture which remained small, and lack of alteration in focus continued to be a problem.

Concentration proved to be especially difficult for the researcher when a number of recordings were shown in sequence.<sup>131</sup> Field notes written at the end of a day on which three recordings had been shown, state:

I felt extraordinarily tired by the end of the afternoon. It is hard watching the videos; they are long, the image is small, and the camera angle never changes. The information doesn't come out sequentially but in bits and pieces here and there. It is difficult to maintain concentration over the whole video, and over three videos it is extremely hard.

In cases involving a number of complainants, the size of the image in the video-recordings shown, made it hard to recall children individually. In the trial involving video-recorded evidence from fourteen children, the trial judge discussed with counsel how he might give jurors a mental image of each child in his summing up, in order to help them recall the children's evidence<sup>132</sup>. The researcher's note, taken at the time, says:

I take his point; I find that although I can recall some of the children, I certainly don't remember them all. It's hard to avoid a sense of the children merging into one - partly because of the similarity of much of their evidence; [...] partly because all the interviews were conducted in the same room and the picture is therefore always the same, just darker or lighter, or the sound of the

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<sup>131</sup> The maximum number of video-recordings shown in any one day was seven.

<sup>132</sup> **Note:** Jurors in the eleven trials were discouraged from taking notes, on the basis that the judge would remind them of all the evidence at the end of the trial.

voices different. The images are so tiny that the children are indistinct, not individual.

Retaining, and discriminating between, witnesses' evidence was found considerably easier by the researcher when it could be associated with some individual characteristic of the witness concerned. However, while it could prove difficult to recall individual children's evidence after viewing a series of pre-recorded interviews, this task became even harder when the evidence was simply read. In the murder trial the evidence of fourteen witnesses was agreed, and as a result the young people concerned did not have to attend court, their evidence being read to the jury by a barrister. In this case, despite the significance of the evidence, it proved extremely hard for the researcher to recall the individual accounts as opposed to their overall purport, as each was associated only with a name. Yet it proved easy to remember testimony given in the courtroom by witnesses in the sexual abuse cases as not only was their evidence short and readily assimilable, but each witness could be associated with some distinct personal characteristic.

While the impact of evidence is not the same as the ability of an observer to recall it, the two might be thought to bear some relationship. Noting her response to live evidence from witnesses in the murder case, the researcher commented:

The court was very quiet during the evidence; everyone was very concentrated. The jury were watching witnesses closely. Hearing the evidence live in the courtroom created a sense of intense focus: the silence except for the two speakers; the enclosed space - the court became a world of its own. NB. the barristers' efforts to re-create the atmosphere of the murder, to sway the jury one way or another - the noise, excitement, heightened arousal of the people involved; shouting, knives, weapons, balaclavas; everything chaotic and frightening in the darkness. [...] The presence of the witnesses contributed to the whole effect. I remember the live witnesses vividly; the statements which were simply read, much less so.

While only being impressionistic and based on the experience of a single observer, the material summarised here lends some support to barristers' contention that the overall impact of evidence may be diminished when the witness is not present in the courtroom with the jury.

In relation to the impact of oral testimony, however, it is cautionary to note that the researcher did not always find that the impressions which she had formed in court coincided with those which later took shape when reviewing her trial transcripts. This issue arose in particular in relation to the testimony given by two of the youngest children in the research sample.<sup>133</sup> Both girls testified from the remote witness room, and the quiet, uncertainly voiced responses which they gave to questions, together with their rather lost and disoriented demeanour, left the researcher unsure what confidence to place in their evidence. It was therefore chastening to discover, when transcribing the day's proceedings, that not only had both girls' evidence been internally consistent, but that they had resisted a number of leading questions from counsel. This suggests that it may be all too easy to underestimate the strength of young children's evidence, irrespective perhaps of the means by which it is given.

### **Summary**

Drawing together the different themes of this chapter, a number of issues emerge.

During the passage of the 1988 and 1991 Criminal Justice Acts the attention given to the needs of children who have been subjected to sexual abuse, and the influence which this has had on the construction of the category 'child witness', appears to have resulted in the interests of other children who are required to give evidence in criminal cases becoming obscured. In the Crown Court Centre where the data for this study was collected, child sexual abuse complainants appeared to be routinely allocated to give their evidence from the remote witness room. Furthermore, in all cases in which video-recorded evidence was available, this was used, even though the quality of the recording was sometimes poor. By contrast, all other child and adolescent witnesses gave evidence in the courtroom itself, irrespective either of their entitlement to be considered for giving evidence by closed circuit television; their relationship with the defendant; or the nature of the evidence they would have to give.

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<sup>133</sup> Child 23 24

However, the various child witness reforms are shown to have left many potentially stressful aspects of a court appearance untouched. Notice of Transfer provisions, introduced in 1991, and which were intended to by-pass the committal process thereby reducing the time taken to process child witness cases, were not used in any of the study cases. However, the range of factors contributing to delay in these cases reaching their final hearing suggests that this reform would have been likely to have had only a marginal effect on the overall time taken.

The average time taken from committal to final hearing was approximately eleven months, which, considered from the perspective of a child, is an extremely long time. Moreover, having once arrived at the courthouse to give evidence, children were likely to find that the administrative arrangements of the court and those working within it took precedence over their needs, their appearance in court frequently being subjected to delay and disruption.

Most importantly, however, the continued requirement for all child witnesses to attend court for cross-examination illustrates how little, in practice, the procedural reforms have shielded children from the conventional demands of a court appearance. While there is evidence that barristers took steps to modify their manner when leading or testing children's evidence, simplifying the way in which they spoke, and rejecting some standard tactics of cross-examination, not all displayed skills in communicating with young children. Additionally, the role of the defence advocate is shown in some cases to be incompatible with the welfare of child complainants, even where care was taken to question children sensitively. Categories of children who appear to be potentially highly vulnerable to the stress of cross-examination, are those whose personal history provides grounds for distressing and shaming questioning, and those who have been rejected by their family. This issue raises a number of questions with regard to prosecution policy.

The new technology in some cases appears to have introduced additional stress factors. While the technical problems which arose in a number of cases were possibly due to lack of familiarity with a new system, it is disappointing that there was no

improvement over the observation period as a whole. This issue apart, there is some evidence that the introduction of video-recorded statements has lengthened the time which children spend in the witness box.

In terms of the trial process, the ability of the television-link to shield children from embarrassment or distress attributable to the evidence they must give, is placed in question by indications that children may still omit certain information when offering oral testimony from the remote witness room. At the same time, the study provides some evidence that counsel are able to establish rapport more readily with witnesses who are present in the courtroom, suggesting that children testifying by closed circuit television may, in this sense, have lost one form of support.

The failure to implement in full the recommendation of the Pigot Committee that examination-in-chief *and* cross-examination of child witnesses should be pre-recorded, means that the problem of children's recall of offences having faded by the time of the court hearing, remains. Nevertheless, video-recorded evidence-in-chief is shown to have the considerable advantage of ensuring that children's evidence can be put before the court in these circumstances. This study suggests that juries are willing to convict on the evidence of a video-recorded interview with a child where the child has forgotten or repressed details of the offence(s) by the time of the trial.

Further, video-recorded evidence appears to have the potential to convey children's evidence in a powerful and convincing form. A number of children are shown to have offered their evidence in a detailed, naturalistic, and narrative manner in video-recordings. Nevertheless, the value of video-recorded evidence appears highly dependent both on the skill of the interviewer, and the quality of the technology employed. In cases involving offences of long-term abuse, a number of video-recorded statements were disjointed and confusing. At the same time, the impact of the evidence was sometimes diminished by the demands placed on a viewer by the size and static quality of the recorded image.

Overall, while there is evidence that a court appearance continues to place heavy demands on children, the majority of children are shown in this study to have given their evidence in a task-centred and highly creditable manner, whether testifying from the remote witness room or in the courtroom itself. The extent to which this is attributable to the reforms which have been introduced cannot be determined from observation alone. In the following chapter, the views of the children themselves on their involvement in the criminal justice process and their experiences of giving evidence, are outlined.

## **CHAPTER EIGHT**

### **THE CHILDREN'S PERSPECTIVE**

The viewpoints of child witnesses themselves are regarded in this thesis as being central to any evaluation of the effectiveness of the child witness reforms introduced by the 1988 and 1991 Criminal Justice Acts. This chapter therefore presents data drawn from interviews with children and young people<sup>1</sup> identified as witnesses in the cases in the research sample, and with their carers. In considering the extent to which the new provisions have met the needs of child witnesses, the children's experiences of testifying at court are placed within the context of their experience of the wider criminal justice system. The topics which are addressed are children's appraisals of their need for information and support in the pre-trial period; of the support and information they received at the courthouse; and of their experience when testifying over the live-link (including the use of pre-recorded statements) or in the courtroom.

The research available, or being undertaken, on these subjects at the time of the 1991 Criminal Justice Act is outlined before the views of child witnesses involved in this study are described. Details of the children, and the methods by which they were contacted and interviewed, are also included.

#### **The research literature**

As discussed in Chapter Five, the objective of the children's evidence reforms introduced by the 1988 and 1991 Criminal Justice Acts was to facilitate the appearance of more, and younger, children as witnesses, through the abolition of rules which placed hurdles in the way of children's evidence being heard, and the modification of court procedures believed to place unjustifiable stress on children and young people when testifying. The proposals for reform of the rules of evidence drew on a substantial body of research on the reliability of children's testimony, which indicated that the existing rules embodied some erroneous beliefs about children's

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<sup>1</sup> To make the prose style of this chapter a little less laborious than it otherwise might be, the term 'children' will normally be used to refer to both young children and adolescents. The ages of all children to whom reference is made is given in the Code for Children, Appendix C.

memory and suggestibility.<sup>2</sup> By contrast, the changes in court procedure were primarily an outcome of campaigning by child care organisations and the police, there being little empirical research available at this time which addressed the effects of the legal process on children.

Developments in child protection practice during the 1980's had led to an increasing convergence in police and social work roles in the investigation of child abuse<sup>3</sup>, which in turn generated calls for the criminal justice system to address its perceived ineffectiveness in prosecuting abusers.<sup>4</sup> Child protection agencies argued that the rise in the number of cases of child sexual abuse coming to their attention was not being matched by an equivalent growth in the number of criminal prosecutions of abusers.<sup>5</sup> This disparity was attributed to the effects of the competency and corroboration rules; the perceived trauma of a court appearance for child victims of abuse; and the reluctance of parents to agree to their children becoming witnesses.<sup>6</sup> Considerable emphasis was placed on the latter issues, it being claimed that an appearance in court under the existing system could be as traumatic for children as the abuse itself.<sup>7</sup> A comprehensive package of reform of the law and court procedure was advocated,<sup>8</sup> the introduction of video-recorded testimony being widely regarded as a solution to the problems of children's fear of seeing the defendant in court; the embarrassment of

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<sup>2</sup> Hedderman, C. (1987) *Children's Evidence: The Need for Corroboration*. Home Office Research and Planning Unit Paper, No. 41. Home Office: London.

<sup>3</sup> Lloyd, S. and Burman, M. (1996) 'Specialist Police Units and the Joint Investigation of Child Abuse.' *Child Abuse Review* 5(1), pp. 4-5; Hallett, C. (1993) 'Child protection in Europe: convergence or divergence?' *Adoption and Fostering* 17(4), p. 29; Department of Health and Social Security (1988) *Working Together: A guide to arrangements for inter-agency co-operation for the protection of children from abuse*. HMSO: London, para. 5.11, p. 21; Metropolitan Police and Bexley Social Services (1987) *Child Sexual Abuse Investigative Experiment Final Report*. HMSO: London, p. 9.

<sup>4</sup> See Harwin, J. (1990) 'The dilemmas of the criminal and civil law approaches to child protection.' *The Journal of Child Law*, p. 134.

<sup>5</sup> Home Office (1989) *Report of the Advisory Group on Video Evidence*. (Chairman Judge Thomas Pigot QC) Home Office: London, para. 1.7, p. 3.

<sup>6</sup> NSPCC (Unpublished: September 1988) *NSPCC Submission to the Home Office Advisory Group on the Admissibility of Video Recorded Interviews*. NSPCC: London, para. 4.4, p.6; Home Office (1989) *Op. cit.* note 5, para.s 1.6 and 2.15, pp. 3 and 17.

<sup>7</sup> NSPCC (Unpublished: September 1988) *Op. cit.* note 6, para. 4.4, p. 6; Home Office (1989) *Op. cit.* note 5, para. 2.12, pp. 15-16.

<sup>8</sup> NSPCC (Unpublished: September 1988 *Op. cit.* note 6, para. 3.1, p. 3.

speaking publicly about sexual matters; and the uncertainty induced by delays in cases reaching court.<sup>9</sup>

At this time, little research was available on the impact on children of giving evidence in court. Flin, however, noted that while there was little doubt that many witnesses, including children, find a court appearance stressful, or that the criminal courts are not designed to hear evidence from children, such empirical evidence as there was provided little support for the contention that children can be psychologically harmed by testifying in court.<sup>10</sup> In the 1960's Gibbens and Prince had conducted research in England which compared the adjustment of a sample of child sexual assault victims involved in court proceedings with a random sample of child victims whose case did not result in a prosecution. They found that 56 per cent of the random sample of children appeared to recover quickly from their experience, but the same could be said of only 18 per cent of those whose case went to court. The researchers were reluctant, however, to attribute this finding only or mainly to court involvement, as they noted that the cases leading to prosecution tended to involve more serious offences than those which did not.<sup>11</sup> Overall, they concluded that an appearance in court was not the main cause of disturbance in children; rather, this was the result of the situation brought about by prosecution, which could create stress over a period of weeks, months or years, and may necessitate readjustments in a whole pattern of attitudes and relationships.<sup>12</sup>

A more recent study by Goodman and her colleagues in the United States provided some evidence that children may be harmed by a court appearance, reporting that child victims who testified in court showed a marginally significant increase in behavioural disturbance in comparison with a matched control group of children not involved in court proceedings.<sup>13</sup> Goodman indicated, however, that her findings were

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<sup>9</sup> Home Office (1989) *Op. cit.* note 5, para. 2.10 - 2.11, p. 15; NSPCC (Unpublished: September 1988) *Op. cit.* note 6, para. 11.1, p. 12.

<sup>10</sup> Flin, R. (1988) 'Child Witnesses: The Psychological Evidence.' *New Law Journal* p. 610.

<sup>11</sup> Gibbens, T. C. N., and Prince, J. (1963) *Child Victims of Sex Offences*. Institute for the Study and Treatment of Delinquency: London, p. 14.

<sup>12</sup> *Ibid.*, p. 5.

<sup>13</sup> Goodman, G. S., Jones, D. P. H., Pyle, E. A., Prado- Estrada, L., Port, L. K., England, P., Mason, R. and Rudy, L. (1988) 'The Emotional Effects of Criminal Court Testimony on Child Sexual

tentative, as her sample was a small one, and many of the children concerned had testified at preliminary hearings, their cases being unresolved at the time of the report.<sup>14</sup>

Examining the sources of stress experienced by child witnesses, Goodman found that a majority of children, interviewed at the courthouse while waiting to testify, expressed negative feelings about giving evidence and almost all were negative about having to face the defendant in court.<sup>15</sup> Flin, in a similar study conducted in Scotland, concluded that the stress experienced by child witnesses is not confined to their appearance in the witness box, but is compounded by the apprehensions felt while waiting for cases to reach court and lack of knowledge about the legal process.<sup>16</sup> She reported that professionals working with children identified the sources of stress involved for children witnesses as being the formality of the courtroom; confronting the accused; the difficulties of cross-examination; and the long delays before cases came to trial,<sup>17</sup> while a sample of children who gave evidence, and their parents, cited lack of knowledge as a significant source of anxiety.<sup>18</sup> In a complementary study carried out with schoolchildren, Flin found that children under ten have minimal knowledge of court proceedings, and that the knowledge which they do have is often incorrect or confused.<sup>19</sup>

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Assault Victims: A Preliminary Report.' In: Davies, G. and Drinkwater, J. (eds) *The Child Witness: Do the Courts Abuse Children?* Issues in Criminological and Legal Psychology No. 13, The British Psychological Society: Leicester, p.51.

<sup>14</sup> *Ibid.*, p. 52. In their final report the researchers state that in the short term the effects of a prosecution were found to be more harmful than helpful, but by the conclusion of the prosecution the behavioural adjustment of most children who testified was similar to that of children in the control group, the general course for all children being gradual improvement. Goodman, G. S., Taub, E. P., Jones, D. P. H., England, P., Port, L. K., Rudy, L. and Prado, L. (1992) 'Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims.' *Monographs of the Society for Research in Child Development* 57(5), pp. 114-5.

<sup>15</sup> Goodman, G. S et al. (1988) *Op. cit.* note 13, p. 50.

<sup>16</sup> Flin, R. and Bull, R. (1990) 'Child witnesses in Scottish criminal proceedings.' In: Spencer, J. R., Nicholson, G., Flin, R. and Bull, R. (eds) *Children's Evidence in Legal Proceedings: An International Perspective*. Papers from an International conference, Selwyn College Cambridge, 26-28 June 1989, published by J.R. Spencer: Cambridge, p. 199.

<sup>17</sup> *Ibid.*, p. 194.

<sup>18</sup> *Ibid.*, p. 195; Flin, R. (1988) *Op. cit.* note 10, p. 610. Note: Additional information on this study is provided by Davies, who was a co-researcher. He reports that 46 children were interviewed, and cites the most frequently mentioned fears expressed by the children as seeing the accused (7), and the unfamiliar situation (7). Davies, G. (1991) 'Children on Trial? Psychology, Videotechnology and the Law.' *The Howard Journal* 30(3), p.183.

<sup>19</sup> Flin, R. and Bull, R. (1990) *Op. cit.* note 16, pp. 195-196; Flin, R.H., Stevenson, Y. and Davies, G. M. (1989) 'Children's Knowledge of Court Proceedings.' *British Journal of Psychology* p. 294.

Taken together these studies showed that a court appearance can be accompanied by a range of stress factors for child witnesses, but (while acknowledging that existing court procedures were not designed with children in mind), offered no conclusive evidence that it was harmful to children.<sup>20</sup> Likewise, there was little empirical evidence to indicate the effectiveness of the reforms to court procedure which were being proposed. An evaluation of reforms introduced in the United States, conducted on behalf of the Scottish Law Commission, found that at August 1987, nineteen states had enacted legislation providing for video-taped interviews with children to be admitted in evidence,<sup>21</sup> while a substantial and growing number had developed facilities for closed circuit video testimony.<sup>22</sup> Nevertheless, at the time of reporting, there was no empirical evidence by which to evaluate these procedures, nor any consensus about their utility in court.<sup>23</sup> Further, the report expressed concern at the speed with which the reforms had been introduced, given the paucity of systematic evidence of the pre-reform reality, and the fundamental importance of the matters which they were designed to affect.<sup>24</sup> In a companion review of law and practice in Israel, Denmark, Sweden, West Germany and North America, the Scottish Law Commission expressed doubt about the use of video technology as a response to the special needs of the child witness.<sup>25</sup> Following a period of consultation on both reports, the Commission concluded that the use of new procedures or techniques such as video-recorded testimony was unlikely to be required in more than a few child

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<sup>20</sup> The conclusion that the legal process is not harmful to children is further supported by a questionnaire survey undertaken in 1984 by Tedesco and Schnell. This found that 60 per cent of child abuse victims rated the investigation and litigation processes as helpful rather than harmful (p. 270). Their findings have to be regarded with caution, however. The numbers involved are small (48 completed child questionnaires) and involved only two questions on this subject, (one using a simple 'helpful/harmful' rating, and the other a scale rating of helpfulness or harmfulness) both of which conflated the investigation and legal processes. Tedesco, J. T. and Schnell, S. V. (1987) 'Children's Reactions to Sex Abuse Investigation and Litigation.' *Child Abuse and Neglect* vol. 11, pp. 267-272.

<sup>21</sup> Murray, K. (1988) *Alternatives to In-court Testimony in Criminal Proceedings in the United States of America*. Research Paper on Evidence from Children, Scottish Law Commission: Edinburgh, p. 11.

<sup>22</sup> *Ibid.*, p. 22.

<sup>23</sup> *Ibid.*, p. 33.

<sup>24</sup> *Ibid.*, p. 73.

<sup>25</sup> Scottish Law Commission (1988) *The Evidence of Children and Other Potentially Vulnerable Witnesses*. Discussion Paper No. 75. Scottish Law Commission: Edinburgh, para. 4.23, p. 41; para. 5.68, p. 108.

witness cases if children were adequately and sympathetically prepared for a court appearance.<sup>26</sup>

A similar conclusion was reached by Morgan and Zedner, who carried out a study of children who were direct or indirect victims of a range of offences including burglary, theft, racial harassment, and physical and sexual assault.<sup>27</sup> Only a minority of the children interviewed had been called as witnesses, most of these being teenagers who had been physically assaulted,<sup>28</sup> but the report highlights the stress which they had experienced during the period leading up to the trial as well as during the hearing itself, and indicates, in line with Flin, that much of this was attributable to a lack of information and imperfect knowledge of court proceedings.<sup>29</sup> The authors echo the assertion that the provision of support to child victims and witnesses during the investigation and adjudication processes might substantially reduce the need for radical departures from conventional practice in the courtroom.<sup>30</sup>

Empirical research thus raised questions about the emphasis of the reform process in England and Wales, particularly in relation to the means being proposed to address the stress of a court appearance for children. In relying on the introduction of video technology to circumvent some of the more stressful aspects of court procedure the government was adopting an approach which was widely advocated in the media and by child protection specialists, but whose effectiveness was untested. At the same time, the reforms demonstrated little recognition of children's needs other than those

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<sup>26</sup> Scottish Law Commission (1990) *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses*. Scottish Law Commission Study No. 125: Edinburgh, para. 1.8, p. 3.

<sup>27</sup> Morgan, J. and Zedner, L. (1992) *Child Victims: Crime, Impact and Criminal Justice*. Clarendon: Oxford, pp. 46-47. Note: This study was not published until 1992, but two of the researchers involved gave a presentation at the Selwyn College Cambridge conference on children's evidence, held in June 1989. See: Morgan, J. and Plotnikoff, J. (1989) 'Children as victims of crime: Procedure at court.' In: Spencer, J. R., Nicholson, G., Flin, R. and Bull, R. (eds) *Children's Evidence in Legal Proceedings: An International Perspective*. Papers from an International conference, Selwyn College Cambridge, 26-28 June 1989, published by J.R. Spencer: Cambridge, pp. 189-192.

<sup>28</sup> Morgan, J. and Zedner, L. (1992) *Op. cit.* note 28, p. 141.

<sup>29</sup> *Ibid.*, pp. 142-144.

<sup>30</sup> *Ibid.*, p. 144. See also Whitcomb, D. (1990) 'When the victim is a child: past hope, current reality and future promise of legal reform in the United States.' In: Spencer, J. R., Nicholson, G., Flin, R. and Bull, R. (eds) *Children's Evidence in Legal Proceedings: An International Perspective*. Papers from an International conference, Selwyn College Cambridge, 26-28 June 1989, published by J.R. Spencer: Cambridge, p. 133.

directly associated with an appearance in the witness box. The issue of pre-court support and information was not addressed by the 1988 nor the 1991 Criminal Justice Act, nor was it considered by the Pigot Committee. In view of the neglect<sup>31</sup> of this issue, yet its significance in the research literature, interviews carried out with children for the present study sought details of the support and information available to children and their carers while waiting for a court hearing, as well as their views on the procedures adopted at court.

## **Details of the interview sample**

### **Size and composition of the sample**

In order to obtain a full picture of the views of child witnesses on their experience of the criminal justice process, it was decided to seek interviews with children involved in all cases in the research sample,<sup>32</sup> irrespective of whether they were eventually called to give evidence or not. In total, the full case sample involved 53 children, 40 of whom gave evidence at court. Seven children involved in cases where charges were discontinued or in which there was a late guilty plea, attended the courthouse on the day the case was scheduled to begin, anticipating that their evidence would be required. Of the remaining six children, two learned six weeks before the final hearing that they would not be required to testify; charges in respect of a third child were severed; those in respect of another were prosecuted on the evidence of older witnesses; and in the remaining two cases, charges were discontinued at an early stage.

The methods used to make contact with child witnesses have been described in Chapter Two. It was agreed that the Crown Prosecution Service case officer should provide child witnesses and/or their carers with details of the research while at the courthouse, and would also seek their consent to research participation. In practice, however, this did not always prove possible and the researcher had to contact a

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<sup>31</sup> The Lord Chancellor acknowledged the anxiety that can be caused to children by lack of knowledge of court when he spoke on 10 May 1993 at the launch of a child witness information pack produced by a consortium of voluntary and government agencies. However, as this chapter will show, the pack does not appear to be reaching its intended audience, possibly due to its cost and failure to designate responsibility for its dissemination to any specific agency.

<sup>32</sup> See Chapter Seven for details of the case sample.

number of children or carers by letter after the conclusion of the court case. Unfortunately, the CPS files, from which all background information was obtained, listed no address for 25 children in the witness sample, and only seven of these received details of the research when at court. In nine cases, however, with the permission of the carer concerned, the police supplied the researcher with an address. Nevertheless, there remained a further nine children with whom the researcher was unable to make any contact. The interview sample therefore includes a total of 44 children. The response rate which was achieved to the request for an interview is summarised in Table One below.

<b>Child agreed to be interviewed</b>	26
<b>Child declined to be interviewed*</b>	3
<b>Parent/carer unwilling for child to be interviewed*</b>	6
<b>*[Parent/carer interviewed in child's place]</b>	[7]
<b>No response</b>	7
<b>No longer living at address supplied</b>	2

As the Table shows, in 2 of the cases in which an attempt was made to contact children by letter after the court hearing, the letter was returned with the information that the child/family had moved. Additionally, there were 7 cases in which the researcher received no response either to information supplied at the courthouse, or a letter sent subsequently. However, a majority of the children contacted agreed to be interviewed (59%), and although 9 children declined (in the case of 6 children this being the decision of their carer), in 7 of these cases a parent or carer spoke to the researcher, providing information on the child's behalf. The information presented in this chapter thus concerns 33 children, who represent 75 per cent of the potential interviewee sample, or 62 per cent of the full sample. An interview was conducted in respect of at least one child in 15 of the 16 prosecutions in the sample, the single exception being Case 11.<sup>33</sup>

<sup>33</sup> This case resulted in a late guilty plea.

The age and witness status of those for whom interview data is available is summarised in Table Two.

<b>Table 2: Age and witness status of those for whom interview data is available</b>					
<b>Note:</b> Figures in brackets indicate a parent/carer was interviewed on child's behalf					
<b>Age in years</b>	<b>Gave evidence</b>		<b>Late guilty plea</b>		<b>Discont.</b>
	<b>Victim</b>	<b>Witness</b>	<b>Victim</b>	<b>Witness</b>	<b>Victim</b>
7	0	0	0	0	1
8	0	0	0	0	0
9	3 + [2]	0	0	0	0
10	1	0	0	0	0
11	1	0	0	0	1
12	1	0	1	1	0
13	2	1	[1]	0	0
14	2	0	0	0	[1]
15	1	0	[1]	1	0
16	1	4	1	0	0
17	[1]	3	0	0	0
18	0	[1]	0	0	0
<b>Total</b>	12 + [3]	8 + [1]	2 + [2]	2	2 + [1]

Twelve of the children who had given evidence in court and who were interviewed directly by the researcher, were complainants in cases of child sexual abuse.

Convictions had been obtained in respect of nine of these children and there were acquittals in respect of three.<sup>34</sup> Acquittals had also been obtained in two of the three cases where a parent or carer spoke to the researcher on behalf of a victimised child who had given evidence.

<sup>34</sup> In relation to these three acquittals, one defendant was convicted of offences against other children involved in the trial, and another had admitted offences against an older girl, these particular charges then being severed and dealt with separately.

### **Content and conduct of interviews**

All interviews were conducted in the child's home. Children and their carers were aware that the researcher had full details of each case and had been an observer in court when cases were heard. They were reassured that the focus of the interview would concern the experience of being a witness rather than the nature and details of the offences involved, but in view of the potential sensitivity of the issues children were offered the opportunity to speak to the researcher alone, or with a parent or carer present. Nine children decided to see the researcher alone, and 17 chose to involve a supportive adult. In two of the latter cases the adult took no part in the interview, and in an additional two cases the adult left when it became clear that the child would be happy to continue the interview alone. Age did not appear to be a determining factor in the child's decision, both groups covering a similar age range.<sup>35</sup> Similarly siblings were invited to choose whether to see the researcher separately or together, in all but one case electing to be interviewed jointly. In all, 21 parents or carers participated in interviews<sup>36</sup> or spoke to the researcher on the child's behalf. Table Three shows the relationship of adult interviewees to the children.

<b>Mother</b>	12
<b>Father</b>	4
<b>Sister</b>	2
<b>Grandparent</b>	2
<b>Foster carer</b>	1

A single interview was conducted with each child but two interviews were carried out in two families. In one of these, siblings were interviewed on different days, while in another a mother was initially interviewed on her daughter's behalf but subsequently contacted the researcher to invite her to interview her daughter.

<sup>35</sup> The age range was 9 to 17 years in the group interviewed alone, and 7 to 17 years in that involving a supportive adult.

<sup>36</sup> In a small number of cases where the carer had strong feelings about what had happened, which they wished to share, an opportunity to speak to them separately was found once the interview with the child was concluded.

Interviewees were invited to describe their experiences at different stages of the criminal justice process. A non-standardised interview format was adopted, both in view of the wide age range of interviewees, and as a means of ensuring that interviews reflected the concerns of the children and their carers. While making analysis of interviews more difficult, (not all interviewees discussed all topics), this approach proved valuable in terms of facilitating the researcher's developing understanding of the children's perspective.

Most interviews were tape-recorded and transcribed in full, but interviewees were offered the opportunity to veto the use of the recorder, and practical or technical problems precluded its use in some cases. Interviews with four children, and with four carers were recorded in note form immediately after the interview.

### **The pre-court period**

In this section three themes are discussed. Firstly data is presented on the impact of offences on children and their carers, and the support available to assist them. Next, the information given to interviewees regarding the progress of cases is outlined. Lastly, children's anxieties about becoming a witness, and the preparation they received for this role, are described.

### **The impact of offences**

It had not been the researcher's intention to discuss the offences with interviewees and this was made explicit in the information provided to them prior to interviews being arranged. However, a number of young people, and in particular, their carers, wanted to speak about the often devastating impact on their lives of what had occurred, a primary theme of a number of interviews being the lack of support available to children and those responsible for them. Given the significance of these issues to those directly concerned, the views they expressed are summarised below.

The discovery that a child had been sexually abused shattered many families. Of the children sexually abused by a family member, for whom interview data is available,

two were rejected by their mother;<sup>37</sup> one moved to live with relatives;<sup>38</sup> five saw their parents separate;<sup>39</sup> and four experienced the development of bitter and divisive conflicts within their extended family.<sup>40</sup> Children subjected to extra-familial sexual abuse were supported by families which remained intact, but the parents of a number of these children<sup>41</sup> reported, privately, disturbing changes in their child's behaviour after the discovery of the abuse, and described sometimes overwhelming feelings of guilt, anger, responsibility, grief and loss of confidence in their ability as parents. In relation to this one mother commented:

... for the first year and a half I did absolutely nothing but take sleeping tablets. Because I just didn't want to know. I didn't want to wake up. Do you know what I mean? I didn't want to face the reality of what had happened. [...] For [...] two years it's been a constant torture in us head.<sup>42</sup>

A father similarly stated:

There was lots of anxieties, lots of frustration in the house. And there's many times I used to say, look, don't talk about it. Just don't talk about it. [It was] something that ... I just wanted to forget about, quite honestly. [...] I felt as though I'd ... let [my children] down by actually allowing [them] to go to [that] house for their tea. [...] I feel that much ... bitterness inside me I just ... [...], I just like to bottle it up, forget it.<sup>43</sup>

The response of wanting to avoid facing, or attempting to suppress the memory of, what had occurred, was not limited to carers. Five<sup>44</sup> of the young people interviewed, three of whom were abuse victims and two who were witnesses in the murder trial, indicated that they had tried (actively or involuntarily) to repress their recollection of the events they had witnessed or experienced:

... I just blocked it out. I didn't want to talk about it. ... And then when I did talk about it, I just felt like breaking down all the time.<sup>45</sup> [*Abuse victim*]

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<sup>37</sup> Child 11 44

<sup>38</sup> Child 43

<sup>39</sup> Child 2 8 9 10 41

<sup>40</sup> Child 4 34 35 45

<sup>41</sup> Parents of children 1 5 30 32 33 45

<sup>42</sup> Mother, child 1

<sup>43</sup> Father, children 32 and 33

<sup>44</sup> Child 1 4 41 50 53

<sup>45</sup> Child 4

... I tried to block it out. After I'd told police, I wanted to try and block it out, so a lot of it went then.<sup>46</sup> [*Murder witness*]

As the second of the above quotations suggests, as a coping strategy, repression could have consequences for a child's eventual court appearance, some children finding that when called to testify it was difficult,<sup>47</sup> or disturbing,<sup>48</sup> to recall evidence given in video-recorded interviews or police statements. It is not possible here to explore the role of memory in surviving traumatic experiences, but it may be relevant that no assistance was offered to witnesses in the murder case to help them cope with what had occurred, and a surprising number of sexual abuse complainants received little, or no, psychological support or counselling. Social work assistance was offered to ten abuse victims,<sup>49</sup> but while two pairs of siblings described their social worker as 'brilliant'<sup>50</sup> or 'good to us',<sup>51</sup> others felt let down by social workers who did not offer support when it was needed,<sup>52</sup> proved unreliable,<sup>53</sup> failed to respect confidentiality,<sup>54</sup> or were simply unable to engage with the child in a meaningful way, thus inhibiting the expression of significant feelings or anxieties.<sup>55</sup> Five children<sup>56</sup> were offered counselling by hospital or community based child psychiatric services, but only after long delays. Two children<sup>57</sup> had received only one appointment by the time of their appearance in court, while the counselling offered to the remaining three children had been terminated after a brief, late, intervention. One girl described counselling as having 'helped a lot',<sup>58</sup> but while others felt they had been helped to some extent, they did not think it had significantly assisted them in coping with their experiences. The value of peer support was mentioned by several children,<sup>59</sup> and the support of carers

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<sup>46</sup> Child 53

<sup>47</sup> Child 1

<sup>48</sup> Child 50

<sup>49</sup> Child 1 4 8 9 10 11 34 35 41 45

<sup>50</sup> Children 9 and 10

<sup>51</sup> Children 34 and 35

<sup>52</sup> Child 8; sister child 11

<sup>53</sup> Sister, child 11

<sup>54</sup> Child 8

<sup>55</sup> Child 1 4 45

<sup>56</sup> Child 1 11 38 41 44

<sup>57</sup> Child 11 44

<sup>58</sup> Child 41

<sup>59</sup> Child 8 16 29 30 38 39 44

was central. However, feelings of isolation and abandonment by professionals were expressed by a several carers,<sup>60</sup> for some of whom<sup>61</sup> the police were the sole source of professional assistance. This lack of support, or support which was not found meaningful by those receiving it, was a theme which dominated a number of interviews.

### **Waiting for cases to reach court: information, consultation and delay**

During the pre-trial period many interviewees described feeling peripheral to, or marginalised by, the criminal justice process, this feeling being in most instances the outcome of the low level of information or consultation offered to them.<sup>62</sup> During this period the police were the primary source of any information received; in a minority of cases police officers paid (occasional) visits to the family home and provided emotional support as well as information on the progress of the prosecution.<sup>63</sup> In the majority of instances, however, such information as was supplied was communicated by telephone by the police, or by letter by the courts, and was solely concerned with court dates. One carer said she had been given 'no information really; just the usual letters - about court dates',<sup>64</sup> while another said she received no information until the week before the trial began,<sup>65</sup> and a third said that the only way she obtained information was by telephoning the police herself to ask for it.<sup>66</sup> An adolescent victim of abuse described the only information she received as being telephone calls from the police to advise her of the defendant's court appearances,<sup>67</sup> while by-stander witnesses spoke of receiving no direct information other than their witness summons and letters indicating when they should attend court.<sup>68</sup>

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<sup>60</sup> Carers of children 2 3 5 30 32 33 45

<sup>61</sup> Carers of children 1 30 32 33

<sup>62</sup> Except in the case of older adolescents, contact was between the criminal justice agencies and children's carers.

<sup>63</sup> Carers of children 1 30 32 33

<sup>64</sup> Carer, child 38. The carers of children 2 and 41 made a similar comment.

<sup>65</sup> Carer child 44

<sup>66</sup> Carer, child 5

<sup>67</sup> Child 4

<sup>68</sup> Child 14 15 16 36 47 51 53

A minority of interviewees<sup>69</sup> were not unduly concerned by the lack of consultation, but for others it contributed another facet to the stresses they were experiencing as a result of the offences. Carers felt they had little influence or control over the prosecution process, and indeed, the manner in which decisions were reached often appeared obscure to them. Some<sup>70</sup> described considerable doubt about how much information they should share with their children, or how they could explain decisions which they only imperfectly understood themselves, and three<sup>71</sup> decided to keep their children in ignorance of the fact that they may have to go to court to give evidence, as a way of sparing them anxiety. Comments made in interview by one child suggest that she was aware of, and tolerated, the views of adults about what it was appropriate for her to know:

[The police] were understanding. And they were really fun as well and sometimes Ken [sergeant] played with us and Marie [constable] did and whenever Marie did tell mum something really important I'm not meant to know, then she'd go in the kitchen while Ken played with us. [They were] really, really good.<sup>72</sup>

However, other children talked of feeling excluded and inhibited from expressing their anxieties by the apparent reluctance of their carers to discuss the court case. One adolescent<sup>73</sup> described how she would secretly read her mother's letters in order to try to find out what was happening. Her mother, she said, rarely spoke to her about the court case, hoping that by ignoring the subject she (daughter) would be able to get on with her normal life. However, it left her feeling isolated and unable to speak of her fears. What she would have preferred, she said, would have been the opportunity to talk about the things worrying her and to assess realistically what might be the outcome at court. An eleven year old described her preoccupation with the impending court case as follows:

Interviewee: ... every day I thought about it - would I have to go to court today? Would I have to go tomorrow? Would I have to go day after? And I

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<sup>69</sup> Child 14 16

<sup>70</sup> Carers child 5 31 32 33

<sup>71</sup> Parents of children 5 31 45

<sup>72</sup> Child 30

<sup>73</sup> Child 8

was, like, thinking would I have to go in school holidays ... Christmas holidays?

Interviewer: You didn't know when it was going to be?

Interviewee: I didn't know *when* I was going, 'cos I ... 'cos during that time it were my birthday, when it were my twelfth ... no, my eleventh birthday, and I were thinking, well, would I have to go to court on my birthday?

Interviewer: Did anyone tell you what was happening?

Interviewee: No.<sup>74</sup>

Anxiety and uncertainty were not limited to the victims of sexual offences, although in interviews it was most frequently expressed by them; a witness in the murder trial spoke of the period waiting for the case to reach court in the following terms:

I knew it were vaguely in September but not until actual week before ... I didn't know anything. [...] And it were a bit ... sometimes I felt relieved - maybe it's over and done with - you know, at the beginning of September, maybe it's over and done with, they don't need me. I mean, I didn't really know what were going on. [But] it were just not knowing anything that really did everybody. [...] Nobody knew anything, not even Jim<sup>75</sup> who were one of main witnesses. [...] And I mean, especially with not knowing what had happened between Magistrates and Crown Court, in between that long time. I mean, somebody even said they saw [defendant] walking down the street, and we were like - what? He's *out*? And then no-one came out for about three week after! So ... it were just intimidating. [...] You think, well, they wouldn't let him out really, like, if he's killed someone ... [but] you don't know what to believe. [...] It sounded as though he were definitely out. And [...] I mean, I heard him say: 'If anyone snitches on me, I'll kill them' and all ... you don't take things like that lightly when he's just killed someone. [...] I think it would be a lot better [...] if anyone else were in a case that ... if it's going to take a long time, to at least - even if it's just once a month - someone phone up and [...] keep in touch.<sup>76</sup>

Knowing nothing of the defendant's circumstances added to the apprehensions of other interviewees,<sup>77</sup> while an adolescent abuse victim similarly said that as time went by without any information about the court case, she persuaded herself the case was no longer going to court.<sup>78</sup>

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<sup>74</sup> Child 44

<sup>75</sup> All names are pseudonyms.

<sup>76</sup> Child 53

<sup>77</sup> Mothers of children 5 41

<sup>78</sup> Child 41

Although most interviewees found waiting for the final court hearing an anxious and long-drawn-out process, interestingly, three expressed mixed feelings, and saw certain advantages in cases taking some time to reach court:

Interviewee: I think the hardest thing for Philippa, really, is that my mother's turned against us. She's taken [defendant's] side. But saying that, she's had a year and a half to get used to that idea. So I don't think it has been as bad as what it would have been if we'd have gone to court straight away. Because then she'd have had everything to deal with all together without my mother's being ... you know, the whole situation of being out of the family home as well ... she'd have had everything there and then. But with it being like, a year and a half since it happened, she's had time to sort things out one step at a time.

Interviewer: So the fact that it took a long time to get to court had some advantages?

Interviewee: Yes, those are the advantages. But then again, it were just hanging on and hanging on, and she didn't like that, you know, waiting. She'd rather it ... have been sooner, to get it all over and done with. You know, and try and sort herself out.<sup>79</sup>

Interviewer: Would it have been any easier if you hadn't had to wait so long for it to go to court?

Interviewee: I don't know, really. Probably. But then, I needed time to get myself ready for it.<sup>80</sup>

If they'd have said that to me right at beginning when [I gave my statement, that I'd have face the defendant in court] I don't think I would have said anything. Because at that time there were no way I'd have gone up and stood in court and faced him or let him see me. [But] I had plenty of time to [...] think about it properly. But if it had gone to court within a month, there were no way I'd have gone. No way at all.<sup>81</sup>

### **Feelings about becoming a witness**

The Crown Prosecution Service is advised that, when deciding whether to use a child's evidence, or whether to bring an abuse case to trial, the interests and wishes of the child should be taken into account.<sup>82</sup> However, the children who discussed this

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<sup>79</sup> Sister, child 11

<sup>80</sup> Child 4

<sup>81</sup> Child 53

<sup>82</sup> The Home Office *in conjunction with* the Department of Health (1992) *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings*. HMSO: London, para. 2.15, p. 11. Note: The *Memorandum* goes on in the same paragraph to make it clear that while child witnesses are *compellable* this means only that 'a child who is wanted as a witness [...] could be ordered to attend. It does *not* mean that, where the child is a witness for the prosecution, the Crown Prosecution Service will insist on including the evidence of a child in every case in which it is known that a child has provided some information to the police.'

issue in interview felt they had had no choice about being a witness, either because they were offered no option in this matter,<sup>83</sup> or because they saw the seriousness of the offences involved as requiring prosecution<sup>84</sup> or placing an ethical obligation on them to give evidence.<sup>85</sup> Interestingly therefore, while a number of children and adolescents said they had known when giving a statement to the police that they may have to give evidence later at court,<sup>86</sup> this was not always the case. One child said she had been led to believe she would not have to go to court as her interview had been video-recorded:

[The police] told us that [...] we had to just make the video and that went to court, and you didn't have to go. But you did,<sup>87</sup>

Additionally, three complainants<sup>88</sup> and two witnesses<sup>89</sup> said they had not been aware their statement may involve them in becoming a witness, one commenting:

Interviewee: I knew that I'd like, have to make a statement and that, but [the police] never said that we'd have to go to court. [...] I mean, I'm not bothered about going, now that it's over and that, but ... I didn't know nowt about it. [...] I just sat there like ... a plonker. Telling them all this stuff.  
 Interviewer: Would it have made a difference if you'd known?  
 Interviewee: Yes, because ... I'd have been prepared. Do you know what I mean? [...] I'd have still given me statement ... but at least I'd have known that I'd have had to like ...go.<sup>90</sup>

Lack of knowledge of the criminal justice system was a significant source of anxiety for many interviewees. A minority of the adolescents interviewed said they had some previous experience of the courts, two having spent half a day at a Crown Court through their involvement in the Duke of Edinburgh award scheme,<sup>91</sup> and one having once attended court with a boyfriend who had been prosecuted.<sup>92</sup> However, when

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<sup>83</sup> Child 4 7 8 13 14 38 39 44 50 53. It is, of course, possible that the children's wishes were sometimes discussed by proxy with their parents.

<sup>84</sup> Child 4 44

<sup>85</sup> Child 53

<sup>86</sup> Child 4 7 8 15 16 34 38 39 41 44

<sup>87</sup> Child 29

<sup>88</sup> Child 1 5 45

<sup>89</sup> Child 13 14

<sup>90</sup> Child 13

<sup>91</sup> Child 15 16

<sup>92</sup> Child 14

interviewees were asked about any concerns they may have had about becoming a witness, the issue most frequently cited was not knowing what to expect. Table Four summarises the anxieties mentioned by the children.

<b>Not knowing what to expect</b>	11
<b>Seeing the defendant or his family at court</b>	9
<b>Being questioned in an aggressive or upsetting way</b>	4
<b>The formality and public nature of the courtroom</b>	4
<b>Retaliation</b>	3
<b>The responsibility of giving evidence</b>	3
<b>Forgetting</b>	2
<b>Having to say what happened</b>	2
<b>Seeing investigating police officer again</b>	1

Anxiety associated with fear of the unknown was shared by both witnesses<sup>93</sup> and complainants,<sup>94</sup> their comments including:

I never got any help before I went to court. Just information about when I was going to go and that. [...] It was really hard because I didn't know what I was going to go through,<sup>95</sup>

I didn't know what to expect or owt, so ... I were just a bit scared,<sup>96</sup>

When we found out we had to go, like, we were all talking and saying we didn't want to go and ... 'cos nobody told us what to expect.<sup>97</sup>

Fear of seeing the defendant or members of his family at court was, again, common to both groups of children.<sup>98</sup> A majority of sexual abuse victims expressed considerable

<sup>93</sup> Child 13 15 47 53

<sup>94</sup> Child 4 8 11 29 41 44 45

<sup>95</sup> Child 4

<sup>96</sup> Child 13

<sup>97</sup> Child 15

<sup>98</sup> Child 2 5 34 38 39 41 47 51

fear of the defendant<sup>99</sup> and for some<sup>100</sup> this was linked with their experience of the defendant's physical as well as sexual violence. Witnesses were sometimes concerned about the implications of living in the same locality as the defendant, and the possibility of retaliation:

She were going to have to stand up and [the defendants] would see her giving evidence against them. And she'd have to look at them. And meet them in the community, after,<sup>101</sup>

I felt really ... frightened because I knew that [the defendant] would be sat there, and his family as well. [...] I didn't want them to see me. I mean, if they saw me down town a couple of days after, it'd still all be in their head, what I'd said, and they'd maybe blame me a little bit and things like that ... And I didn't want to be seen,<sup>102</sup>

I was frightened his family would be there - that if he was sent down they'd come and get me,<sup>103</sup>

... it weren't just his family, it's all his friends and everything. [...] I just ... I didn't want them to see me, you know. Because [...] I thought they'd be able to recognise me. So that were worst. [...] I was actually scared of, like, being by myself - I'd be the only one who's saying, like, ... he actually did it.<sup>104</sup>

The responsibility of giving evidence was a concern mentioned by three interviewees<sup>105</sup> anxious about the potential consequences of their testimony for other people. A witness in a sexual abuse case said she had been concerned about the possibility of her evidence leading to the conviction of someone who may be innocent, as she had been undecided whether she believed the complainant's allegations or not.<sup>106</sup> A younger child was worried that her evidence might be responsible for separating a friend from her family, and was only reassured when she talked to her friend at court and realised that she 'hated' the defendant, and was glad to no longer

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<sup>99</sup> Statements made in court by some children [18 19 20 29] suggested that the relationship between perpetrator and victim was not always one of fear, one child describing the defendant as 'kind' and another saying 'he was right good fun'.

<sup>100</sup> Child 2 11 41

<sup>101</sup> Father, child 47

<sup>102</sup> Child 53

<sup>103</sup> Child 39

<sup>104</sup> Child 51

<sup>105</sup> Child 8 13 29

<sup>106</sup> Child 14

be living with her parents.<sup>107</sup> The dilemma which criminal proceedings can involve for abuse victims was highlighted by one adolescent who spoke of wanting her father to understand what he had done to her, but also of not wanting him to be sent to prison. The prospect of the latter had caused her much distress.<sup>108</sup>

Anxieties specific to the process of giving evidence were primarily expressed by witnesses rather than complainants, possibly reflecting an element of reassurance given to the latter when their statement had been video-recorded. Two witnesses<sup>109</sup> spoke of being afraid they might forget their evidence, and anxiety about aggressive questioning by barristers was mentioned by four.<sup>110</sup> However, two complainants said they had been worried about having to speak publicly about their experiences,<sup>111</sup> and concern about the formal and public nature of the courtroom was referred to by equal numbers of complainants<sup>112</sup> and witnesses.<sup>113</sup>

Interestingly, a number of interviewees<sup>114</sup> referred to the influence of television in forming their views of what to expect at court, some saying that they now saw this as having given them a distorted picture of what would happen:

I'd never been to a court before. And seeing it on telly and that, and, like, barrister getting up and like, shouting at [witness] and that ... [...] I kept thinking, I don't want to go if he does that to me. What do I say? What if I forget everything?<sup>115</sup>

... it wasn't half as bad as we'd all expected, 'cos we all expected it to be like you see on telly, where they start shouting at you, and you know how they always get upset on telly? And start shouting and that? We all expected it to be like that. But it were nothing like that at all,<sup>116</sup>

The [defence barrister] was alright. 'Cos you expect - when you see it on telly and that, they're really nasty, like putting questions to them and that, and

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<sup>107</sup> Child 29

<sup>108</sup> Child 8

<sup>109</sup> Child 13 53

<sup>110</sup> Child 14 15 16 53

<sup>111</sup> Child 8 9

<sup>112</sup> Child 9 38

<sup>113</sup> Child 16 36

<sup>114</sup> Child 13 15 16 30 45 51 53

<sup>115</sup> Child 13

<sup>116</sup> Child 15

making them out to be liars. But he were fine,<sup>117</sup>

I keep watching 'The Bill' and all these men witnesses, and all these ladies being really silly on it. [...] The real court is a lot different,<sup>118</sup>

I'd never been to court or anything like that. And like, I mean, when I watch telly, you see all sorts of things happening and that were going through my mind - you know, like when prosecution and defence are, like, both piling questions on you, and ... I were just thinking that's going to happen to me. [...] I mean, I know they're silly now, but if you've never done that before, they don't seem so stupid.<sup>119</sup>

### **Preparation for court**

The benefits of providing children with information to enable them to understand the issues and procedures involved in a criminal trial were acknowledged by the Lord Chancellor when he launched the Child Witness Pack, a set of booklets for children, adolescents and carers which explain what is involved in testifying at court.<sup>120</sup>

However, despite the Child Witness Pack having been available for some time before fieldwork for this study began, it had been seen by children in only two of the fifteen cases for which interview data is available.<sup>121</sup>

Nevertheless, there had been some efforts to help children prepare for the witness role, a majority of complainants<sup>122</sup> having been taken (usually by police officers) on a visit to the courthouse in the week before the trial began. None of the by-stander witnesses, however, were offered such a visit. Amongst the complainants, most expressed appreciation for the visit, five highlighting the fact that this had enabled them to meet the usher who would be with them in the remote witness room when they gave evidence.<sup>123</sup> Nevertheless, it appeared from their descriptions that the visit was primarily an exercise in familiarisation rather than providing preparation *per se*, the focus having been on showing children the layout of the courthouse.<sup>124</sup> Minimal

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<sup>117</sup> Child 16

<sup>118</sup> Child 30

<sup>119</sup> Child 53

<sup>120</sup> The Lord Chancellor (unpublished, 1993) *Speech for the Lord Chancellor: The launch of the Child Witness Information Packs*. Speech made on Monday 10 May 1993, p. 3.

<sup>121</sup> Cases 6 and 8

<sup>122</sup> Child 4 and child 5 were not offered a pre-court visit; the parents of child 31 did not want her to know about the court case until the day she was to give evidence.

<sup>123</sup> Child 29 30 41 44 45

<sup>124</sup> Child 1 2 8 29 30 34 35 41 44 45; carers of children 11 and 32.

attempts appeared to have been made to create an opportunity for children to ask questions or express any of their anxieties, or to ensure that they had a clear understanding of what is involved in the process of giving evidence. Many children<sup>125</sup> thus felt that the visit had done little to help them to understand what would happen at court, or to alleviate their fears, some seeing it in terms of ‘just being shown round’.<sup>126</sup>

One mother<sup>127</sup> spoke of her concern to ensure that her son was given an opportunity to familiarise himself with the video-link before appearing in court, as she thought his curiosity about the equipment might distract him from the task of giving evidence. However, while several children<sup>128</sup> said they had been shown the remote witness room and video equipment on their pre-trial court visit or on the first day of the trial, the ‘practise run’ usually appeared to have been very brief, the following description being typical:

[The judge] just said hello. He says, I’ll put you on to Mr Hope, and he just said hello, and that’s that.<sup>129</sup>

It would appear that children were not seen as active participants in this process, and as a result it provided little by way of opportunity for meaningful involvement. An adolescent complainant said:

They gave me a look to see what it would be like on screen, on first day. [...] [I]t was nice to see where you’re going to be sat and what you’re going to be looking at, but ...you know ... it didn’t really help.<sup>130</sup>

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<sup>125</sup> Child 2 8 30 34 35 45

<sup>126</sup> Child 29 41 44. Interestingly, six children [8 30 34 41 44 45] commented on the fact that while they had been shown the remote witness room and waiting areas, they had not been allowed to see any of the courtrooms. Apparently the resident judge had ruled that this would be counter-productive. However, while two children [30 44] said they were glad about this as they thought seeing the courtroom would have made them nervous, or made them think about the defendant, three [8 34 45] were critical and cited this as a reason they had not found the visit particularly helpful.

<sup>127</sup> Mother, child 1

<sup>128</sup> Child 4 9 10 29 38 39. Also, mother of child 7.

<sup>129</sup> Child 29

<sup>130</sup> Child 4

Although by-stander witnesses were not offered a pre-trial court visit, a number<sup>131</sup> said they had received an advice leaflet with their witness summons. Their comments suggested, however, that the general nature of the leaflet, and its lack of specificity to the Crown Court concerned, reduced its helpfulness:

It didn't really say much. Just told you that ... it really were just explaining that you had to be there and if you didn't go .... it didn't really tell you much about what to expect,<sup>132</sup>

... we got a Victim Support leaflet through post, but that [...] were just telling us simple facts, not things that we really *needed* to know. [...] [W]hat we needed to know were [...] what it was going to be like actually in court ... [...] I mean, I didn't know whether you had to call judge Your Honour, or ... Mr Whatever, or Sir or ... you know, things like that,<sup>133</sup>

I got one of those leaflets, [...] a Witness Support one, and also '*What Happens When You Go to Court*' - you know, where to stand and things like that, they tell you. [...]But [...] it's different than the leaflet. [...] Even silly things like the layout of the courtroom were different than on the leaflet. And that threw me a bit. [...] I was building up a sort of a picture of what to expect, and then it was totally different.<sup>134</sup>

Witnesses indicated that once at court, they were told by ushers, witness support volunteers, or the police about the procedure which would be followed in the courtroom. The quality of the advice and information they received, however, was variable:

... that policeman that come and saw us, he run us through when we got to court. [...] And then we spoke to ... what do they call her? Lady there, is it one of ushers? She run us through a bit, but we didn't really know what to expect,<sup>135</sup>

... this woman, I think it were usher or summat, she took us in [the courtroom] and she were showing us round and everything, and like, where we'd come in and where we'd stand and stuff. So that helped, once we'd seen room and that, and knew where we were going to be,<sup>136</sup>

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<sup>131</sup> Child 13 15 16 53. Sister of child 11.

<sup>132</sup> Child 15

<sup>133</sup> Child 53

<sup>134</sup> Sister, child 11

<sup>135</sup> Child 14

<sup>136</sup> Child 16

... policeman came in and he showed us like, us statements and that. I mean, nobody else would have done owt - like showed us where to go or owt like that if he hadn't have been there. He did, like. Showed us court, made sure, like, we'd seen what were going off and that. But nobody else were bothered about you at all;<sup>137</sup>

... that Witness Support team were brilliant. They were really, really good. They really helped a lot. [...] Somebody, like, went up and showed me round court, and explained who would be talking to me and who'd be sat where, and everything else. [...] The support were brilliant.<sup>138</sup>

The comments made by complainants and witnesses suggest that the provision of information is not a priority for the court services. Such information as is offered varies in quality, but tends to be relatively superficial, neglecting to engage children actively (eliciting neither their questions nor their misconceptions). By largely ignoring children's individual and emotional needs, the familiarisation or briefing sessions offer little possibility for children to share anxieties, or express opinions. Nevertheless, the potential benefits of an informed understanding of what would happen in court were indicated by a mother and daughter who were involved in a case which went to an immediate re-trial. The teenager concerned said in interview:

It was a lot easier the second time [I gave evidence] than the first time, because I knew what I was expecting. [...] I weren't so confused [when I was cross-examined] - I was able to say everything I needed to say and I thought about [the defendant watching me on the video monitor] a lot less second time;<sup>139</sup>

while her mother separately commented:

... the second time I went in [...] I felt that I definitely could get over my side of the story, really. [The first time] I felt as though the barrister was kind of ... trying to hurry the questions [but afterwards] I actually went into the court to listen, so I think that gave me a good idea as well, as to how to answer some of [the questions] and, you know, just to say hang on a minute, but this happened as well. [...] I went to look at court beforehand and I think what we could have done then is just ... I know it's not really possible ... but do a

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<sup>137</sup> Child 13

<sup>138</sup> Sister, child 11

<sup>139</sup> Child 41

*playrole* of some sort while you're actually in there. So you can feel, you know, the tension and everything in there.<sup>140</sup>

## **Being at court**

### **Waiting to give evidence: support, information and consultation at court**

A number of interviewees<sup>141</sup> described waiting to give evidence as being an even more stressful experience than testifying. The Crown Court had no facilities specifically set aside for witnesses, but arrangements for child witnesses had recently been made the responsibility of the newly appointed Child Liason Officer, and a volunteer Witness Support team had also been established. Efforts were made to provide complainants in the sexual abuse cases, and their carers, with a separate room in which to wait, with toys, games, and a video usually being provided, while witnesses in the murder case were accommodated at an adjacent police station. Most interviewees welcomed the arrangements which had been made for them, despite the discomfort of the facilities themselves,<sup>142</sup> and the human support provided by ushers and volunteers was described by carers in particular as 'brilliant', having offered an unanticipated level of personal warmth.<sup>143</sup> Nevertheless, some interviewees described the arrangements at the courthouse as having heightened their anxiety, one commenting: 'It were just frightening because everywhere we went, we had to have someone with us.'<sup>144</sup> Another described her seclusion in a small room, and dependence on volunteers to fetch any drinks or food she wanted, as having emphasised her feeling of powerless vis a vis the defendant, while her mother commented that the defendant had 'the run of the court - he could go anywhere.'<sup>145</sup> The arrangements made for witnesses in the murder case seem to have been particularly elaborate, and two interviewees<sup>146</sup> indicated that this increased the tension which they were feeling, especially when the arrangements broke down, or they had to move from one building to another. A problem for a number of abuse complainants,<sup>147</sup> which in part resulted from the lack

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<sup>140</sup> Mother, child 41

<sup>141</sup> Child 15 16 41 50 51 53. Sister of child 11.

<sup>142</sup> One of the rooms employed for this purpose was normally used as a committee room, and furnished as such, while another was very small.

<sup>143</sup> Child 38 39. Carers of children 11 32 34 45

<sup>144</sup> Child 2

<sup>145</sup> Mother of child 41

<sup>146</sup> Child 50 53

<sup>147</sup> Child 2 41. Carers of children 5 11

of purpose-built provision, was accidental encounters with the defendant on stairways or corridors. While it was clearly difficult for court staff to safeguard witnesses against all eventualities, it nevertheless appeared from interviews that the potential of the support available was undermined by a failure to consult with witnesses and complainants, thus preventing them from communicating their particular anxieties or exercising a degree of choice about the assistance provided. This point was made by two interviewees in particular,<sup>148</sup> one of whom commented:

I think everyone understands ... understood that what they were doing, they were doing for us own good, but I think if they'd have asked us what we were worried about or ... maybe even *any* sort of conversation really, it would have been better.<sup>149</sup>

Lack of information was an issue raised by several interviewees, problems having arisen for some children and carers as a result of inadequate warning of restrictions on contact between witnesses while the case was heard.<sup>150</sup> Likewise, although one mother<sup>151</sup> said ushers provided her with regular bulletins on the progress of her daughter's case, a number of adolescents said they were given no information about what was happening in court, which added to the tension they were already feeling.<sup>152</sup> Some carers were strongly critical of a perceived failure to discuss decisions with them, particularly where this involved the discontinuance of charges:

We got really upset because we'd been waiting for this court case to come up all this time and then it just got dropped. [...] They said to me would [my daughter] be able to stand the pressure [of giving evidence], so they asked [her] and [she] said yes. And [...] they showed her room and everything where she has to go, and then it just got dropped. That got us really mad,<sup>153</sup>

We didn't have a say - we never talked to our barrister all the time we were there. He never approached us at all. We was only passed messages through the police. And when [the police officer] says they're dropping all [co-complainant]'s evidence, full-stop, they might go for a re-trial, we never had a say in the matter. [...] They did it all for us and that weren't fair. That was

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<sup>148</sup> Child 8 53

<sup>149</sup> Child 53

<sup>150</sup> Child 15. Carers of children 5 34.

<sup>151</sup> Mother, child 45

<sup>152</sup> Child 8 50 53

<sup>153</sup> Mother child 2

our children that was up there. They'd done all that. And it should be up to us whether we want them to go through it again or not.<sup>154</sup>

A carer<sup>155</sup> who was in the courtroom when the trial judge gave his reasons for accepting a defendant's plea of guilty to one charge and discontinuing the more serious charge which was contested, had a clear understanding of the decision and appeared satisfied with it. Others,<sup>156</sup> who had not had this opportunity, were confused about the reasons for severing or discontinuing charges, and of two cases<sup>157</sup> which went to a re-trial, the views of the complainants and their carers were sought in only one.

Additionally, the absence of any formal system for ensuring that complainants, witnesses, and their carers were informed of the progress of cases either before the final hearing or at the courthouse meant that children were given no opportunity to express a view on whether their evidence should be given from the remote witness room or in the courtroom. Most interviewees accepted this fatalistically as another matter over which they had neither influence nor control, but two adolescents<sup>158</sup> were highly critical of the failure to consult them. Likewise, despite the facts that firstly, permission for use of the live-link and pre-recorded evidence had in all relevant cases been given well in advance of the final hearing, and secondly, most complainants were shown the remote witness room when visiting the courthouse in the week before the trial, a number of interviewees said they did not know until the day they gave evidence whether they would be allowed to testify over the link or not, and this had been a source of much anxiety.<sup>159</sup>

### **Giving evidence from the remote witness room**

Children whose evidence was given over the television-link, whether live or including a pre-recorded statement, identified a number of benefits in this facility. The most

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<sup>154</sup> Mother, child 5. The case did not go to a re-trial. The defendant was offered this option, but declined it.

<sup>155</sup> Carer child 38

<sup>156</sup> Carers of children 32 33 34 35

<sup>157</sup> Cases 1 and 12.

<sup>158</sup> Child 8 13

<sup>159</sup> Child 45 46. Sister child 11.

frequently mentioned benefit was the protection the closed circuit system offered them from the sight of the defendant:

[It's] better than being stood in courtroom itself 'cos you can't see him or anything,<sup>160</sup>

I thought it would be a bit better, which it were .... I didn't have to see him,<sup>161</sup>

If I was standing in a [witness] box, knowing me, if I saw [the defendant] I'd probably faint. I'd probably do summat. Or tell a lie,<sup>162</sup>

I didn't feel as nervous as I think I would have done if I went in the court. [...] All I could see was the people I was speaking to and a bit of behind them and in front of them. And that's all I could see. And that made me a lot better. I think if I saw [defendant], then I wouldn't be able to look.<sup>163</sup>

I wanted to give [my evidence] that way. I couldn't face him. I couldn't see him. If I'd have had to see him, that would have been that. I wouldn't have been able to go in. [But] I felt safe, not having to see him.<sup>164</sup>

A ten year old boy who had given evidence at an old-style committal described how frightened he had felt in the magistrates' court seeing not only the defendant but also the magistrates, clerks, and solicitors, and said:

It's better on tv-link because you feel more confident. Instead of standing up in front of all them people,<sup>165</sup>

His mother separately described how he had felt too embarrassed in front of the magistrates to speak of everything which had happened to him:

... it were a lot of people for him to have to look at and say this. I mean [...] he didn't want the whole world to know [and] he thought that room were the whole world, *everybody* were going to know. And he just ... got apprehensive. He said enough for them to take it to Crown Court but he didn't say what he said in his statements and everything. [...] He was holding back. Because he simply felt embarrassed.<sup>166</sup>

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<sup>160</sup> Child 9

<sup>161</sup> Child 45

<sup>162</sup> Child 44

<sup>163</sup> Child 30

<sup>164</sup> Child 4

<sup>165</sup> Child 1

<sup>166</sup> Mother, child 1

The advantage of the video-link in shielding abuse victims from the defendant was nevertheless undermined if children accidentally encountered the perpetrator in other parts of the courthouse.<sup>167</sup> Moreover, it was apparent from the comments of some interviewees that there were features of the video-link itself which could be experienced as stressful. Some children found the thought of the defendant watching them when they could not see him, a disturbing one;

It felt safe because I knew he wasn't ... not hardly near that room. But it just felt horrible knowing that he was watching that tv screen when I was saying [what he'd done to me]. He could be gloating over it and everything.<sup>168</sup>

The only thing I didn't like ... 'cos when he saw me on the television it was really frightening thinking about [him seeing me] and I'm not seeing him.<sup>169</sup>

while the artificiality of the system sometimes proved a problem:

[There were] little microphones you had to clip on, and you've got to look at .... instead of looking at screen to look at judge you've got to look at this red light, 'cos otherwise they couldn't see you. I were thinking, what do I look at? The telly or the light? So I were *mimics looking from one to the other*. [And] I just made answers up sometimes 'cos I couldn't hear him. Well, I could hear him but there were blubbing [interference] and things [...] and I couldn't hear;<sup>170</sup>

It were a bit funny ... it weren't as if ... people were talking to me straight face to face. It were ... really funny. I couldn't hear them right. [...] It were loud enough. It's just that they had to keep repeating it over and over again because I couldn't understand. I couldn't hear them right.<sup>171</sup>

Feelings of isolation presented a difficulty for some,<sup>172</sup> and while children were invariably grateful for the support they had been given by ushers, a number said they would have preferred to have been accompanied by someone to whom they were

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<sup>167</sup> Sister, child 11

<sup>168</sup> Child 41

<sup>169</sup> Child 30

<sup>170</sup> Child 29

<sup>171</sup> Child 45

<sup>172</sup> Child 4. Mother child 5.

close.<sup>173</sup> The separation of children from the main centre of activity mean they frequently had little knowledge of what was happening in the courtroom, and while some said this was not a problem,<sup>174</sup> it became apparent during interviews that some younger children had been left with unrealistic and rather disturbing fantasies of what had occurred there.<sup>175</sup>

Where a video-recording had taken the place of a child's evidence-in-chief, the main benefit identified by interviewees<sup>176</sup> was that the recording had helped them to remember what had happened:

It were like ages ago.. we'd made the actual video. [...] It made it easier because then we remembered what ... like some of things what we'd told [the police officer]. And then when questions were asked [in court] we'd like, know what we'd said.<sup>177</sup>

It reminded me everything about what I'd said because after like, two or three years, you forget things.<sup>178</sup>

For some, however, the experience of watching the recording at court was stressful. One mother described her daughter as having been disturbed by the video as she had put what the defendant had done to her out of her mind by the time of the trial and did not know whether to believe that it was really herself she was seeing or not in the video-recording.<sup>179</sup> A nine year old interviewee spoke of feeling an intense wish to go into the courtroom to hit the defendant while the recording was being shown, as a result of which she tried to avoid watching it.<sup>180</sup>

Thus while some children<sup>181</sup> felt they could not have testified if the live-link had not been available, and most expressed appreciation of the attention paid to them by

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<sup>173</sup> Child 1 4 34 41

<sup>174</sup> Child 9 41

<sup>175</sup> Child 29 30

<sup>176</sup> Child 2 9 10 30 41

<sup>177</sup> Child 9

<sup>178</sup> Child 30

<sup>179</sup> Mother child 31. This child did not learn until the morning she was to give evidence that she was to be a witness. Prior to this she had no knowledge of the prosecution.

<sup>180</sup> Child 29

<sup>181</sup> Child 4 9 10

ushers and volunteers, and of the personal care represented by the remote witness room, others<sup>182</sup> nevertheless thought that the stress of giving evidence had only been marginally alleviated by the video provisions, particularly as neither the link nor pre-recorded evidence could affect either their feelings towards the defendant nor the process by which their evidence was tested. Apropos of this, three of the children interviewed<sup>183</sup> said they had wanted to give their evidence in the courtroom. For the youngest child concerned<sup>184</sup> this appeared to be about a need to see the defendant be punished, but for two adolescents it related to wanting to put their evidence to the court directly. Issues of influence and control were involved for one girl,<sup>185</sup> who preferred to think it was what she had said in her live evidence rather than her video-recording which had put her story across to the court, and who had wanted to be the courtroom to see the people she was speaking to, especially the jury. A fourteen year old<sup>186</sup> expressed concern about her lack of choice. She recognised that the video provisions had been used in order to protect her, but said she had not wanted to be helped in this way. Rather, she had wanted an opportunity to show her father that she could face him. Being in the courtroom represented to her not only the opportunity to speak to a powerful symbolic form of authority about what her father had done, but the chance to speak directly to him - something which she had been unable to do since his arrest as a result of the restrictions imposed both by the child protection agencies and her father's bail conditions.

### **Giving evidence in the courtroom**

Witnesses invariably described having felt extremely anxious while waiting to go into the courtroom. Their fears involved a mixture of concerns, notably tension associated with the matters about which they would have to speak,<sup>187</sup> and apprehension about an unfamiliar task.<sup>188</sup> Two<sup>189</sup> said they would have preferred to have given evidence

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<sup>182</sup> Child 4 29 30 34 41 44 45. Carers of children 5 11 32

<sup>183</sup> Child 8 29 34

<sup>184</sup> Child 29

<sup>185</sup> Child 34

<sup>186</sup> Child 8

<sup>187</sup> Child 14 50 53

<sup>188</sup> Child 13 14 15 36 50 51 53

<sup>189</sup> Child 13 36

over the live-link, and one<sup>190</sup> wished she had been offered the protection of a screen. However, despite experiencing some initial nervousness, some<sup>191</sup> found that their anxiety diminished once questioning began, and a majority of those interviewed<sup>192</sup> said they had not found giving evidence in the courtroom the ordeal they had expected it to be. These were, however, all older adolescents; the youngest witness to whom the researcher spoke described the experience as having been highly stressful, although the lack of a supportive known adult at court, and the unfamiliarity of the process, may have added to the anxiety which she felt:

Well, I were scared of going in 'cos, like, I've never seen [a court] and I've never been there and like, there were people looking at me and [...] I'm like, in that box, and then there's big manager there or summat, and then there's some more stood down there. They were *pushing* me to say opposite thing [...] and they shouldn't really do that. They should, like, ask you to say what happened and then ask you questions. But they didn't. They kept asking me questions and like pushing me to say summat else. And as soon as I got out I started crying 'cos they pushed me and they scared me. [Perhaps it was because] I were just by messen. If me mum were there I probably ... [...] It were because I were by messen, probably.<sup>193</sup>

Four interviewees referred to the presence of the defendant as having been the worst aspect of testifying in the courtroom,<sup>194</sup> although one said this had not concerned her, as she could not see him<sup>195</sup> and another said he had blocked out the thought of the defendant and his family by focusing on what he had to say.<sup>196</sup> Two described how their concentration was affected, one saying it might have been easier if he had been able to face the defendant directly:

When I had to look at [defence counsel], straight behind him was [the defendant]'s family [...] so when he were asking questions, I weren't really concentrating [...] I were, like, trying any way I could to keep my eyes away from his family. [...] I know [the defendant] were up to left, and I just didn't look there. I just didn't want to look at him at all.<sup>197</sup>

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<sup>190</sup> Child 53

<sup>191</sup> Child 14 50 53

<sup>192</sup> Child 13 14 15 16 50 51 53

<sup>193</sup> Child 36

<sup>194</sup> Child 14 16 51 53

<sup>195</sup> Child 15

<sup>196</sup> Child 50

<sup>197</sup> Child 53

Probably the worst were ... is the fact that [the defendant]'s actually behind you and he's not ... [.] he's behind you but you can still see him in the corner of your eye if you look. If you're looking at the defence you can see him in the corner of your eye, and you can see him looking at you. [...] The fact that you can just see him is probably worse than actually being full blow, like full really looking at you [...] because you can't actually see what he's ... [...]. If he was full on you could see if he's looking at you or see what actions he's doing, but when he's in corner [of your eye] you've always got your imagination ... you've got this fear that he's going ... he's staring right into the back of you and it's ... that's bad that.<sup>198</sup>

Yet some<sup>199</sup> found that knowing that the defendant was there acted as an incentive to tell the court what they knew, one young adult carer stating:

I just felt so vulnerable. [...] I was very aware [the defendant] was near me and he was there. Because even though [he] was behind, you could still see out of the corner of your eye. You know, I could feel him. I could feel him watching me. And I didn't like that at all. [...] But if anything, I think, you know, it helped [...] because I thought, I'm not letting you get away with it, kind of thing. I'm going to say what I've got to say.<sup>200</sup>

### **Cross-examination**

Cross-examination was anticipated with considerable anxiety by many interviewees, but the actual experience, as described in research interviews, differed significantly, according to whether children were complainants or had acted as supporting or bystander witnesses. Witnesses frequently said the reality of cross-examination was less of an ordeal than they had expected. The manner adopted by defence counsel was often an important factor in alleviating the stress they experienced, many finding that barristers did not adopt the confrontational approach or use the manipulative techniques they had envisaged:

Interviewee: I thought it was going to be a lot worse than what it were. [...] I was expecting [the defendant]'s barrister to, like, say [the complainant]'s told you this - you know, [...] say it's not really happened. And for them to, like, try and make out I were a liar and all that. But ... [.] it were alright actually.

Interviewer: It wasn't as bad as you'd expected?

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<sup>198</sup> Child 51

<sup>199</sup> Child 13. Sister, child 11.

<sup>200</sup> Sister, child 11

Interviewee: It were a lot better.<sup>201</sup>

[The barristers] were both really nice. They just ... we just sat down, like, and they just asked us questions, just really nice, and didn't say anything. And we'd expected them to, like, make us out to be liars or shout or something, but they were both really calm and nice,<sup>202</sup>

I expected [defence counsel] to be like they are on television. Like, really getting at you, to get answers out of you, and twist your answers round. And he didn't. He just wanted to make sure that what I'd said were what I meant. [...] Compared to what I thought it would be like [...] it was a lot easier;<sup>203</sup>

I thought [the defendant]'s barrister were going to be really nasty to me and that, but he wasn't at all [...] because really, what [he] did, [he] went through my statement and then [...] just picked points out of that and asked me questions. And [I]'d got to read that before [I] went in, so that were ok;<sup>204</sup>

It was ... I don't know, I think that it were more psychological than anything. [Defence counsel] were nice, [...] you know what I mean? He weren't horrible to me. But the things he were saying weren't nice. You know, they got me angry and upset. But it was the way he came across, were quite nice. [...] He weren't very aggressive or anything like that. [...] I don't think it were as bad as what I'd expected it to be.<sup>205</sup>

One adolescent<sup>206</sup> described himself as having become increasingly irritated by a barrister who he felt was 'mocking' his responses, and said he had reacted by 'blinking' the questions in order to put an end to the questioning. However, he also indicated that, for his own reasons, he had been reluctant to state in court everything he had previously told the police. Giving evidence was experienced by this interviewee as involving significant personal risks, and the dilemma in which he found himself may have contributed to the discomfort of the cross-examination process.

As might be expected, cross-examination proved a stressful experience for complainants in sexual abuse cases. In the previous chapter it was noted that oppressive cross-examination styles; questions eliciting feelings of shame; and the lengthy and detailed exposure of areas of perceived weakness in the witness' account,

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<sup>201</sup> Child 13

<sup>202</sup> Child 15

<sup>203</sup> Child 53

<sup>204</sup> Child 16

<sup>205</sup> Sister, child 11

<sup>206</sup> Child 50

had an adverse effect on witnesses' composure. Sadly, (but perhaps relevantly), the complainant thought to have experienced the most stressful cross-examination did not wish to be interviewed for this study,<sup>207</sup> but the more negative accounts of cross-examination given by interviewees were found, in large part, to correlate with courtroom observations.

Complainants' accounts highlight some specific aspects of cross-examination which added to the stress of the testing of their evidence. Repeated questioning on individual topics; manipulative use of witnesses' responses; and tight control over the way in which the witness could respond were the most frequently cited examples:

[Defence counsel] didn't give me chance to finish any of the questions [he] asked. [...] I couldn't answer them at all properly, and he was always confusing me. [He'd interrupt me] while I was trying to speak [and] come on to another question. [I got] very confused. I couldn't work out the proper dates and times when everything happened,<sup>208</sup>

[Defence counsel] kept asking me questions, he kept confusing me. [...] He kept asking the questions, then he'd change question, tried to make me say another question - another answer, like. [...] I were that confused, I give him some different answers [...], so he could make me out to be a liar. [...] Well, he didn't exactly say it in words, but he says, it's not true that, is it? As if he were calling me a liar;<sup>209</sup>

The person who was on my side wasn't as horrible as, wasn't as bad as the person who was on [the defendant]'s side. Like, he asked me a cartload of questions, person on my side, and the one on his side kept on asking me the same questions. Did it happen, Susie? I'm suggesting it never happened, Susie. I'm suggesting that you're telling lies, Susie, and you're doing this, Susie, and you're making it up, Susie. [...] But I never had a break. [...] 'Cos I thought if I had a break, I'd back down, [...] I'd change me story. So I thought I'd go straight through it and I did;<sup>210</sup>

[Defence counsel] wasn't very nice. [...] Way he spoke, [he were] snidey to me. [...] Every time I answered a question, he'd badger me to say ... as if I were lying. And he'd question me over and over again. [...] It was like, I went to answer a question ... if I'd say summat, he'd say, just please answer the question, yes or no? [...] I mean, he were shutting everything else out, he

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<sup>207</sup> A carer was interviewed on her behalf.

<sup>208</sup> Child 41

<sup>209</sup> Child 45

<sup>210</sup> Child 44

didn't want to know owt else. [He] just wanted *that* answer. [...] He were bugging me, so I told him straight!<sup>211</sup>

Two carers reported that children were acutely distressed by cross-examination,<sup>212</sup> but many of the children themselves said that while they had found it a difficult and stressful process, they nevertheless thought they had been treated reasonably fairly, or had been able to cope, or felt the outcome of the prosecution had made it worthwhile:

... some of questions were really hard to answer, 'cos, like, [I]'d forgot most of stuff. But then, some of questions were easy as well. [...] They treated me fair,<sup>213</sup>

[Defence counsel] just asked questions and that. He'd say things like ... he only really tried to make it out once when ... 'cos I didn't tell my mum until quite a long while afterwards, [...] he said did I not tell mum straight away because I were lying, but I said no. [...And] he asked did I have any particular friends [...] just in case I were ganging up and lying and things. [...] And then he said, alright then, and switched back to judge,<sup>214</sup>

His solicitor [*sic*], when he tried to make me out a liar, he looked at [the judge], our judge, [...] and judge says summat to him, not quite sure what he said, but then [defence counsel] didn't make questions so hard, after judge said that. [...] I weren't really bothered [that he tried to make me out a liar.] I just told them what had happened and, like, I knew ... I knew I were in right and I weren't lying. [...] I think [defence counsel] believed me, because he told him to say why he'd done it, like,<sup>215</sup>

The person who was, like, talking for [the defendant] was, like, really strict [...]; he looked grumpy [...] and he was trying to make *all this* ... he was, like, trying to get the truth and everything, and trying to get everything out of me. [...] It was really scary, and I didn't like that, but I could have done it again,<sup>216</sup>

[The defence] tried to make it out that it were [my fault] all the time. But I told him it weren't me. It were a bit hard. I got through it alright. I were a bit upset and that, but ... I'm just glad that I've got five years of my life to live [as a result].<sup>217</sup>

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<sup>211</sup> Child 34

<sup>212</sup> Carers of children 7 and 11

<sup>213</sup> Child 9

<sup>214</sup> Child 29

<sup>215</sup> Child 45. Defence counsel in this case tried, on the morning of the trial, to persuade the defendant to enter a late guilty plea.

<sup>216</sup> Child 30

<sup>217</sup> Child 4. She is referring to the length of the defendant's sentence.

A majority (although not all) of these interviewees had their complaint upheld and this may have coloured their recollection of the impact of cross-examination, or, within the context of a single interview, some children may have minimised painful feelings. Nevertheless, from the accounts given, the children appear to have coped with defence suggestions that their allegations were untrue somewhat better than might have been expected from the literature.<sup>218</sup> Among the above quotations are some which suggest that the interviewee did not find it unreasonable that their allegation should be tested, and, provided this was done in a relatively straightforward manner, was not adversely affected in the longer term. Where cross-examination was experienced as oppressive or confusing, children describe themselves as having been upset at the time, but nevertheless some indicate that they were fortified by the knowledge that they were telling the truth, or by their determination to speak out about their experiences. One child described her response to repeated suggestions from the defence that her allegations were untrue, in the following terms:

I felt like just getting [defence counsel] by the neck and saying, I'm *not* telling a lie. [But] every time I said [...] yes, [the defendant] *did* do that; yes, he did do *that* as well, I kept on getting stronger and stronger. [...] 'Cos I knew [what I was saying] was true. [...] [I was thinking of] a lot of things - [...] if he gets out, he'll do it to other people, [...] he'll hurt other people. [And] I don't want to let him get away with this... [...] I knew if I weren't strong he'd be getting after me. [...] It's something that - probably no-one wants to do it, but you've got to. You've got to kind of ... stand up for yourself. And stand up for other people.<sup>219</sup>

Interestingly, one mother suggested that a clear, direct challenge to a child's account may be less stressful than an indirect one whose implication may be open to misconstruction:

I think [the cross-examination] was very confusing, [...] not straightforward. If they'd have said, you're a liar, then that would have been straightforward, but it was the way that the defence barrister put it across to them - that didn't happen there did it? - and he was confusing them I think.<sup>220</sup>

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<sup>218</sup> See, for example, Spencer, J. R. and Flin, R. (1990) *The Evidence of Children: The Law and the Psychology*. Blackstone Press: London, pp. 225 and 294.

<sup>219</sup> Child 44

<sup>220</sup> Mother, child 32

### Knowledge and understanding of the legal process

As a number of the preceding quotations will have illustrated, most interviewees had some understanding of the role of defence counsel in a criminal trial. One child described this as:

To stand by person who's in wrong. [...] To change story - make it out not to be real, like;<sup>221</sup>

while others said:

I didn't need to talk to [prosecuting counsel] because he believed us. But the other one's got to make out we're all lying and this;<sup>222</sup>

Me nanna told me. She said, [the defence] will try and [...] make you say things that you don't want to say. He'll try and make you say it's not true;<sup>223</sup>

When we spoke to that policeman, he said, no matter how nasty [defence counsel] is, just look at it that that's his job. That's what he's paid to do;<sup>224</sup>

... the defence will obviously want to ... get his person free, so [...] he's not going to be helpful. But ... you just have to expect that.<sup>225</sup>

If a broad understanding of the defence role was quite widespread among interviewees, and may have helped to moderate the stress of the cross-examination process, several children nevertheless raised queries in interview about aspects of court procedure, or displayed misconceptions. Discussing cross-examination, one said:

But if I were telling lies I'd get - I'd be the one to get to prison;<sup>226</sup>

a belief which must have contributed to the overall anxiety of her involvement in a criminal prosecution. Another interviewee's account revealed how lack of familiarity

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<sup>221</sup> Child 45

<sup>222</sup> Child 29

<sup>223</sup> Child 44

<sup>224</sup> Child 14

<sup>225</sup> Child 51

<sup>226</sup> Child 44

with trial procedures could place witnesses at a disadvantage and divert their attentional resources away from the primary task:

Interviewee: I got a bit frightened when defence had asked me a question and then next thing I knew, they told me I'd got to wait for jury to go out, go out, and wait in a little room while prosecution asked judge a question. So I thought, well, have I said summat wrong? Have I done summat wrong? And I were getting more het up and when I went back in, I were shaking and ... it were really bad, that bit.

Interviewer: Did anyone explain to you what that was about?

Interviewee: Well, [Witness Support volunteer] did. She said that most probable were that prosecution wanted to ask a question and he wanted to know whether he could. And at that I thought, well, what question is he going to ask me then? So it started me worries again. [...] I were just like, listening to every question - is *that* the question he were asking about or is it still to come? [...] That really got me on edge.<sup>227</sup>

Other children said they had not understood the relevance of some of the questions they were asked,<sup>228</sup> or were confused about their meaning, either because of the unfamiliarity of barristers' accents or because of the vocabulary which they used.<sup>229</sup> Two children said that they asked if they did not understand a question,<sup>230</sup> but such assertiveness proved difficult for others who said they were too nervous or frightened to reveal their incomprehension.<sup>231</sup>

### **The aftermath of the court case**

The interfamilial and emotional repercussions of child sexual abuse were not resolved with the conclusion of criminal proceedings; three children<sup>232</sup> spoke of the court case having re-awakened memories which had otherwise begun to preoccupy them less; and two<sup>233</sup> lived apart from their non-abusing parent for a short period after the verdict, both they and their carers needing time to re-adjust and recover from the strains of the preceding months. Some carers,<sup>234</sup> expressed feelings of isolation and

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<sup>227</sup> Child 53

<sup>228</sup> Child 14 15 41

<sup>229</sup> Child 9 29. Mother of child 7.

<sup>230</sup> Child 1 34

<sup>231</sup> Child 36 41

<sup>232</sup> Child 1 41 44

<sup>233</sup> Child 8 41

<sup>234</sup> Carers of child 1 5 11 32 33 44 45

an on-going need for support, as they continued to have anxieties about the effect on their child of the abuse to which s/he had been subjected. In cases where the defendant had been acquitted of abusing the child,<sup>235</sup> some of the children involved were said by carers to have initially thought the acquittal meant they were not believed,<sup>236</sup> and were described as having been devastated by the outcome. However, by the time of the research interview carers of three of the five children concerned<sup>237</sup> regarded the outcome philosophically. In two families<sup>238</sup> carers took the view that the prosecution had been a salutary experience, and the acquittal was more to do with the standard of proof required by the courts than a lack of belief in the child's complaint. This view had in some cases been adopted by the children, two of whom<sup>239</sup> said in interview that they were glad there had been a prosecution, and that this showed they had been believed. One mother, however, expressed anger at the outcome and a profound sense of having been let down by the criminal justice system, although her criticisms were directed at the police and perceived failings in the original investigation rather than the courts.<sup>240</sup>

The communication of information had sometimes continued to be a problem. By the conclusion of the researcher's observation period at court, the Witness Support coordinator had taken responsibility for advising witnesses and complainants of the jury's verdict, but there had been no such contact with witnesses in the earlier cases, and a number of complainants<sup>241</sup> said they had not been formally told what sentence the defendant received.<sup>242</sup> The anxieties expressed by some children about the risk of retaliation if they testified at court were borne out for two interviewees,<sup>243</sup> both of whom were physically assaulted as a direct result of the defendant's conviction.

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<sup>235</sup> Child 5 8 11 29 34

<sup>236</sup> Child 5 8 11 34. One child was unaware that the defendant had been acquitted of the charges against her as her parents had not told her and he had been convicted of offences against other children.

<sup>237</sup> Child 8 11 34

<sup>238</sup> Carers of child 11 34

<sup>239</sup> Child 8 34

<sup>240</sup> Mother, child 5

<sup>241</sup> Child 34 38 44

<sup>242</sup> Sentencing was deferred for reports in a number of cases.

<sup>243</sup> Child 38 51. This was how child 38 learned that the defendant had been convicted.

Furthermore, a number of children displayed anxiety in interview about the possibility of the defendant seeking them out on release from custody.<sup>244</sup>

A number of carers,<sup>245</sup> expressed a view that the court case had been a ‘waste of time’,<sup>246</sup> either because of the failure to secure a conviction or because it was thought the defendant had received too lenient a sentence. However, the views of the children interviewed were, almost without exception,<sup>247</sup> positive about the prosecution or their treatment at court. Their comments included:

I thought we were treated alright. [...] I think we were treated a lot better than what all other grown-ups would have been,<sup>248</sup>

Just - say it's good. And you want to lick the person who did it to you. And when you get [to court] there's lots to do. And judge is cheerful,<sup>249</sup>

If I had to, I really would do it again, if I had to get somebody in jail for doing something bad, I would,<sup>250</sup>

One good thing, [the defendant]'s in prison. The next good thing, he's got to stay away from kids. [...] I think that the video link is the best thing that they've come up with so far,<sup>251</sup>

I feel relieved [now the case is over]. It *is* worth going through it.<sup>252</sup>

One child<sup>253</sup> expressed a sense of pride in herself for the way she had coped with her court appearance, and others spoke of feeling stronger and more confident as a result of surviving their abusive experiences and participating in the prosecution of their abuser.<sup>254</sup> It was also apparent from interviews with those acting as witnesses that their involvement had made a deep impression on them, many<sup>255</sup> voicing heightened

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<sup>244</sup> Child 4 29 33 44

<sup>245</sup> Carers child 2 5 34 45

<sup>246</sup> Mother, child 2.

<sup>247</sup> The exception being child 8, whose main concern was that no-one, at any stage of the criminal justice process, had sought her views on any aspect of the investigation or prosecution.

<sup>248</sup> Child 9

<sup>249</sup> Child 29

<sup>250</sup> Child 30

<sup>251</sup> Child 44

<sup>252</sup> Child 4

<sup>253</sup> Child 9

<sup>254</sup> Child 8 38 44. The sister of child 11 made the same comment about her.

<sup>255</sup> Child 13 15 16 36 50 53

interest in the criminal justice process and feelings of enhanced self-esteem as a result of taking on a role which they saw as involving considerable responsibility.

### **Summary**

The time spent waiting for a case to reach court was a stressful one for a majority of interviewees, this being exacerbated for many of those subjected to sexual abuse, and their carers, by a lack of support to assist them in dealing with the emotional and interpersonal consequences of the abuse.

The sketchy nature of the information supplied during this period on the progress of the prosecution and the bail or custody arrangements made for the defendant, together with a lack of direct contact with criminal justice personnel (communication being in the main by post; occasionally by telephone; rarely face to face), meant that children and those caring for them often felt marginalised and without any effective means of influencing the decision-making process or expressing their views.

With respect to becoming a witness, not knowing what to expect at court was the source of anxiety most frequently mentioned by interviewees. Most sexual abuse complainants were taken by the police to see the courthouse a few days before the trial was due to begin, but, while invariably appreciated, these visits appear to primarily have been an exercise in familiarisation rather than enabling children to become equipped to act as witnesses. The limited duration and scope of the visit meant that in most cases it did little to dispel children's anxieties or misconceptions about a court appearance. By-stander witnesses were not offered a pre-trial court visit. Some received a leaflet outlining the role of a witness, and most were given a short briefing by ushers or Witness Support volunteers before being called to give evidence, but again, the quality of the information provided was variable and only marginally alleviated the anxiety many witnesses felt at the prospect of a new and unfamiliar task.

The personal support provided at the courthouse by ushers and volunteers was, nevertheless, much valued by interviewees, whose anxiety was particularly high while

waiting to testify. The practical arrangements made to allay witnesses' fears of meeting the defendant were likewise appreciated, although again, failure to consult children and carers about these arrangements (thus introducing an element of choice) at times undermined their effectiveness.

Most children who testified from the remote witness room spoke positively of the assistance this had given them, especially with regard to the protection it had offered from direct confrontation with the defendant. Without this, some children felt they would have been unable to give their evidence. However the element of artificiality introduced by a technological system proved problematic for some, and a small number were disturbed by the thought that the defendant was watching them when they were unable to see him. The substitution of a pre-recorded statement for evidence-in-chief was welcomed by a majority of children concerned, but a minority found it disturbing to watch the recording again. A small number of children said they would have preferred to have given their evidence in the conventional way, and criticised the failure to consult them about the use of the live-link.

By-stander witnesses had likewise been given no opportunity to express a view about the way they would testify. Most did not find giving evidence in the courtroom the ordeal they had expected, although the youngest witness interviewed had found it a very stressful experience and would have preferred to have testified over the live-link.

By-stander witnesses further reported that cross-examination had not been as difficult or confrontational a process as they had anticipated. Most had based their expectations on courtroom dramas shown on television and found the reality very different. The experience of complainants was rather different and a number highlighted particular aspects of cross-examination which they had found oppressive, notably repeated questioning and restricted opportunities to answer as they would have wished. Nevertheless a significant proportion appeared to accept that their allegations had to be tested and showed no lasting adverse effects as a result of defence suggestions that their complaint was unfounded. What emerged from a number of interviews was the strength and resilience of many of the children, some of

whom expressed a sense of increased self-confidence as a result of having coped with a largely unchosen, deeply worrying, and demanding task. By-stander witnesses likewise appeared to have given considerable thought to the responsibility involved in testifying in court case, and might justifiably have taken a pride in their participation.

In chapter nine the findings presented in this and the two preceding chapters will be drawn together. Chapter ten will then consider what this study suggests about the law reform process as a whole.

## **PART FOUR**

## **PART FOUR**

### **INTRODUCTION**

The different themes of this thesis are drawn together in this concluding section. Chapter Nine makes links between the three sets of empirical data which were reported in Part Three. It highlights the mixed effects of the reforms, and the categorical distinctions evident in the treatment of child complainants and by-stander witnesses at the Crown Court where fieldwork was undertaken. Some proposals are put forward for further improvements in the position of child witnesses within the criminal justice system.

Chapter Ten then broadens out the discussion to re-consider the child witness reform process in the light of the empirical research which has been conducted for this study. In particular, it considers the way in which the terms of the debate silenced alternative perspectives and marginalised some key actors. Some comments are offered on what this might suggest about the law reform process more generally.

## CHAPTER NINE

### THE CHILD WITNESS: THE WAY FORWARD

The present chapter draws together the empirical findings reported in the three preceding chapters, and uses these as a basis on which to evaluate the child witness reforms introduced in 1988 and 1991. The effects of the reforms are discussed in relation to the three objectives of the legislation identified in Chapter Five; the reduction of the stress of a court appearance for child witnesses; the facility for more, and younger, children to act as witnesses; and the achievement of a higher rate of prosecutions in cases of child sexual abuse. Some characteristics of the way in which the reforms were implemented in the Crown Court where fieldwork was undertaken are then highlighted and related to specific features of the process through which the reforms were brought about. In conclusion, the representativeness of the results of this study are considered, and some recommendations for future development are made.

#### **The effects of the child witness reforms**

##### **Reducing the stress of a court appearance**

As was shown in Chapter Five, a primary objective of the reform process was the reduction of the trauma of a court appearance for children involved in abuse prosecutions, with the video link and video-recorded evidence providing the means by which this was to be achieved. At the time, discussion focused on the stress associated with the *process of testifying* rather than on any psychological, emotional or inter-familial stress factors associated with criminal justice system involvement more generally. The rationale for this was that the latter stressors are highly individual and difficult to control, whereas the more technical aspects of a court appearance, such as examination and cross-examination, or confrontation with the accused, are amenable to intervention and improvement.<sup>1</sup> However, it is important to note that an early child witness study, conducted by Gibbens and Prince in the 1960's, concluded that the relatively short-term stress of giving evidence at court is less

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<sup>1</sup> See, for example, Spencer, J. R. and Flin, R. (1990) *The Evidence of Children: the Law and the Psychology*. Blackstone: London, p. 298.

harmful to sexually abused children than the longer-term effects of alterations in their personal circumstances brought about by involvement in criminal proceedings. In particular, the authors noted that children might have to re-orientate themselves to adult interpretations of the offences they had experienced, or accommodate themselves to a changed atmosphere in the family home or changes in the structure of their family.<sup>2</sup>

These very different understandings of what it is that is stressful for children about involvement in an abuse prosecution highlights how little is really known, from a child's perspective, about the relative merits of welfare and criminal justice system responses to the problem of child sexual abuse. At the same time, as will be discussed in more detail later in this chapter, the emphasis on abuse prosecutions during the debate on child witnesses begged the question of whether these are the only cases in which children's evidence is heard and, if not, to what extent the needs of children testifying in relation to other offences are comparable to, or different from, those of victimised children.

For these reasons, the present study has not been limited to an evaluation of the effectiveness of the video-link and video-recorded evidence in reducing the stress associated with testifying at court. It was not felt appropriate to investigate, in the space of a single interview, the circumstances of child witnesses or their carers, nor to assess their attitudes towards the institution of criminal proceedings, given the sensitivity of the issues involved. Nevertheless, data was collected which makes it possible to consider whether there are features of criminal justice system involvement which are open to improvement but which have not been addressed by the reform process.

The Crown Court at which fieldwork was undertaken provided valuable data on which to base an assessment of the new provisions. All complainants in study cases who testified in child sexual abuse prosecutions gave their evidence over the video-

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<sup>2</sup> Gibbens, T. C. N. and Prince, J. (1963) *Child Victims of Sex Offences*. Institute for the Study and Treatment of Delinquency: London, p.5.

link, and in all cases in which a video-recording had been made of the investigative interview with the child, this was used in court. However, child witnesses who were not themselves complainants testified conventionally in the courtroom. Thus while it is not possible here to contrast the experiences of complainants who used the video facilities with that of complainants who testified in the conventional manner, some comparisons can nevertheless be drawn between the experiences of complainants and by-stander witnesses.

### **Benefits of the video facilities**

Trial barristers were almost unanimously agreed that the introduction of the video facilities has reduced the stress of testifying at court for child witnesses. They identified the video-link as having a number of advantages in this respect, protecting children from a range of stressors, notably direct confrontation with the defendant; the size, formality and public nature of the courtroom; and much of the pressure associated with cross-examination, since this is conducted at a remove. Pre-recorded evidence was seen as primarily assisting children by reducing the risk of their recall of the offence(s) fading, and lessening the extent to which they had to give live testimony about distressing or embarrassing subjects.

A majority of children who gave evidence from the remote witness room similarly regarded the live-link as having been of considerable assistance to them, and spoke enthusiastically of the new facility. The protection offered from testifying in the presence of the defendant was the single most frequently mentioned advantage of the link, and a number of children said they doubted they would have been able to go through with their evidence had this facility not been available to them. Children whose testimony had included the use of a video-recorded statement were again, in the majority, positive about the use of the recording, and their accounts confirmed that an important advantage of this system is that it reduces the anxiety associated with close questioning about events after the passage of considerable time when recall of precise details may have faded. These accounts suggest, therefore, that the video facilities have largely been successful in providing a means of accommodating the interests of child witnesses within the trial process. Such a conclusion is further

supported by the fact that child abuse victims reported fewer anxieties in the pre-court period about the processes involved in testifying than did by-stander witnesses, suggesting that their awareness of the availability of the video systems may have provided them with a degree of reassurance in this respect.

### **Drawbacks of the video facilities**

Nevertheless, the video facilities did not appear to suit all children. A minority of those who testified from the remote witness room indicated that the technology involved had interfered with their ability to communicate effectively. Two children reported difficulty hearing what was said, this appearing to be a problem taking in information over the link rather than one of sound quality. Furthermore, a number of children said they had felt uncomfortable knowing that the defendant could see them on the courtroom monitor when they could not see him. It appeared that for some children their separation from the main site of activity could result in a feeling of powerlessness, as not only had they few means of knowing what was happening in the courtroom, but they were unable to judge the response of significant persons (such as the defendant or jurors) to their evidence. While a number appreciated these limitations on their participation, this was not always the case, and three complainants criticised the failure of trial personnel to consult them about the use of the live-link, saying they would have preferred to have given evidence in the conventional way.

Similarly, a minority of children whose evidence had included a pre-recorded statement had not felt wholly at ease with this procedure, experiencing some emotional discomfort during the playing of the recording. This was primarily associated with the memories which the recording evoked, but again, one child felt disempowered by the use of the recording, feeling she had been denied the opportunity to tell the court her story herself.

Observation of trials provided further evidence that the use of technology in communicating children's testimony may itself be associated with a degree of stress. The use of video-recorded evidence appears to have increased the length of time taken by children's testimony, and thus the time they effectively spend 'in the witness

box'. Investigative interviewers were shown on video-tapes to require adequate time to set the child at ease; conduct a careful inquiry into the nature of the complaint; identify the evidence to substantiate it; and establish details of the child's circumstances. Invariably this took longer than it did for prosecuting counsel to question children on a statement, the details of which were known to both parties.

In view of the length of time taken by pre-recorded evidence, and also the distressing nature of complainant's testimony, it is unsurprising that some children who testified from the remote witness room became tired or upset and needed respite breaks which were not required by by-stander witnesses. However, complainants' evidence was also subjected to significantly more interruption than that of children whose testimony was given in the conventional manner. Sadly, technical problems associated with the use of the closed-circuit television system were shown to be the single most frequent cause of disruption to children's testimony. Although this problem may have been a result of court officers' lack of familiarity with the new system, practical problems with the video system were evident throughout the fieldwork period.

It is of interest that by-stander witnesses in the majority said that although the prospect of testifying in the courtroom had caused them considerable anxiety, they nevertheless found that once they began their evidence, their fears diminished, and they did not find the experience as much of an ordeal as they had anticipated. Clearly, it is relevant that these children's evidence was completed speedily, being dealt with (on average) in less than a third of the time of that of complainants whose testimony was similarly given in full orally at the trial, but from the remote witness room. Furthermore, in some cases, the nature of the evidence which by-stander witnesses offered was not associated with any anxiety other than that of giving evidence *per se*. Witnesses in the murder trial, however, experienced considerable anxiety about their role. Not only were the facts about which they testified highly disturbing, but a number were in fear of the defendant; indeed, this was the only trial in the research sample in which there was some doubt as to whether certain witnesses would in fact appear. It is therefore noteworthy that these young people showed fewer of the defined indicators of stress than children who used the video facilities. Age may have

been a factor here, witnesses in this trial being aged sixteen or above. Furthermore, there were important differences in the personal import of the testimony which they gave, and the nature of the cross-examination which they faced. However, there was also some evidence that their presence in the courtroom enabled them to receive certain reassuring non-verbal feedback from counsel which was not available to children in the remote witness room. In particular, children who testified in the courtroom were observed to seek or respond to eye-contact with counsel, while children who testified over the video-link had no means of looking directly into counsel's eyes. In relation to this, one girl commented that it was not always possible even to observe counsel's face on the video monitor, as the camera at which she had to look was placed above the monitor.

### **Other sources of stress**

Within the restricted objective of circumventing stressful aspects of trial procedure, the video-link and use of video-recorded evidence, while not ideal for all children, nevertheless appear to be of considerable usefulness. However, the procedural reforms focus on the act of testifying and, in the absence of other complementary reforms, leave many stressful features of criminal justice system involvement untouched.

The Pigot Committee, in recommending that children's evidence should be dealt with at a pre-trial hearing,<sup>3</sup> were concerned not only to address the difficulties created for child witnesses by the courtroom context, but also to ensure that children's involvement with the criminal justice process is speedily concluded, enabling them to put the experience behind them at the earliest opportunity. In rejecting the option of a pre-trial hearing, the Lord Chancellor argued that the proposal risked introducing increased complexity, and that a preferable way forward would be to reduce systemic delay, making sure that cases were dealt with as soon as they were ready for trial.<sup>4</sup> In line with this strategy, a Notice of Transfer provision<sup>5</sup> was introduced by the Criminal

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<sup>3</sup> Home Office (1989) *Report of the Advisory Group on Video Evidence*. (Chairman Judge Thomas Pigot QC.) Home Office: London, para. 2.25, p. 21.

<sup>4</sup> *Hansard (Lords)* 21 May 1991, column 138.

<sup>5</sup> Section 53, Criminal Justice Act 1991.

Justice Act 1991 in order to speed up the processing of child witness cases. It is therefore of some concern that the present study indicates that delay remains a significant problem, causing considerable stress to child witnesses and their carers.

Study cases took an average of almost 48 weeks from committal to a final hearing, exceeding by almost 27 weeks the average waiting time for all contested cases heard during the same year.<sup>6</sup> Furthermore, the length of time elapsing between the commencement of the criminal investigation and the final hearing averaged 16 months; an extremely long time for children to face stressful demands on their coping resources. Notice of transfer procedures were not used in any of the study cases but the range of factors contributing to delay was extremely varied, suggesting that this measure would have done little to reduce the time taken.

Putting to one side the psychological impact of offences on child victims and witnesses, and the consequences of these for the stability of children's home circumstances and their overall well-being, the inadequacy of support systems for witnesses is shown to have contributed to the stress of the pre-trial period. Little information was available to children or their carers about the progress of the prosecution, and many reported feeling marginalised. Furthermore, lack of information about the whereabouts of the defendant left a number feeling anxious and vulnerable. Feelings of marginalisation were exacerbated for some children by the failure to consult them about matters of importance to them, such as the way in which their testimony would be given.

Lack of knowledge of the legal system was another problem. Asked about their anxieties during the pre-trial period, the factor most frequently cited by children was not knowing what to expect when they were at court. Although a majority of complainants were shown around the courthouse shortly before the final hearing began, and had an opportunity to briefly try out the video-link, this was primarily an exercise in familiarisation and did not adequately prepare children for the demands of

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<sup>6</sup> In 1994 the average waiting time for defendants pleading not guilty was 21.4 weeks. Lord Chancellor's Department (1995) *Judicial Statistics: Annual Report 1994*. (Cm 2891). HMSO: London, p. 70.

the witness role, or provide them with an opportunity to discuss any specific fears or misapprehensions. At times this lack of knowledge had implications for the quality of their testimony; some children reported that their feelings of confusion about what was occurring, or uncertainty about the reason for certain of the questions they were asked, preoccupied them to the extent that they found it difficult to think clearly about their answers.

A majority of children spoke highly of the support they had been given at the courthouse by ancillary staff and volunteers. However, inattention to the implications for children of some routine court practices was at times apparent. For example, the study provides only one example of a case in which the timing of the lunch-time adjournment was altered to avoid disrupting a child's testimony.

One of the most controversial aspects of the procedural reforms has been the government's rejection of the Pigot committee proposal that children's evidence should be taken in full at a pre-trial hearing. In requiring all child witnesses to attend court for live cross-examination, and in leaving the cross-examination of child witnesses unregulated, a particularly demanding feature of the criminal trial has remained untouched. Spencer and Flin, when advocating reform of the present system, argued that cross-examination can be a traumatic experience for many witnesses, and that for children whose comprehension of the legal system is limited, it can result in their evidence being destroyed rather than tested.<sup>7</sup> An advantage of the proposed system of pre-trial hearings was thought to be the opportunity this would create for cross-examination to be undertaken in a less formal and public environment, thus hopefully freeing children from some of the anxiety associated with the court context. It is therefore of interest that so many of the child witnesses in this study showed relatively little overt stress during cross-examination, and that a considerable number acknowledged the need for their evidence to be tested, and felt (despite the frequently demanding nature of the process) that this had been done fairly. However,

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<sup>7</sup> Spencer, J. R. and Flin, R. (1990) *Op. cit.*, note 1, p. 296. Similar arguments continue to be advanced; see, for example: Kranat, V. K. and Westcott, H. L. (1994) 'Under fire: Lawyers questioning children in criminal courts.' *Expert Evidence* vol. 3, p. 23; Social Services Inspectorate (1994) *The Child, the Court and the Video*. Department of Health: London, para.s 3.32 - 3.33, p. 51; para 4.18, p. 62.

it is also noteworthy that where cross-examination proved stressful, it was to complainants, almost a quarter of whom (23%) showed evident distress during this stage of their evidence. This was especially so where particular aspects of the child's personal history could be used by the defence to cast doubt on their evidence; where children were vulnerable as a result of parental rejection; or where the questions put to them involved conceptual tasks which exceeded their cognitive abilities. In relation to the first two issues, it is pertinent that the use by defence counsel of a supportive questioning style<sup>8</sup> could not in itself entirely alleviate the inherent difficulty of the process; and, indeed, some barristers acknowledged their belief that subjecting witnesses to a degree of stress is an intrinsic part of defence counsel's role. Taken together, these findings suggest that any negative effects of cross-examination may be closely related to children's individual circumstances; the nature of the evidence they give; and the issues which their testimony raises. This is not to say, however, that there would not be certain advantages to children if cross-examination were carried out in a less public, more child-centred environment, as Pigot recommended.

### **Protection or empowerment?**

The video reforms are shown here to have some valuable advantages for child witnesses, although their effectiveness in reducing the stress of a court appearance appears to be limited as a number of stressful features of the trial process remain unchanged. While providing evidence that the witness role will involve more stress for some children than for others, this study nevertheless shows that it can be a demanding undertaking whatever the child's witness status. It is therefore striking that almost without exception, the children's evidence was offered in a task-centred and effective manner, irrespective of the way in which they testified. In every case, the child's evidence was completed, and only one complainant failed to provide sufficient evidence to enable the charges in respect of her to proceed.

To what extent this latter finding can be attributed to the use of the live-link and pre-recorded evidence is hard to determine. As outlined above, many of the children who

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<sup>8</sup> This has been suggested as an issue requiring further attention; see: Kranat, V. K. and Westcott, H. L. (1994) *Op. cit.*, note 7, pp. 16-24.

used the video facilities believed that it would have been more difficult, if not impossible, for them to testify without this assistance. Yet the majority of those who testified in the conventional way indicated that being in the courtroom itself did not prove to be as much of an ordeal they had anticipated. Indeed, the overall impression which emerges from observation of trials and interviews with witnesses is the strength and competence of all the children concerned. In relation to this, it is relevant that the comments made by some of the children interviewed suggest that there can be important benefits to children from coping with a difficult task, especially in terms of their confidence and self-esteem. This raises the question of whether, in being premised on the concept of protection, and seeking to circumvent the problems posed by a court appearance, the procedural reforms may have neglected children's strengths, and the value to them of interventions combining both protective and empowering strategies.

#### **Enabling more, and younger, children to become witnesses**

The reform of the competency and corroboration rules effectively abolished long-established legal barriers to children's evidence being put before the courts. In so doing, these measures challenged the traditional discrimination against children's testimony, and made it possible for more, and younger, children to act as witnesses. The practice of requiring children to be aged at least eight years before they could be called as witnesses had become an established feature of the criminal justice system, but the basis for this was called in question by the reform process. Although the reform of the rules of evidence can be seen, at least in part, as a response to the demand that the government address difficulties in securing the prosecution and conviction of perpetrators of child sexual abuse, it nevertheless drew on empirical studies which cast doubt on the legal system's bias against young children becoming witnesses. Psychological research demonstrated that while children under five years lack some of the deliberate recall skills of older children and adults, and are especially vulnerable to suggestion, their memory can nevertheless be robust and accurate,<sup>9</sup> and they need not be debarred from giving evidence simply on the grounds of age.

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<sup>9</sup> Hedderman C (1987) *Children's Evidence: The Need for Corroboration*. Home Office Research and Planning Unit, Paper No. 41. Home Office: London.

The question of whether the reform of the rules of evidence has enabled more children to become witnesses cannot be answered by the present study, although it is relevant that barristers clearly saw this as being the case. However, with regard to the issue of young children, the study suggests that attitudes may have changed little. It is striking that of the fifty-three children in the research sample, only two were below seven years, and neither child gave evidence at court. One was aged only eighteen months when the offences against her were committed, and the charges were prosecuted on the evidence of by-standers. Charges in relation to the second (aged five when the case was finally dealt with) were discontinued at an early stage. This latter child being the only example of a pre-schooler who might have acted as a witness, it is difficult to draw conclusions about the willingness of prosecutors to institute proceedings in cases relying on the testimony of younger children, particularly in the absence of information about the number of such cases which were assessed as offering no realistic prospect of conviction. From the evidence of barristers' views on the matter, however, it would seem that many practitioners continue to have reservations about young children becoming witnesses.

Although some of the barristers who completed the research questionnaire took the view that children's competence to testify should be a matter for individual assessment, others continued to suggest that there should be a lower age-limit below which children should not normally act as witnesses, putting the cut-off point at anything between four and eight years. Similarly, barristers were divided on the question of the reliability of young children's testimony as compared with that of adults. Although prepared to acknowledge that children can be effective witnesses, a number of practitioners described cases in which children had made highly contradictory statements, which led them to be cautious about the risk of children's testimony being influenced by their deference to adult authority, or susceptibility to suggestion.

It became apparent that barristers' reluctance to see young children become witnesses is related to practical problems they experience when dealing with child witnesses

rather than scepticism about the robustness of children's memory as such, although some practitioners continued to have their doubts about this also. The willingness on the part of one interviewee to acknowledge that different skills may be required when questioning children suggests that constructive debate on these issues may be possible. However, from the comments of other practitioners, which implied a belief that their concerns are not widely appreciated, it would appear that barriers to inter-professional communication may need to be addressed before such a debate will occur.

### **Achieving a higher rate of prosecutions in cases of child sexual abuse**

The objectives of reducing the stress of a court appearance for child witnesses and of enabling more children to become witnesses can be seen as subsumed within the overall objective of achieving a higher rate of prosecutions in cases of child sexual abuse. It was this objective, above all, which appears to have underpinned the reform process and generated the political will to introduce the relevant legislation.

On the evidence of the present study, it cannot be determined whether more abuse prosecutions are now being instituted, but on the question of the success of prosecutions, it would appear that the conviction rate in these cases is quite high. This finding has to be interpreted with caution in view of the small numbers involved, but it is, nevertheless, significant, as it was not only the low percentage of prosecutions (as compared to reported cases) of sexual abuse which fuelled criticism of the effectiveness of the criminal justice system in dealing with such offences, but also the perception that too many of the prosecutions which were instituted, failed, either because of difficulty corroborating the charges, or because children had problems coping with the demands of a court appearance.

The present study involves fifteen contested cases of child sexual abuse, of which two thirds resulted in a conviction. One case was discontinued; four resulted in a late guilty plea, and ten went to a jury trial. Of the latter, six resulted in a conviction. Taking the discontinued case together with the jury trials, the conviction rate in cases in which the defendant maintained a not guilty plea, was 54.5 per cent. A conviction

rate which only slightly exceeds 50 per cent may not satisfy some critics of the criminal justice system; it is nevertheless higher than the national average for 1994 (the year fieldwork for this study was undertaken), when the overall conviction rate for defendants who pleaded not guilty to all counts was 40 per cent.<sup>10</sup>

To what extent the conviction rate in study cases is attributable to the procedural reforms, or the reform of the rules of evidence, is difficult to determine in view of the complexity of the issues involved in the trial process, and the lack of firm evidence of the pre-reform reality. On balance, however, this study suggests that the video facilities have both advantages and disadvantages, making it unlikely that of themselves they significantly increase, or decrease, the likelihood of conviction.

In terms of the advantages, barristers completing the research questionnaire were almost unanimous in believing that with the introduction of the video-link children have become more willing to testify, and are more confident and relaxed when giving evidence. Furthermore, a number of practitioners commented that the use of pre-recorded evidence has reduced the risk of children omitting all or part of their evidence through fear or embarrassment. In relation to this it is relevant that of the twenty-six children in this study who gave evidence of personal victimisation, none failed to complete their testimony. Moreover, the study offers an example of a case in which a conviction was secured on the basis of a child's video-recorded statement, despite her indicating in court that she could no longer remember details of the incident in question. Had the prosecution relied solely on the child's oral evidence at the trial, the defence would have been in a position to argue that the charge should be dismissed as the child had failed to come up to proof.

Practitioners nevertheless also expressed certain reservations about the video systems. A number (including a barrister who prosecuted almost a third of the cases in the research sample)<sup>11</sup> suspected that the impact of complainants' testimony is diminished

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<sup>10</sup> This figure includes cases which were discharged by the judge, and directed acquittals. Lord Chancellor's Department (1995) *Op. cit.*, note 6, p. 67.

<sup>11</sup> Barrister D, who was involved in 5 of the 16 study cases, 3 of which eventually went to trial. Of these, 2 resulted in a conviction, and 1 in an acquittal.

when it is transmitted over closed-circuit television, and that as a result, more cases may be 'lost'. Although this view is not supported by the relatively high conviction rate in study cases (and, moreover, the study offers some evidence that recordings of investigative interviews can enable children's accounts of abuse to emerge in a powerful narrative form which contrasts markedly with the brevity of much oral testimony), some problems *were* noted. For example, video-recorded evidence was found to sometimes make heavy demands on the observer's concentration. Furthermore, it was noted that evidence did not always emerge in a clear or sequential way in the recordings. Given the exploratory nature of investigative interviews this was not surprising. However, this finding confirmed that the prosecution can be hampered by short-comings in the interview, and supported the barristers' misgivings on this point.

### **The implementation of the reforms**

Turning to the implementation of the reforms as opposed to their effects, what is striking about the way in which the video facilities were employed in the study Crown Court is the closeness with which practitioners adhered to the parameters defined for their use during the reform process. This is of particular interest given that it has been found that the disappointing effects of legislation can sometimes be attributed to the informal behaviour or resistance of those undertaking its implementation. Two features of the implementation of the procedural reforms are highlighted for discussion below; the allocation of the video-link, and the management of cases by prosecuting counsel. Connections are made between specific aspects of the debate on the 1988 and 1991 child witness reforms, and the practice observed in the course of the present study.

### **The use of the video facilities**

When plans for the introduction of the video-link were first announced, in October 1986, it was stated that its use was specifically intended for the prosecution of child abuse.<sup>12</sup> No case was ever made for limiting the application of the link in this way; indeed, no direct acknowledgement was made that its use was being restricted.

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<sup>12</sup> 'Courts may use videos in cases of child abuse.' *The Times* 10.10.1986.

Rather, there appears to have been an implicit assumption that the criminal trials in which children act as witnesses are those involving abuse. The same premiss underpinned the arrangements for video-recordings of investigative interviews with child witnesses to be admitted as evidence in criminal trials.

Furthermore, although sections 32 and 32A of the Criminal Justice Act 1988 identify the video provisions as being available in criminal proceedings concerning assault or injury; child cruelty as defined by section 1 of the Children and Young Persons Act 1933; and all forms of sexual offence involving children (that is, they adopt a standard definition of child abuse), public and parliamentary debate focused entirely on the latter issue. Demands for new trial procedures were predicated on reports of the distress manifested by children testifying to their sexual victimisation, and no reference was made to children testifying in cases of assault or neglect. Of course, this may reflect very real differences between the different forms of abuse. The nature of the evidence which can go to prove a case of physical assault or neglect is such that these cases can be prosecuted in the absence of direct testimony from the child victim, whereas the difficulty in identifying clear medical evidence of child sexual abuse, or finding eye-witnesses to these offences, makes their prosecution almost impossible without the evidence of the child concerned. It is therefore reasonable to believe that significantly more children testify in sexual abuse prosecutions than in cases concerning physical abuse or neglect. Nevertheless, one outcome of the overwhelming emphasis on sexual abuse during debates on procedural reform was that all other child witnesses effectively became invisible.

There is some evidence (as discussed in Chapter Five) that children testify across the range of criminal cases, albeit perhaps in small numbers. It is therefore of interest that no attempt was made either by the Home Office or the Pigot Committee to establish the overall frequency with which children act as witnesses, nor to determine whether there are features of the witness role which place unhelpful demands on children irrespective of the type of offence involved. These omissions are especially surprising given that in 1990 the Scottish Law Commission's report on the evidence of children

and other potentially vulnerable witnesses drew attention to the latter issue.<sup>13</sup> However, the report received little attention in England and Wales, and child witnesses other than those who were the victims of sexual abuse continued to be notable primarily by their absence from the debate on reform. It can be argued that despite sections 32 and 32A of the Criminal Justice Act 1988 restricting the use the video-link and video-recorded evidence to prosecutions involving sexual or violent offences, in not having limited the video facilities to child complainants the legislation implicitly recognises that children who provide eye-witness or other supporting testimony can also find a court experience stressful. However, the inclusion here of non-victimised children attracted no comment or detailed attention, and so cannot be said to have substantially informed the debate.

In the present study, as might be expected, sexual offences against children formed the majority of prosecutions. However, six of the 40 children whose testimony was eventually heard in court, gave evidence in a case of murder, showing that child witnesses are indeed called in cases other than abuse prosecutions. Moreover, a further eight children gave eye-witness or other supporting evidence in the sexual abuse cases. There were, however, clear differences in the procedures followed when hearing the evidence of these 14 children, and that of the 26 complainants, showing how central the child sexual abuse victim has become to the understanding of the term 'child witness', and the influence which this construction has had on professional practice. All 26 child sexual abuse complainants (who were aged between seven and seventeen years at the time of the final hearing) gave evidence over the video-link. Yet none of the 14 by-stander witnesses testified from the remote witness room, all being required to give evidence in the conventional way in the courtroom despite the

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<sup>13</sup> Scottish Law Commission (1990) *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses*. Scottish Law Commission Study No. 125, HMSO: Edinburgh, para. 1.7, pp. 2-3. Note: there were isolated articles on this report. McEwan, for example, compared the report favourably with that by the Pigot Committee, and suggested that the latter had been blinded by the 'hot-house atmosphere' surrounding child sexual abuse to the fact that there are other witnesses who may be equally as vulnerable as children. However, she was referring here to adults and made no reference to the S.L.C.'s recommendation that procedural reforms designed to accommodate the needs of child witnesses should not be restricted to those involved in abuse cases. McEwan, J. (1990) 'In the Box or on the Box? The Pigot Report and Child Witnesses.' *Criminal Law Review* p. 369. Spencer had publicised the S.L.C.'s earlier consultation papers, but again made no mention of this particular issue. Spencer, J. (1988) 'How not to reform the law.' *New Law Journal* pp. 497-499.

fact that the wording of the legislation would have permitted the majority of them to have given evidence over the live-link. This suggests that applications to use the video facilities were made on the basis of children's victim status rather than, for example, an assessment of the needs or preferences of the individual child. The validity of allocating the use of the link in this way is, however, questionable.

Research interviews with children involved in the present study indicate that victim (or witness) status does not invariably determine children's needs. A small minority of sexual abuse victims would have welcomed an opportunity to confront their abuser in court; similarly, one of the youngest of the by-stander witnesses would have felt far more confident testifying over the live-link.

The differentiation in the procedures adopted for taking evidence from victims and by-stander witnesses can be seen as partly an outcome of the way in which the criminal investigation had been conducted. There is evidence from the processes by which statements were taken, for example, that police officers distinguished between victims and other child witnesses. By-stander witnesses involved in abuse prosecutions in which the complainant was interviewed on video were, without exception, interviewed by way of a question and answer statement. Nevertheless, given the permissive nature of the legislation, it remained open for the CPS to apply for their evidence at the trial to be offered over the live-link. That this did not happen lends additional support to the inference that professionals' attitudes towards the stress of the witness role for children have been strongly influenced by the attention given during the reform process to sexual victimisation. This is also suggested by the way in which cases were conducted by prosecution counsel.

### **Prosecution practice**

Just as all child complainants in study cases gave their evidence from the remote witness room, in all cases in which video-recorded evidence was available this was used as the evidence-in-chief of the child concerned. This is a significant finding, as section 32A of the Criminal Justice Act 1988 (which deals with the admissibility of pre-recorded evidence) is permissive. Sub-section (3) indicates that where a video-recording is tendered in evidence, the court will admit the recording unless the child is

unavailable for cross-examination; the rules on disclosure have not been followed; or the court is of the opinion that admitting the recording would not be in the interests of justice. Thus where counsel plan to submit a video-recording in evidence, it will invariably be used unless there are very persuasive objections. Nevertheless, although it is clear that there is an underlying presumption in favour of the use of pre-recorded evidence, the initial decision to tender a video-recording in evidence is a matter for the practitioners concerned. In view of barristers' ambivalent attitudes towards the video provisions, it is therefore particularly interesting that this study provides no examples of prosecuting counsel declining to use video-recorded evidence where this was available.

Barristers clearly saw video-recorded evidence as helpful to the trial process in a number of ways. In particular they valued the way in which this circumvents some of the problems associated with children's recall of offences fading over time, and also allows the investigative interview to be opened up to close scrutiny. Nevertheless, they also had reservations about the use of recordings. Not only were they concerned about what they saw as the diminished impact of evidence transmitted over a video monitor, but they expressed disquiet about the effects of flaws in the conduct of the investigative interview on the presentation of the Crown's case. If, for example, evidence did not emerge in a clear and sequential manner this could not be rectified by counsel at the trial. Other concerns were specific to the video-link. A number of practitioners suggested that in reducing the stress involved in testifying, the video-link has made it less likely that children will tell the truth. Furthermore, several barristers commented that they found it harder to cross-examine over the link as the non-verbal cues which they consider as indicators of evasive or lying intent, are harder to detect on a video monitor than they are face to face.

Given practitioners' mixed feelings about the video facilities, it is striking that the evidence of complainants was always given over the live-link irrespective of their age or personal characteristics. Moreover, in all cases in which video-recorded evidence was available, this was substituted for the child's evidence-in-chief whatever the technical merits of the recording or short-comings of the investigative interview. In interpreting these findings, it is perhaps relevant that there is some evidence

suggesting that video-recordings may not be scrutinised as closely as might be expected. This is indicated, for example, in the use of the video-recording described in Chapter Seven, in which the voices of the child witness and her interviewer were inaudible through the extraneous noise of traffic and dogs fighting. It may be that the prosecutor concerned took a conscious decision that it was preferable to admit this video despite its technical deficiencies, than to subject the child to the stress involved in giving live evidence-in-chief. Nevertheless, the recommendation by one barrister that the present system would be improved if the judge who dealt with the application to admit a video-recording personally viewed the tape and was provided with statements that it had been watched by prosecuting and defence counsel, lends weight to the supposition that some tapes were admitted which had not been evaluated in detail by the legal practitioners concerned.

This aside, however, it might be thought that barristers' willingness to use the video facilities despite doubts about their effectiveness, points to the influence on them of public and expert child-care opinion suggesting that conventional trial procedures are traumatic and potentially harmful to child victims. What emerges from some of the comments made in interview by barristers is their very mixed feelings about these issues. On the one hand their remarks indicate a belief that lawyers have attempted pragmatically to be responsive to children's needs, and that offering testimony in the conventional way may be stressful but is not (in the long-term) harmful, as has been supposed. Yet on the other hand they communicate a very real concern for children's vulnerabilities, and a desire to mitigate the undoubted distress of a court appearance where children are called to offer evidence of their sexual victimisation. It may be that the decision by prosecution counsel to set aside their doubts about the effects of the video facilities on the outcome of trials, and to act in compliance with the presumption that the video facilities provide the best means of dealing with the evidence of child victims, simply reflects an adherence to the law as defined in statutes, and a willingness to offer the video provisions the benefit of the doubt. Nevertheless, it is an interesting finding, and points to the openness of the legal practitioners to the influence of predominant ideological and social expectations.

**How representative are the findings of the present study?**

The extent to which the findings of qualitative studies can be generalised is problematic, in view of the small numbers involved. A strength of the present study is, however, the comprehensive nature of its sample. It is based on observation of the final hearing of all but two of the cases meeting the research criteria which were dealt with at the Crown Court Centre where fieldwork was undertaken; research interviews with child witnesses involved in all but one of the sample of 16 observed cases; and questionnaire data supplied by all but two of the barristers involved in the 11 cases which were finally dealt with as jury trials. It therefore offers a dependable data-base on which to evaluate responses to the child witness reforms in the Crown Court selected for study. What it cannot do, however, is indicate whether the practice reported here is representative of that across England and Wales. Nevertheless, it is unlikely that it is idiosyncratic to the Crown Court studied; the barristers whose views and working practices are reported deal with cases in other courts, and while the majority work from chambers in the geographic area covered by the Crown Court concerned, a number are from elsewhere. Furthermore, five of the 16 study cases were dealt with by High Court judges, whose conduct of trials can be expected to reflect extensive experience across court circuits.

The interview data does, however, involve small numbers. The number of legal practitioners who were interviewed formally is especially small, and their comments have to be regarded as illustrative, rather than typical, of professional opinion. Moreover, although the participation by children and their carers in research interviews is high (providing data on 75 per cent of the children who could be contacted; 59 per cent of the full sample) it is not a complete sample, and leaves open the question of whether some children declined to participate because of highly negative experiences of the criminal justice system. To date, it nevertheless represents the largest sample of child witnesses from England or Wales to have been interviewed for research purposes.

### Findings of comparable studies

Since fieldwork for this study was undertaken a number of reports have been published on aspects of child witness reform. These include an evaluation for the Home Office by Davies and Noon of the introduction of the video-link in England and Wales;<sup>14</sup> an evaluation for the Home Office by Davies, Wilson, Mitchell and Milsom of video-recorded evidence;<sup>15</sup> and an evaluation for the Scottish Office by Murray of the use of the live-link in Scotland.<sup>16</sup> The results of these studies are summarised below in order to draw out common findings or areas of disagreement. In drawing these contrasts, however, differences in methodology have to be borne in mind.

The two studies by Davies and his colleagues rely on observational data collected from a representative sample of courts across England and Wales. Rating sheets were completed for children testifying from the remote witness room but no observation was undertaken of children who gave evidence in the conventional way. In his study of the video-link Davies redresses this limitation by drawing on an earlier study, conducted in Scotland by Flin, Davies and Tarrant,<sup>17</sup> of children's courtroom testimony. Davies notes, however, that the two groups of children are not directly comparable; only 35 per cent of the children in Flin's study gave evidence in cases involving sexual offences, whereas this was the case with 94 per cent of the children in Davies' study.<sup>18</sup> A further limitation of both of Davies' studies is the lack of information from child witnesses themselves. No information was collected directly from children for the video-link study, and while the study of video-recorded evidence reports the results of a questionnaire survey of child witnesses' views, the questionnaire was returned by only 17 of the 150 children whose testimony was observed.

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<sup>14</sup> Davies, G. and Noon, E. (1991) *An Evaluation of the Live Link for Child Witnesses*. Home Office: London.

<sup>15</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom, J. (1995) *Videotaping Children's Evidence: An Evaluation*. Home Office Publications Unit: London.

<sup>16</sup> Murray, K. (1995) *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials*. The Scottish Office Central Research Unit, HMSO: Edinburgh

<sup>17</sup> Flin, R. H., Davies, G. M. and Tarrant, A. B. (1988) *The Child Witness*. Final Report to the Criminological Research Branch, Central Research Unit, The Scottish Office Home and Health Department, Grant 85/9290. Davies and Noon use data from this study in Chapter Five of their report, see: Davies, G. and Noon, E. (1991) *Op. cit.* note 14, pp. 67-75.

<sup>18</sup> Davies, G. and Noon, E. (1991) *Op. cit.* note 14, p. 67.

Murray's work is more directly comparable with the present study, in that it includes observational data on children who testified conventionally, and over the live-link, together with information from research interviews carried out with the children after the court hearing. Furthermore, the observational data draws not only on rating sheets, but trial transcripts. The legal position in Scotland is, however, different to that in England and Wales; video-recorded evidence is not admissible, although the video-link is available to any child witness under the age of 16 years 'on cause shown'. Murray indicates that during the first 27 months of operation of the link, one or more child witness was cited in 19 per cent of all criminal prosecutions in Scotland, sex-related charges representing 45 per cent of the total.<sup>19</sup> An application for the use of the link was made on behalf of 10 per cent of the children recorded as prosecution witnesses.<sup>20</sup>

All three studies confirm that it is child sexual abuse complainants who use the video-link. Although the Scottish legislation is less restrictive about its use than that of England and Wales, Murray reports that Scottish children were significantly more likely to be the subject of an application for the link if they testified in a sex-related case;<sup>21</sup> moreover, victims were seen as being in greater need of the link than bystander witnesses.<sup>22</sup> In Davies' study of the live-link, 89 per cent of the 154 children whose testimony was observed were victims;<sup>23</sup> and the same was the case with 88 per cent of the 150 children observed for his subsequent study of video-recorded evidence.<sup>24</sup> The charges in both of these studies overwhelmingly concerned child sexual abuse, which formed almost 95 per cent of all the charges involved in the sample of video-link cases,<sup>25</sup> and 100 per cent of the charges in the sample of cases observed for the study of video-recorded evidence.<sup>26</sup>

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<sup>19</sup> Murray, K. (1995) *Op. cit.* note 16, para. 3.9, p. 23.

<sup>20</sup> *Ibid.*, para. 3.11, p. 24.

<sup>21</sup> *Ibid.* para. 3.19, p. 27.

<sup>22</sup> *Ibid.* para. 3.16, p. 26.

<sup>23</sup> Davies, G. and Noon, E. (1991) *Op. cit.* note 14, pp. 22-23.

<sup>24</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom, J. (1995) *Op. cit.* note 15, p. 29.

<sup>25</sup> Davies, G. and Noon, E. (1991) *Op. cit.* note 14, p. 24.

<sup>26</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom, J. (1995) *Op. cit.* note 15, p. 27.

With regard to the effects of the video-link on children's testimony, Davies' conclusions are the most positive, while Murray's rather more detailed findings closely reflect the mixed findings which have been reported here. Contrasting observational ratings for children who testified by live-link, and those of 28 children of comparable age in Flin's Scottish study who testified in open court, Davies and Noon state that the former were happier, more fluent, and less likely to give inconsistent testimony.<sup>27</sup> In view of the fact that the Scottish sample involved less child sexual abuse prosecutions, and a greater proportion of by-stander witnesses, (both of which factors, they suggest, might have been expected to result in fewer signs of distress or anxiety in the children concerned), they conclude that the live-link facilitates children in giving evidence. However, their conclusion is not supported by Murray's findings. On the basis of her observational ratings Murray reports that in contrast to testimony given by children in open court, that given over the live-link was significantly less detailed; less complete; less audible; less fluent; less effective and less credible.<sup>28</sup> Link-users performed better than children who testified conventionally on only one measure, being less tearful during cross-examination than children in the open-court sample.<sup>29</sup>

A number of advantages of the link do, however, emerge from Murray's interview data. Link-users were found to be significantly less likely to report feeling fear while they testified;<sup>30</sup> with a few exceptions they thought it was easier for them to give their evidence this way; and the protection the link offered from the sight of the defendant was reported as an important advantage.<sup>31</sup> As in the present study, however, the link does not emerge as an ideal means of accommodating the needs of child witnesses. More than half of the children had found the system 'strange',<sup>32</sup> a minority had not liked it at all,<sup>33</sup> and some would have preferred to have been in open court.

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<sup>27</sup> Davies, G. and Noon, E. (1991) *Op. cit.* note 14, p. 74-75.

<sup>28</sup> Murray, K. (1995) *Op. cit.* note 16, p. iii.

<sup>29</sup> *Ibid.*, para. 6.31, p. 66.

<sup>30</sup> *Ibid.*, p. iv.

<sup>31</sup> *Ibid.*, para. 6.46, p. 70.

<sup>32</sup> *Ibid.*, para. 6.44, p. 69.

<sup>33</sup> *Ibid.*, para. 6.43, p. 69.

Again, in common with the present study, Murray's findings suggest that insufficient attention may be being paid to the option of empowering child witnesses. She reports that irrespective of the method by which their evidence was given, child witnesses stood up well to lengthy examinations; testified confidently, and in the main displayed only mild anxiety.<sup>34</sup> Furthermore, when interviewed a majority said their court appearance was less of an ordeal than they had anticipated.<sup>35</sup> It is also relevant that 67 per cent of the children felt they had been given no say in the procedures adopted for their evidence, and would have preferred an opportunity to participate in the decision-making process.<sup>36</sup>

Turning to video-recorded evidence, Davies, Wilson, Mitchell and Milsom report that a video-recording was used as evidence-in-chief for 73 per cent of the 150 children in their sample. The remaining children gave oral evidence-in-chief over the live-link. Observers rated interviewers in the recordings as more supportive of the children than trial barristers; furthermore, the children themselves were rated as displaying less anxiety than those who gave live evidence-in-chief. However, ratings on competency and demeanour during cross-examination showed no consistent differences between the children in the two groups.<sup>37</sup> Furthermore, an analysis of trial outcomes showed these to be independent of whether evidence-in-chief was live, or pre-recorded.<sup>38</sup> Davies and his colleagues therefore conclude that the main benefits of video-recorded evidence are that this reduces the stress of a court appearance for the children concerned, and increases the transparency of the interview process.<sup>39</sup>

Interestingly, three of the 17 children who completed Davies' research questionnaire indicated that they had not wanted to be interviewed on video, and four said they would have preferred to have given their evidence in full, over the live-link.<sup>40</sup> The implications of this are not drawn out by the researchers, but it would appear to

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<sup>34</sup> *Ibid.*, para. 6.35, p. 67.

<sup>35</sup> *Ibid.*, para. 6.42, p. 69.

<sup>36</sup> *Ibid.*, para.s 3.43 and 3.44, p. 34.

<sup>37</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom, J. (1995) *Op. cit.* note 15, p. iii.

<sup>38</sup> *Ibid.*, p. 35.

<sup>39</sup> *Ibid.*, p. 42.

<sup>40</sup> *Ibid.*, p. 36.

underline the likelihood that children will express varying preferences about the way in which they testify at court.

Davies and his colleagues make no attempt to assess the impact of pre-recorded evidence on the trial process itself. However, they separately analyse 40 videotaped interviews.<sup>41</sup> Sixty per cent of these were rated as being well-structured, and 75 per cent were said to offer a clear account of the incident [sic]. There were questions which breached the rules of evidence in 40 per cent of interviews, and frequent instances of inappropriate comforting were identified. The authors note that trial observers reported a number of instances in which video-recordings were not used in evidence, despite permission having previously been granted. The reason for this was not always stated by the observers, but it would appear that in some cases it was due to the poor technical quality of the recording, and in others to prosecuting counsel not having been involved in the original application.<sup>42</sup>

With regard to younger children acting as witnesses, the age-profile of children in both studies by Davies', and also that of Murray, show few children aged five years or below acting as witnesses. In Davies' first study, 12 children aged between 4 and 7 years were called as witnesses, representing 8 per cent of the study sample.<sup>43</sup> One of these, a child aged four and a half years, was deemed not competent to testify by the trial judge.<sup>44</sup> No detailed breakdown is given of the ages of the 150 children in Davies' second study, although they are said to have been between 5 and 17 years, with an average age of 11.<sup>45</sup> However, a bar chart which analyses the age of children identified by the Lord Chancellor's Department as witnesses in video-link cases heard between October 1992 and April 1994, suggests that of some 1,561 children, approximately 40 (or 2.5%) were aged 5 years or less.<sup>46</sup> Murray's study provides a comparable age profile; of 66 children aged between 4 and 14 years whose testimony was observed, 5 (7.5%) were aged 5 years or under. One 5 year old testified in the

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<sup>41</sup> *Ibid.*, p. 21.

<sup>42</sup> *Ibid.*, p. 30.

<sup>43</sup> Davies, G. and Noon, E. (1991) *Op. cit.*, note 14, p. 22.

<sup>44</sup> *Ibid.* p. 42.

<sup>45</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom J. (1995) *Op. cit.* note 15, p. 29.

<sup>46</sup> *Ibid.*, Table 4.3, p. 28.

courtroom, and the remaining four gave evidence by video-link.<sup>47</sup> Taken together, these findings support the conclusion of the present study that to date the child witness reforms have not led to a marked increase in the involvement of younger children in criminal proceedings.

In terms of the outcome of cases, Davies, Wilson, Mitchell and Milsom found a higher rate of late guilty pleas (48%) than was the case in the present study,<sup>48</sup> while of their subset of 93 cases which went to a jury trial, acquittals slightly outnumbered convictions.<sup>49</sup> Murray reports that in Scotland, between 1991 and 1991, there was a drop both in late guilty pleas and in convictions in child witness cases, although she is reluctant to place too much emphasis on this finding, or to speculate on the reasons behind it.<sup>50</sup> Nevertheless, she is clear in concluding that the use of a live television link does not in itself increase the rate of conviction.<sup>51</sup> A similar conclusion is reached by Davies and his colleagues in relation to video-recorded evidence.<sup>52</sup>

Davies' and Murray's findings on legal practitioners' opinions of the procedural reforms are, in the main, highly consistent with those reported here. Murray interviewed judges and advocates, and indicates that the former were anxious to see the burden on child witnesses reduced without reducing the defendants right to a fair trial, but even those who were most enthusiastic about the live-link did not see it as an ideal solution.<sup>53</sup> Lawyers thought that children benefited from the link in terms of the stress of their court appearance being reduced,<sup>54</sup> but expressed concern that evidence given over the link loses impact; furthermore, they found the link interfered with their ability to establish rapport with the child or to pick up his or her reactions;<sup>55</sup> and some thought it made it harder to conduct a cross-examination.<sup>56</sup> Overall, it was the firm view of both lawyers and judges that children's evidence is best elicited in the

<sup>47</sup> Murray, K. (1995) *Op. cit.*, note 16, Table 5.4, p. 51.

<sup>48</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom J. (1995) *Op. cit.* note 15, p. iii.

<sup>49</sup> *Ibid.*, p. 34.

<sup>50</sup> Murray, K. (1995) *Op. cit.*, note 16, para. 4.42, p. 47.

<sup>51</sup> *Ibid.*, para. 4.43, pp. 47-48.

<sup>52</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom J. (1995) *Op. cit.* note 15, pp. 34-35.

<sup>53</sup> Murray, K. (1995) *Op. cit.*, note 16, para.s 9.46 and 9.47, p. 141.

<sup>54</sup> *Ibid.*, para. 8.6, p. 109.

<sup>55</sup> *Ibid.*, para.s 8.24 and 8.25, p. 116.

<sup>56</sup> *Ibid.*, para. 8.34, p. 118.

courtroom. They believed that a more constructive and imaginative solution might be found to the needs of child witnesses than that offered by video technology, although it was conceded that the live-link had enabled some children to testify who otherwise might not have done so.<sup>57</sup>

Davies and Noon's findings differ in being expressed rather more positively. Based on a questionnaire survey, they report that 83 per cent of barristers' responses indicated a favourable impression of the live-link, although 38 per cent of these expressed some reservations. Concerns were about loss of impact of the evidence (31%); loss of immediacy/artificiality (26%); loss of rapport (18%); loss of eye-contact (18%); and loss of efficiency of cross-examination (13%).<sup>58</sup> On the positive side, reduction of stress was the most frequently cited advantage (38%), followed by protection from confrontation with the defendant (24%); ease of eliciting information from the child (24%); and protection of the child from the courtroom atmosphere (22%).<sup>59</sup> The costs and benefits of the link identified by practitioners closely resemble those cited in the present study, although the percentages vary.

Davies' subsequent study, however, reports growing reservations about the use of video. A questionnaire survey conducted prior to implementation of the Criminal Justice Act 1991 found muted enthusiasm among barristers and judges for video-recorded evidence, while a follow-up survey, carried out after implementation of the Act, showed support to have declined even further. Legal practitioners identified the reduction of the stress involved in testifying as the main benefit of pre-recorded evidence. However, they were concerned about the reduced impact of the evidence; the lack of preparedness of witnesses for live cross-examination, and the risk of undetected false allegations.<sup>60</sup>

Taken together, the above findings provide strong support for those of the present study. The somewhat more positive results reported in 1991 by Davies and Noon

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<sup>57</sup> *Ibid.*, p. iii.

<sup>58</sup> Davies, G. and Noon, E. (1991) *Op. cit.*, note 14, pp. 77-78.

<sup>59</sup> *Ibid.*, p. 79.

<sup>60</sup> Davies, G., Wilson, C., Mitchell, R. and Milsom J. (1995) *Op. cit.*, note 15, p. ii.

may be explained by differences in methodology, (rating sheets and questionnaires providing less detailed data than that yielded by trial transcripts and interviews) and changing opinion over time.

### **The child witness: the way forward**

When Davies and Noon conducted their evaluation of the video-link, closed-circuit television facilities were available in 14 Crown Courts. A total of 544 applications for use of the link were made between 1.1.1989 and 31.12.1990, the period covered by their study.<sup>61</sup> Since that time, video-link systems have become available in 100 Crown Courts,<sup>62</sup> and figures provided by the Court Service<sup>63</sup> show that there has been a steady growth in applications both to use the video-link, and to admit video-recorded evidence; see the Table below.

<b>Applications for the video-link and video-recorded evidence</b>		
<b>Year</b>	<b>Video-link</b>	<b>Video-recorded evidence</b>
1993	714	357
1994	1157	839
1995	1571	1180

Given the investment which has been made in the video facilities, it is unlikely that there will be any fundamental alteration in the procedures adopted for children's testimony in the near future. Nevertheless, the mixed findings of this, and comparable studies, regarding the effects of the video link and video-recorded evidence, together with the numbers of child witness cases now being dealt with, makes it needful to consider whether some modification of the present system is called for. From the evidence which has been reported here, it would seem that more flexibility in the use of the new provisions would be helpful. In particular, it is suggested that the availability of the video facilities should be extended to all child witnesses irrespective of the type of prosecution in which they appear; child witnesses should be offered the

<sup>61</sup> Davies, G. and Noon, E. (1991) *Op. cit.*, note 14, p. 34.

<sup>62</sup> The Court Service, 8.7.1996: personal communication.

<sup>63</sup> The Lord Chancellor's Department, 2.3.1995: personal communication; The Court Service, 20.3.1996: personal communication.

opportunity to express a preference about the way in which their evidence is given; and prosecution counsel should be allowed greater freedom to lead evidence from children in cases relying on pre-recorded testimony. It is also suggested that the provision of information and support to child witnesses in the pre-trial period should be improved. Fresh consideration may need to be given to the issue of child witnesses of pre-school age.

### **Removing restrictions on the availability of the live-link**

Although concern for victimised and abused children is understandable, the exclusive focus among politicians, policy-makers, and practitioners, on the needs of children subjected to sexual offences has resulted in a lack of visibility for children who are by-stander witnesses or whose testimony relates to other types of crime. Further research is needed to establish with what frequency such children testify in criminal prosecutions in England and Wales, and the nature of their needs. However, this study provides some evidence that while a court appearance is not invariably experienced by these witnesses as frightening (and indeed, can be associated with feelings of enhanced self-esteem and social responsibility), neither is it always free from fear of the defendant; anxiety associated with the formality of the surroundings; or distress arising from the nature of the evidence which has to be given. Since the particular strength of the video facilities appears to be their contribution to reducing the first two of these anxieties, it would seem helpful to extend their availability to all child witnesses experiencing such problems, or otherwise indicating a need.

Furthermore, making the new provisions available to all child witnesses would remove a form of discrimination which has not been recognised, but whose basis is difficult to justify.

### **Taking account of children's preferences**

In Scotland the use of the live-link is not restricted to any specific category of case. Nevertheless, Scottish legislation does require that a need should be demonstrated before an application for the link is granted. This raises the issue of discretionary provision, regarded by some as problematic since professional practice may be

inconsistent, or even unfair or arbitrary.<sup>64</sup> Nevertheless, the permissive wording of the legislation on the video-link and video-recorded evidence means that an element of discretion already exists in English law. Extending this further might be considered justifiable if, as this study suggests, greater flexibility in the use of the video provisions would have benefits both for child witnesses, and for the trial process itself.

From the perspective of the children, what emerges from observations and interviews is that children's needs and preferences regarding the arrangements for their testimony differ. Furthermore, their comments strongly suggest the possibility of an association between the quality of their testimony; the impact on them of their court appearance; and their level of comfort or satisfaction with the procedures by which they testify. Given lawyers' preference for oral testimony given by witnesses appearing in the courtroom, practitioners are unlikely to object if children meeting the present criteria for the video facilities opt not to testify over the video-link. At the same time, it would appear only fair that they should be willing to consider the needs of by-stander witnesses who are anxious about testifying conventionally and would prefer to give evidence from the remote witness room. The lack of direct contact between the Crown Prosecution Service and counsel on the one hand, and prosecution witnesses on the other, does not encourage the communication of children's wishes at the present time. It is pertinent, however, that some children said when interviewed, without questioning or prompting, that they would have liked a greater say in how their evidence was given.

#### **Flexible use of live and pre-recorded evidence**

Turning to the perspective of the trial process, it is clear that while video-recordings of investigative interviews provide the courts with valuable information, some of those shown in court in the trial sample reported here were of poor quality, whether technically or as a result of the difficulties posed by an investigative interview. Yet, having once admitted a recording in evidence, prosecutors were handicapped in that they were unable to rectify any deficiencies by re-capping or reviewing some of the evidence with the child. Since fieldwork for this study was undertaken, the law has

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<sup>64</sup> Murray, K. (1995) *Op. cit.*, note 16, para. 3.53, p. 36.

been modified on this point, section 50 of the Criminal Justice and Public Order Act 1994 having amended section 32A of the 1988 Act to allow the prosecution to examine a child witness on matters already covered in the child's video testimony if, in the opinion of the court, they were not dealt with 'adequately' in the recorded testimony. However, this provides only a very limited opportunity for supplementing pre-recorded testimony with oral evidence from a child witness. Prosecutors continue to have little scope for determining how the Crown's case should be presented, the choice essentially remaining one between oral, or video-recorded, testimony. Inevitably, this has certain implications for the trial process, and it is significant that the Pigot Committee, in its recommendations on pre-trial hearings, left open the balance to be achieved between pre-recorded and oral testimony in any individual child's evidence-in-chief.<sup>65</sup> Clearly, there is something to be said for permitting those with responsibility for the effective presentation of the Crown's case, the professional discretion to determine how this should be done. Furthermore, observation of trials suggests there may be benefits in allowing the prosecution greater freedom to use video-recorded evidence in combination with oral testimony. If, for example, the child were able to tell the court some, or all, of their story again in evidence-in-chief, this may compensate for any loss of impact attributable to the use of pre-recorded evidence, and would give the prosecution's case the immediacy which practitioners value so highly. In relation to this, it is interesting that some children referred, directly or implicitly, to a wish to speak to the court directly. This perhaps reflects the fact that the criminal trial has both actual and symbolic significance, and that 'telling one's story' can be an important element of the latter, especially for victims.

The prohibition on the use of oral evidence-in-chief to supplement that provided by a video-recording of an investigative interview was drafted with children's welfare in mind. However, it is suggested that, again, legislators may have been overly protective. If prosecutors were allowed wider discretion to determine how to present evidence on behalf of the Crown, but with the proviso that the balance struck between oral and pre-recorded testimony should reflect not only the interests of the case (in terms of the most effective use of evidence) but also respect the wishes of the witness,

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<sup>65</sup> Home Office (1989) *Op. cit.*, note 3, para. 2.31, p. 23.

this may assist the trial process while also ensuring that children continue to be provided with safeguards.

### **Pre-court support and preparation**

The length of time taken for cases to reach a final hearing places considerable stress on children, in addition to the risk it involves that their recall of the events to which they will testify may fade. It is clear that further research needs to be undertaken to establish the causes of delay, and steps which might be taken to overcome this problem. Pre-trial hearings have been advanced as a possible solution, although it is possible that, as was argued by the Lord Chancellor,<sup>66</sup> this may not significantly bring forward the completion of children's testimony as the hearing could not be arranged until the defence were in a position to test the prosecution case.

However, what emerges from interviews with children and their carers is that some of the stress children experience while waiting for cases to reach court could be reduced by paying increased attention to their information needs. The anxiety attendant on involvement in a criminal prosecution was exacerbated for many interviewees by a lack of information about the progress of the prosecution; lack of information about bail or custodial arrangements for the defendant; and lack of knowledge about the legal process. The latter issue is of particular interest as it was the source of stress most frequently referred to by children who took part in research interviews.

Anxiety is to be expected in children before a court appearance. However, a number of children commented that giving evidence did not prove to be as much of an ordeal as they had anticipated, and that many of their more exaggerated fears were based on having watched television courtroom dramas. It is possible that had these children been provided with age-appropriate pre-trial information and support, their expectations might have been more realistic and their anxieties have correspondingly been fewer. At the same time, children who *did* find their court appearance as (or even more) stressful than they had anticipated, might have been assisted, through pre-trial preparation, in becoming equipped to meet the demands they would face at court.

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<sup>66</sup> *Hansard (Lords)* 21 May 1991, column 138.

It should be noted that of two children who testified at a re-trial, one stated clearly that she had felt considerably more confident testifying on the second occasion as she then knew what to expect. It would therefore seem that preparation may offer important benefits and it is perhaps noteworthy that its potential was highlighted (but largely ignored) during the debate on reform.<sup>67</sup>

### **The pre-school witness**

The term 'child witness' has been used in this thesis to refer to children and young people, whether of pre-school age or in late adolescence. Inevitably, this hides the developmental processes which characterise these stages of life (as indeed it does differences associated with class, culture, gender or disability). In its inattention to the question of developmental issues the thesis is not atypical of the child witness literature generally. However, one of the issues which emerges from the empirical data is that of the unique problem posed to the criminal justice system by the pre-school child. It appears doubtful whether the procedural reforms which have been enacted to date meet the needs of such young children, although this is difficult to evaluate as they so rarely become witnesses.

As stated earlier, further research is needed in order to determine whether so few children below the age of five years give evidence because they only very exceptionally become drawn into a criminal investigation; or because a prosecutorial decision is taken not to call their evidence; or both. However, whatever the reason for this, it is apparent that there is a minority of cases in which their testimony is necessary. In these instances, observation of study cases in which seven year olds gave evidence indicates that it can be easy to underestimate the internal consistency of the evidence young children give if their demeanour is lacking in confidence. Once again, this highlights the need for age-appropriate pre-trial preparation both in the interests of the children and also the trial process.

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<sup>67</sup> See, for example, Scottish Law Commission (1990) *Op. cit.* note 14, para. 1.8, p. 3; Morgan, J. and Zedner, L. (1992) *Child Victims: Crime, Impact and Criminal Justice*. Clarendon: Oxford, p. 133.

Furthermore, observation of younger children's testimony suggests that without appropriate levels of support it may be difficult for pre-school children to cope with the demands of the present trial process, as the calls on witnesses' social skills; stamina; and powers of concentration and recall, are extremely heavy.

It may, therefore, be helpful to review the question of pre-school witnesses. A number of proposals made in the course of the passage of the 1988 and 1991 child witness reforms failed to achieve government support as strategies for child witnesses generally, but may be appropriate for pre-schoolers. There may, for example, be a role for a specialist child examiner in such instances. Similarly, the option of a pre-trial hearing, or examination conducted in less public surroundings in the immediate presence only of the trial judge, counsel and a parent or other support person, has some practical merit. Historically, the legal system has displayed considerable reluctance to rely on the evidence of young children, but this has also been tempered by a pragmatic recognition among individual practitioners of the needs of younger children,<sup>68</sup> and the importance of not excluding them from access to the criminal justice system. It is not inconceivable that imaginative and practical solutions could be devised which would meet the needs of this small but challenging population of witnesses.

## Summary

The government had three objectives when introducing child witness reform. The reform of trial procedures was intended to reduce the stress of a court appearance for children, while reform of the rules relating to children's evidence was intended to facilitate children's access to the courts by abolishing the discriminatory barriers which had prevented much child testimony from being heard. An overriding objective of both sets of reforms was the achievement of a higher rate of prosecution in cases of child sexual abuse.

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<sup>68</sup> Spencer and Flin give a number of examples of this. For example, in the 18th century Mr. Justice Rooke would adjourn trials to allow child witnesses who failed the competency test to take religious instruction, while Mr. Justice Humphries (1867-1956) would ask a woman juror to sit beside a child witness to act as his/her interpreter. In a recent case, a judge allowed a solicitor who knew the child to question her, rather than prosecuting counsel. Spencer, J. and Flin, R. (1990) *Op. cit.*, note 1, pp. 47 and 79.

The effects of the reforms appear, however, to be mixed. While statistics supplied to the Court Service by individual courts suggest that more (if not younger) children are appearing as witnesses, many stressful aspects of a court appearance remain unaffected by the reform process. In particular, the delay in processing cases and the lack of available information and support for witnesses, exacerbates the anxiety which children and their carers can experience during the pre-trial period. Furthermore, although the introduction of the video-link and video-recorded evidence has been widely welcomed, these facilities do not appear to suit all children, in addition to which, the restriction of their use to cases involving sexual and violent offences means that there will always be children for whom the video procedures are unavailable.

For these reasons a number of recommendations have been made for future development, notably wider access to the video-link; the introduction of greater flexibility in the use of video-recorded evidence; attention to children's own preferences about their means of testifying; and an emphasis on pre-trial preparation and support.

In making these recommendations it is acknowledged that although the existing child witness provisions may be modified, they are unlikely to be fundamentally altered in the foreseeable future. Yet, as this thesis has shown, the reforms were ideologically led and this had important implications both for the conceptualisation of the problems the reforms were designed to address, and for the parameters of the solutions which were proposed. In the concluding chapter these issues are discussed in more detail.

## CHAPTER TEN

### THE LAW REFORM PROCESS

This thesis has traced the processes through which the child witness reforms enacted in the 1988 and 1991 Criminal Justice Acts were brought about, and the way in which the reforms have subsequently been implemented in one Crown Court Centre. In so doing, it has shown that the reforms were associated with a reconceptualisation of child sexual abuse as a criminal justice, rather than a welfare, problem, and that the influence achieved by this reconceptualisation has had a number of important effects. Firstly, it enabled the introduction of procedural reforms which, whilst welcomed by the police and child care professionals, were at best only ambivalently supported by the weight of the available empirical research and by the criminal justice practitioners who would be required to implement them. Secondly, it has resulted in the ascendancy of a set of ideas in which child witnesses other than those involved in an abuse prosecution have no place. This raises a number of questions, notably about the reasons why this reconceptualisation came to have the influence which it did, and, following on from this, what this tells us about the law reform process. These issues are the subjects of this concluding chapter.

#### **The reconceptualisation of child sexual abuse as a criminal justice problem**

The 1988 and 1991 child witness reforms were inextricably linked with public and professional concern about the problem of child sexual abuse, the re-discovery of which undoubtedly constituted an urgent social dilemma during the 1980's.

Nevertheless, as this thesis has shown, this concern was not sufficient in itself to generate changes in the way in which child witnesses were dealt with within the criminal justice system. As described in Chapter Four, similar concerns had been expressed during the 1920's both about the extent of sexual offending against children, and the stresses placed upon them by involvement in an abuse prosecution.

The recommendations concerning child witnesses made in 1925 by the Committee on Sexual Offences against Young Persons<sup>1</sup> closely resemble those made more than sixty

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<sup>1</sup> Committee on Sexual Offences against Young Persons (1925) *Report*. (Cmd 2561). *Parliamentary Papers 1924-1925*, vol. 15: London.

years later by the Pigot Committee.<sup>2</sup> However, in 1925 little government action followed from the advisory committee's report, while, by contrast, the 1980's saw a fundamental transformation of the rules of evidence and legal procedures relating to child witnesses. Now, clearly there are problems in treating differing historical periods as if they can be directly compared. These very divergent outcomes nevertheless offer a fruitful avenue by which to explore the openness of the law reform process to ideological influence.

What becomes apparent is that in the 1920's public policy was moving away from a concept of incest and sexual abuse as being problems requiring a criminal justice solution towards an analysis which placed emphasis on the welfare needs of both the victims and the perpetrators concerned. Sixty years later, this welfarist construction came under challenge and sexual abuse was once again re-defined as a criminal justice issue. A significant difference between the two analyses is that while the welfare perspective is couched in relativist moral terms (the sexualisation of the victim may result in them developing behaviours or predilections which place them at further risk; the perpetrator may be socially inadequate or otherwise vulnerable), the argument for criminalisation is expressed in absolutist terms (the child is vulnerable and innocent; the perpetrator is corrupt and guilty). Smart has shown how the simplicity of the moral propositions used in such absolutist arguments creates a 'regulatory imperative';<sup>3</sup> that is, by appealing to a framework of meanings in which the nature of the harm concerned is held to be obvious and the identity of those responsible for it is regarded as unambiguous, they set up a logical sequence of connections in which the value of intervention and regulation is made to appear self-evident.<sup>4</sup> Furthermore, the claims of the argument can effectively silence alternative viewpoints, since to suggest that the solutions proposed may not work as anticipated opens up whoever intimates this to the inference of a lack of concern for the victimised.<sup>5</sup>

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<sup>2</sup> Home Office (1989) *Report of the Advisory Group on Video Evidence*. (Chairman Judge Thomas Pigot QC.) Home Office: London.

<sup>3</sup> Smart, C. (1995) 'Unquestionably a Moral Issue: Rhetorical Devices and Regulatory Imperatives.' In: Smart, C. *Law, Crime and Sexuality: Essays in Feminism*. Sage: London, pp. 88-99.

<sup>4</sup> *Ibid.*, p. 92.

<sup>5</sup> *Ibid.*, p. 97.

This helps us to understand why it is that child witness reform could be achieved in the 1980's when little reform of any significance was secured in 1925. It also explains why members of the legal profession had so little influence over the 1988 and 1991 child witness reforms, and why in the Crown Court studied here barristers invariably used the video-link and video-recorded evidence when taking evidence from child abuse victims despite their reservations about the effects of these facilities on trial outcomes.

The concept of child sexual abuse which developed in the 1920's, far from appealing to a framework of meanings which unambiguously supported the proposed child witness reforms and established their claim to the moral high ground, led to uncertainty and disagreement among even some advocates of reform.<sup>6</sup> The difficulties experienced by child witnesses when confronted with the adult procedures of the criminal courts became obscured in arguments over who was responsible for sexual offences against children and whether children themselves could sometimes be held accountable. Furthermore, concern was expressed both about the potentially harmful effects of a criminal prosecution on incest victims in particular and their families, and the extent to which desired standards of sexual behaviour can be enforced through legal regulation and coercion. From this perspective, imbued as it is with nuance, it was far from self-evident that criminal prosecution offered an appropriate response to the problem of sexual offending against children, medical and welfare intervention appearing to offer an apparently more humane option. The impetus towards child witness reform correspondingly faltered.

During the 1980's, however, when the prevailing welfare ethos was challenged, discussion of child sexual abuse was conducted in language reminiscent of that used in the late nineteenth century by members of the social purity movement, and emphasised children's innocence, vulnerability, and need for protection.<sup>7</sup> The

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<sup>6</sup> See: Hooper, C. A. (1992) 'Child sexual abuse and the regulation of women: variations on a theme.' In: Smart, C. (ed) *Regulating Womanhood: Historical Essays on Marriage, Motherhood and Sexuality*. Routledge: London, p. 58.

<sup>7</sup> In relation to this, it is interesting that the term 'child protection' was adopted to denote work in the area of child maltreatment, and that the long-established Area Review Committees were re-designated Area Child Protection Committees. See: Department of Health and Social Security (1976) *Non-Accidental Injury to Children: Area Review Committees*. Local Authority Social

offender, by contrast, was divested of his complexity and humanity, and took on the stock characteristics of the monstrous deviant. Presented in these stark terms the issues appeared straightforward; the harm to children from sexual abuse was shown not only to be appalling and obvious but a violation of childhood itself, while the responsibility for such behaviour was placed unambiguously with the perpetrator.

Seen from this perspective, diverting child sex abuse cases away from the criminal justice system into the mental health and welfare systems represented an unjustifiable failure of the victimised child, whose 'right to justice' was thereby denied.

Furthermore, since the result of this failure was that children were left 'with feelings of anger, resentment, frustration and even guilt',<sup>8</sup> the recovery of the child victim became predicated on involvement with the criminal justice system, the social institution principally concerned with attributions of innocence and guilt. Yet, the actual experience of a court appearance for a child victim under the existing trial system was traumatic: 'The NSPCC's experience is that many children would prefer to let the abuser go free rather than face the trauma of appearing in court.'<sup>9</sup> The conclusion became self-evident; court procedures had to be reformed.

It is notable that within this scenario the voices of children themselves were never directly heard; instead, their views were represented by adults concerned for their welfare. During the 1980's child care professionals, speaking on behalf of abused children, were accorded the status of 'experts' on the needs and interests of children within the criminal justice system, an expertise acknowledged by the Pigot committee.<sup>10</sup> Moreover, the ability of legal professionals to speak on these subjects was questioned and, furthermore, barristers were themselves designated as part of the problem which child witnesses faced.<sup>11</sup>

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Services Letter LASSL (76)2 February 1976; Department of Health and Social Security and the Welsh Office (1988) *Working Together: A guide to arrangements for inter-agency co-operation for the protection of children from abuse*. HMSO: London.

<sup>8</sup> Home Office (1989) *Op. cit.* note 2, para. 2.15, p. 17.

<sup>9</sup> NSPCC (Unpublished: 1988) *NSPCC Submission to the Home Office Advisory Group on the Admissibility of Video Recorded Interviews*. NSPCC: London, September 1988, para. 4.4, p. 6.

<sup>10</sup> Home Office (1989) *Op. cit.* note 2, para. 2.12, p. 16.

<sup>11</sup> Adler, Z. (1988) 'Prosecuting child sexual abuse: A challenge to the status quo.' In: Maguire, M. and Pointing, J. (eds.) *Victims of Crime: A New Deal?* Open University Press: Milton Keynes, p. 140. Interestingly, the marginalisation of the views of the legal profession appears to be persisting.

The power of the moral rhetoric implicit in the criminalisation argument was such that the debate on procedural reform became characterised by its silences. As has been shown in Chapter Five, little attention was paid to the efforts of some members of the legal profession to draw attention to practical measures capable of making the trial process somewhat more informal and sensitive to the needs of children, such as using a small courtroom; excluding members of the public; leaving aside formal legal dress; and seating the child at a table beside the judge and a known and trusted adult. Similarly, the option of a pre-trial hearing, proposed in the early stages of the debate by Granville Williams<sup>12</sup> and referred to in parliament by a former barrister,<sup>13</sup> was ignored until it was drawn to the attention of the child care community by the Pigot committee and received their enthusiastic endorsement. Moreover, doubts which were voiced about the proposed video-reforms - such as whether the technology of the video-link might be found alienating by some children, or the use of a video-recording of an investigative interview as evidence in a criminal trial might alter the nature of the interview, resulting in its becoming more formal and consequently less sensitive to the needs of the child - were dismissed out of hand.

This silencing of dissent provides an explanation for the finding that barristers involved in the empirical aspect of this study were keen to be seen as supportive of the video facilities. On the evidence of the trials reported here it is clear that the video-link and video-recorded testimony have resulted in a reduction of barristers' control over the witness and the evidence s/he gives. They might therefore be forgiven for a lack of enthusiasm for these new provisions. Yet they were virtually unanimous in stating that a court appearance is now less stressful for child victims of abuse and, while expressing doubts about the effect of the video facilities on trial

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A steering group established by the Home Office to monitor the implementation of government initiatives and legislation affecting child witnesses, includes representatives of the Home Office, Department of Health, Lord Chancellor's Department, Crown Prosecution Service, Association of Chief Police Officers, Association of Directors of Social Services, the Social Services Inspectorate, and Her Majesty's Inspector of Constabulary - but not the judiciary or the legal profession. Stewart, C. (1995) *Steering Group on Child Evidence*. Unpublished information sheet distributed to participants at the 'Children in the Crossfire' conference held by the Michael Sieff Foundation, 4-5 April 1995.

<sup>12</sup> Williams, G. (1986) 'More humanity, Mr Hurd.' *The Times* 25.11.1986.

<sup>13</sup> *Hansard (Commons)* 27 November 1986, column 507.

outcomes, did not act on their reservations when dealing with evidence from child complainants. While this might point to practitioners' professional objectivity, the hesitancy with which some of their criticisms of procedural reform were expressed suggests that for a number of these barristers voicing criticism of the procedural reforms may have been associated with a risk of accusations of insensitivity to the needs of vulnerable children.<sup>14</sup>

This analysis also highlights the disparity between the image of the child witness created during the reform process and what has been said in the present study by child witnesses themselves. As indicated above, advocates of reform emphasised the secondary abuse of victimised children by the criminal justice process and for a time the news media gave widespread publicity to this view.<sup>15</sup> Yet what emerges in this and other research reports is the fortitude and competence of the majority of child witnesses, numbers of whom have said in interview that testifying at court did not prove as much of an ordeal as they had anticipated.<sup>16</sup> This is not to say that giving evidence in a criminal trial is not stressful for children, nor that it is not sometimes a highly distressing experience. However, the way in which child witnesses were presented publicly was a loaded one, designed to reinforce the legislative solutions proposed.

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<sup>14</sup> In this context it is interesting that the Law Society's response to the Pigot report includes the following statement: 'The Society's Working Group would draw the distinction between "victims" and other witnesses. Empirical research has shown that the evidence of a child as victim of a crime is unlikely to be fabricated. However, as ordinary witnesses of fact, the evidence shows that, *at best*, children are only as reliable as adults, and, *at worst*, they may be considerably less reliable.' At this time it was a *sine qua non* of the child protection profession that children never lie about abuse, and this statement can be read as evidencing a reluctance to appear doubtful about the validity of this belief. The Law Society (Unpublished: 1990) *Response to the Report of the Advisory Group on Video Evidence*. The Law Society: London, para. 5, p. 2.

<sup>15</sup> See, for example, the editorial article 'A Child's Evidence.' *The Times* 25.9.1987. Note: It is relevant that this continues to be the public conception of the effect on children of a court appearance. For example, speaking on television, Alan Levy recently described this in the following terms: 'It's not a friendly environment and one sees the results. For instance, children crying in the witness box, children vomiting in the witness box, children having asthmatic attacks, and in one case an epileptic fit. On other occasions children have run screaming from the witness box. I mean, these are episodes which can only point to the traumatic nature of giving evidence.' *Public Eye: All Fall Down*. BBC television programme transmitted 20.2.1996.

<sup>16</sup> Murray, K. (1995) *Live Television Link: An evaluation of its use by child witnesses in Scottish criminal trials*. The Scottish Office Central Research Unit HMSO: Edinburgh, para. 6.42, p. 69; Goodman, G. S., Taub, E. P., Jones, D. P. H., England, P., Port, L. K., Rudy, L. and Prado, L. (1992) 'Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims.' *Monographs of the Society for Research in Child Development* 57(5), pp. 96-97.

### **The law reform process**

The reconceptualisation of child sexual abuse as a criminal justice, rather than a welfare, problem clearly had a significant influence on the child witness reform process, and contributed to the widespread acceptance of the need for modification of trial procedures to ensure that they would better accommodate the needs of children. Furthermore, it enabled members of the child care profession to play a significant role in discussions on the treatment of children within the criminal justice process. However, it is important to note that the influence of the child care organisations was limited. As outlined in Chapter Five, child care professionals amended their early advocacy of video-recorded evidence as a solution in itself and pressed for implementation of the Pigot committee's recommendation that children's evidence should be taken in full at a pre-trial hearing. Yet, as we have seen, despite the extensive support for this proposal (embraced amongst others by the legal community), the government declined to act on it. Given the strength of the backing for procedural reform in general, and the introduction of pre-trial hearings in particular, why did the government reject this option?

One answer may be caution. Comments made by Lord Mackay at a specialist conference held in 1989 show that the government was conscious of the risks involved in introducing untested reforms as a means of assuaging public anxiety. He stated:

For its part the government is more than willing to consider further reforms which benefit child witnesses provided that these are practically achievable, affordable, and do not detract from the rights of the accused. This is an area in which we have thought it right to proceed with some circumspection. [...] Some solutions which were arrived at in times of particular concern about child sexual abuse have subsequently been criticised in practice or held to be at variance with constitutional principles.<sup>17</sup>

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<sup>17</sup> Clashfern, Lord Mackay of, (1990) 'Opening Speech to the Conference.' In: Spencer, J. R., Nicholson, G., Flin, R. and Bull, R. (eds.) (1990) *Children's Evidence in Legal Proceedings: An International Perspective*. Papers from an international conference, Selwyn College Cambridge, 26-28 June 1989, published by J. R. Spencer: Cambridge, p. 6.

Nevertheless, another answer is suggested by the Lord Chancellor's reference to cost. The government may have rejected the option of pre-trial hearings because it would have required the establishment of a new, labour-intensive, system, whereas by contrast, the admissibility of video-recorded evidence represented the extension of an existing policy commitment. The 1980's had seen the increasing convergence of police and social work roles in relation to child protection, and the development of joint investigation procedures which emphasised the benefits of video-recording when interviewing children. The related emphasis on video technology as a means of modifying trial procedures to meet the needs of child witnesses was entirely compatible with these developments and, indeed, admitting video-recordings of investigative interviews with children as evidence in criminal proceedings was a quite logical extension of these initiatives.

Before considering what the above factors indicate about the law reform process, it is helpful to return briefly to the question posed at the outset of this thesis; to what extent can the reforms be said to have been in children's interests?

It will by now be clear that the rhetoric on which the advocates of reform substantially relied, in focusing on the needs of one group of child witnesses, marginalised the wider child witness population. Furthermore, it is probable that it was the absolutist terms of the reform argument which resulted in the procedural reforms being framed, as they were, in a highly prescriptive manner. Implicit in the legislation is a presumption that the video facilities offer the best means of presenting complainants' evidence. Yet the comments made by children interviewed for this thesis indicate that there is considerable diversity in children's experiences of the criminal justice system, and that their needs cannot invariably be represented in any simple or unified way, despite the fact that they face certain demands in common when they appear at court. It is therefore of concern that children acquired no rights under the legislation, whether to the use of the video-link or video-recorded evidence, or to having their preferences taken into account when decisions are made about the use of these facilities.

Nevertheless, the video systems clearly *do* assist many children. Furthermore, although the attitudes which informed the competency and corroboration rules are still held by a number of practitioners, the abolition of the rules of evidence which discriminated against child witnesses and their testimony can be said to have had a democratising effect. Considered overall, however, from the perspective of child witnesses the outcomes of the reforms appear mixed.

What, then, does all of this tell us about legislative processes? Taken together, these findings illustrate how uneven the development of the law can be, and show something of the complexity of the reform process. The law emerges here as being open to adaptation to meet changing social circumstances, but in a way which reflects ideological and political pressures rather than a more disinterested analysis of the prevailing circumstances. Thus, while specialist interest groups have access to the legislative process (and it may be that a generalist civil service is becoming increasingly dependent on 'expert' advice), it would appear that the way in which their proposals are perceived is related to their ability to appeal to dominant beliefs as well as to their relationship to the priorities influencing the government's strategy. Interestingly, as a result, groups who are normally viewed as having high status and considerable influence can find their proposals marginalised.

It is also apparent that legislative initiatives can develop a momentum of their own; a specific course of action (here for example, the introduction of video-links, and video-recording of investigative interviews with children thought to have been abused) can define the parameters for the acceptability or perceived practicality of subsequent proposals.

The empirical findings reported here additionally suggest that the rhetoric of the reform process can influence the attitudes and behaviour of practitioners; although it can also be resisted by them (as shown here in the attitudes of some barristers towards younger child witnesses). While there may be a trend in one direction or the other (which may be related to the strength of the relevant belief systems), it would seem

likely that both will in fact occur, which may contribute to a perception of inconsistency or ambiguity of the outcomes of reform.

This thesis therefore provides support for the view that ideology both informs legislation and contributes to the uncertainty of its outcomes in practice. By its nature, ideology searches for broad patterns capable of offering explanation and clarification, yet in so-doing it can generate controversy, and become rigidly prescriptive to the detriment of the diversity of human and social experience.

Is it possible for legislation to avoid such problems? The relatively non-controversial character of the debate on the reform of the rules of evidence suggests that it may be, although on closer examination this particular aspect of the legislation can also be shown to be coloured by particular beliefs and values.

Given the complexity of human relations, it would therefore seem that social legislation will invariably involve a degree of engagement in its proponents, and will be informed by beliefs which, while widely supported, will be neither universally held nor universally valid. Even if legislation were framed with sufficient flexibility to be responsive to individual circumstances where needful, it would doubtless be subject to differences of interpretation which would create dissatisfaction with the outcomes. Perhaps the law can only ever hope to be 'good enough'.

In relation to this, it is interesting to note how the child witness reforms have been amended since fieldwork for this thesis was begun. The Criminal Justice and Public Order Act 1994 has clarified the intention of the competency provision introduced in 1991, and modified the restriction on oral examination by prosecuting counsel of children whose evidence-in-chief involves a video-recorded statement. Additionally, the Criminal Procedure and Investigations Act 1996 has introduced a provision for binding rulings to be made on the use of the video facilities.<sup>18</sup> These developments highlight how some of the unanticipated outcomes of major reforming legislation can

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<sup>18</sup> Section 62, Criminal Procedure and Investigations Act 1996. See: *Hansard (Commons)* 5 February 1996, columns 85-88, for a report of the debate on this provision.

be addressed by a process of on-going amendment. In the present case they illustrate diverging trends, the amendment on oral questioning indicating a slight movement towards flexibility, and that on binding rulings (which may have important advantages to child witnesses in reducing one aspect of the uncertainty of the pre-trial period) reaffirming the strength which the presumption in favour of the video provisions exerts on the thinking of interest groups and policy makers. Nevertheless, it is possible that it is through such smaller pieces of amending legislation, which receive less public attention and are the subject of less contentious claims, that the most comfortable 'fit' between social needs and legislative prescriptions will be found.

## **APPENDICES**

## APPENDIX A

## CODE FOR CASES

Key.

1. \* indicates a case in which there was more than one complainant.
2. Long-term indicates offences which were committed over one or more years.
3. Short-term indicates offences committed over three months or less.
3. [R] indicates a case involving a re-trial.

Case 1	trial 1 [R]	Child sexual abuse	Long-term
Case 2		Child sexual abuse*	Long-term
Case 3	trial 2	Child sexual abuse*	Long-term
Case 4	trial 3	Child sexual abuse	Short-term
Case 5	trial 4	Child sexual abuse	Long-term
Case 6	trial 5	Child sexual abuse*	Long-term
Case 7	trial 6	Child sexual abuse/ Actual Bodily Harm	Long-term Single offence
Case 8	trial 7	Child sexual abuse*	Long-term
Case 9	trial 8	Child sexual abuse*	Long-term
Case 10		Child sexual abuse	Single offence

Case 11		Child sexual abuse	Single offence
Case 12	trial 9 [R]	Child sexual abuse	Short-term
Case 13		Child sexual abuse*	Long-term
Case 14	trial 10	Child sexual abuse*	Short-term
Case 15		Child sexual abuse	Single offence
Case 16	trial 11	Murder	

**APPENDIX B****CODE FOR BARRISTERS****Key.**

An upper case symbol denotes a barrister who completed the questionnaire.

A lower case symbol denotes a barrister who discussed the child witness reforms with the researcher, but who did not complete the questionnaire.

A.	White male.	Case 1 (Trial 1)
B.	White male.	Case 3 (Trial 2)
C.	White male.	Case 3 (Trial 2)
D.	White male.	Cases 4 (Trial 3); 11; 12 (Trial 9); 15; 16 (Trial 11)
E.	White male.	Cases 5 (Trial 4); 8 (Trial 7); 9 (Trial 8); 10; 16 (Trial 11)
F.	White male.	Case 6 (Trial 5)
G.	White male.	Case 6 (Trial 5)
H.	White male.	Cases 2; 7 (Trial 6)
J.	White male QC.	Cases 2; 7 (Trial 6); 16 (Trial 11)
K.	White male QC.	Cases 8 (Trial 7); 16 (Trial 11)
L.	White male.	Case 8 (Trial 7)
M.	White male QC.	Case 8 (Trial 7)
N.	White male.	Case 9 (Trial 8)
P.	White male.	Case 12 (Trial 9)
Q.	White male.	Case 14 (Trial 10)
R.	White male.	Case 14 (Trial 10)
a.	White male.	Case 1 (Trial 1)
b.	White male.	Cases 4 (Trial 3); 5 (Trial 4); 15
c.	White male QC.	No direct involvement in study cases.

d.	Asian female.	No direct involvement in study cases.
e.	White male	Case 10
f.	White male.	Case 11
g.	White male.	Case 13
h.	White male.	No direct involvement in study cases.
j.	White male.	Case 15
k.	White male.	Case 15
m.	White male QC	No direct involvement in study cases.

## APPENDIX C

## CODE FOR CHILDREN AND YOUNG PEOPLE

**Key**

- a. **Bold** type denotes a child or young person who gave evidence at court.
- b. Standard type denotes a child or young person who was listed as a witness or a complainant in a case which resulted in a late guilty plea.
- c. *Italic* type denotes a child or young person, charges in respect of whom were discontinued or severed.
- d. \* denotes a child or young person who agreed to be interviewed for this study.
- e. (\*) denotes a child or young person who was not interviewed but whose parent(s)/carer(s) were interviewed in the child's place.
- f. \*\* denotes a child or young person who was interviewed and whose parent(s)/carer(s) were also interviewed.
- g. C = complainant.
- h. W = witness.
- i. Age given is that when the case was finally concluded.

1. **Boy 10 years: C \*\***
2. **Girl 11 years, sister of no.3: C \*\***
3. *Girl 14 years, sister of 2: C*
4. **Girl 16 years: C\***
5. **Girl 9 years: C(\*)**
6. **Girl 7 years: C**
7. *Girl 5 years: C*
8. **Girl 14 years: C\***
9. **Girl 13 years, sister of no. 10: C\***
10. **Girl 15 years, sister of no. 9: C\***
11. **Girl 17 years: C(\*)**

12. **Girl 16 years: W**
13. **Girl 16 years: W\***
14. **Girl 16 years: W\***
15. **Girl 16 years: W\***
16. **Girl 16 years: W\***
17. **Girl 16 years: W**
18. **Girl 10 years, sister of nos. 19 and 20: C**
19. **Girl 8 years: C**
20. **Girl 3 years: C**
21. **Girl 11 years: C**
22. **Girl 9 years: C**
23. **Girl 7 years, twin sister of no. 24: C**
24. **Girl 7 years, twin sister of no. 23: C**
25. **Girl 10 years: C**
26. **Girl 8 years: C**
27. **Girl 10 years: C**
28. **Girl 10 years: C**
29. **Girl 9 years: C\***
30. **Girl 9 years: C\*\***
31. **Girl 9 years: C(\*)**
32. **Girl 9 years, sister of no. 33: C\*\***
33. *Boy 7 years, brother of no. 32: C\*\**
34. **Girl 12 years, sister of no. 35: C\*\***
35. *Girl 16 years, sister of no. 34: C\*\**
36. **Girl 13 years: W\***
37. **Girl 13 years: W**
38. **Girl 12 years: C\*\***
39. **Girl 12 years: W\*\***
40. **Girl 13 years: C**
41. **Girl 14 years: C\*\***
42. **Girl 15 years, sister of no. 43: C(\*)**
43. **Girl 13 years, sister of no. 42: C(\*)**

44. **Girl 11 years: C\*\***
45. **Girl 13 years: C\*\***
46. Girl 15 years: C
47. Girl 15 years: W\*\*
48. **Boy 16 years: W**
49. **Boy 16 years: W**
50. **Boy 17 years: W\*\***
51. **Boy 17 years: W\*\***
52. **Girl 18 years: W(\*)**
53. **Girl 17 years: W\***

## APPENDIX D

## CHILD WITNESS RESEARCH PROJECT

## PARENT/GUARDIAN INFORMATION SHEET

I am a research worker based at Leeds University and am looking at criminal cases in the Crown Court which involve children and teenagers giving evidence. Being a witness is not easy for adults and must be even harder for children and young people. I am wanting to find out whether recent changes - like the TV link - help young witnesses in the way it was hoped they would do, or whether there is still more that needs to be done. Your opinions, and those of your son/daughter, based on your experiences, would be invaluable to me. I should be very grateful if you would agree to talk to me once it is clear that the case you are involved with is finally over. Would it be alright for me to contact you at your home about six weeks after the end of the trial, to arrange to meet?

I realise that being involved in a court case can be very distressing and want to reassure you that **I would not need to talk to you or your son/daughter about the offences or the details of the case.** I only want to know how you feel you have been treated by the criminal justice system and whether you think the system could be improved.

I do hope you will agree to help me.

Amanda Wade.

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Yes, I should be happy to talk to you.

Name \_\_\_\_\_

Address \_\_\_\_\_

No, I should prefer not to talk to you.

Name \_\_\_\_\_

Address \_\_\_\_\_

**APPENDIX E****SAMPLE LETTER**

Dear

I am a research worker based at Leeds University and am writing to ask if you and your [daughter/son] [name] would be willing to talk to me in connection with my work. I am looking at the arrangements made for children and young people who act as witnesses in Crown Court cases. In particular, I am wanting to find out how children feel about recent changes which have been introduced, such as the video link, and video-recorded evidence.

The research is supported by the Crown Prosecution Service, who give me details of all the cases in the [...] Crown Court in which children are involved. This is how I know [...] has been a witness. Because of Crown Prosecution Service rules, I am not able to speak to any witnesses until their case has been over for six weeks. This letter is therefore simply to let you know who I am; what I am doing; and to ask if I might contact you again in six weeks time to arrange to meet?

I realise that being involved in a court case can be upsetting for everyone involved, and want to reassure you that if you agree to see me, I would not ask any questions about the case itself. I only want to know what [...] thinks about the way [s/he] gave evidence, as it is important to hear from children themselves what has helped them, or made this more difficult. Everything I am told is treated in confidence, and nothing will be written which would identify the people who have spoken to me.

I hope you will both feel able to see me. I can be contacted by telephone on [...] if you would like to ask any questions before making a decision. Or, if you would prefer me not to contact you again, just return this letter to me in the enclosed stamped/addressed envelope.

Yours sincerely

Amanda Wade

## APPENDIX F

## PROSECUTION/DEFENCE QUESTIONNAIRE

## Part A: Assessment of child witness

Name of child:

Date gave evidence:

TV link used? Yes/No

Pre-recorded video evidence shown? Yes/No

FORM COMPLETED BY COUNSEL FOR THE: PROSECUTION : [ ]  
DEFENCE: [ ]

**We would appreciate your co-operation in completing our questionnaire on this child witness. The information you give will be treated confidentially and will only be used for the purposes of the research study.**

1. Do you think it was easier or harder for the child to use the TV link than to give evidence in the normal way, or didn't it make any difference?

Easier [ ]

Harder [ ]

No difference [ ]

2. Did the use of the TV link make it easier or harder for you to examine/cross-examine the child, or did it make no difference?

Easier [ ]

Harder [ ]

No difference [ ]

Please explain

3. Do you think it was easier or harder for the child to testify with the child's pre-recorded video statement being shown, or didn't it make any difference?

Easier [ ]

Harder [ ]

No difference [ ]

4. Was it easier or harder for you to present/test the child's evidence with pre-recorded evidence being used, or did this make no difference?

Easier

Harder

No difference

Please explain

5. When you examined/cross-examined the child, how well do you think s/he understood your questions?

Very well

Fairly well

Not all that well

Not at all well

6. How co-operative do you think the child was with you?

Very co-operative

Quite co-operative

Fairly unco-operative

Very unco-operative

7. How would you assess the child's mood during your questioning (or questioning by interviewer, if pre-recorded evidence used - Prosecution only)?

	<u>Mostly</u>	<u>A little</u>	<u>Not at all</u>
Confident	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Relaxed	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Friendly	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Inhibited	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Embarrassed	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Withdrawn	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sad	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Anxious	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Hostile	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Angry	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

8. Was the child's live testimony offered in a way which appeared:-

Very spontaneous [ ]  
Quite spontaneous [ ]  
Somewhat rehearsed [ ]  
Very rehearsed [ ]

9. Did the child engage in any non verbal behaviour which detracted from his/her testimony? Please describe.

Video statement

Examination-in-chief

Cross-examination

10. Did the child engage in any non verbal behaviour which made his/her testimony more compelling? Please describe.

Video statement

Examination-in-chief

Cross-examination

11. How would you rate the child's performance as a witness in relation to:-
- |   | <u>Above average</u> | <u>Average</u> | <u>Below average</u> |
|---|----------------------|----------------|----------------------|
| Understanding of court procedures   | [ ]                  | [ ]            | [ ]                  |
| Level of concentration  | [ ]                  | [ ]            | [ ]                  |
| Confidence in asking for explanations of words/questions did not understand | [ ]                  | [ ]            | [ ]                  |
| Ability to recall events  | [ ]                  | [ ]            | [ ]                  |
12. Overall, how would you rate the child's testimony in relation to:-
- |                                       | <u>Above average</u> | <u>Average</u> | <u>Below average</u> |
|---------------------------------------|----------------------|----------------|----------------------|
| Its internal consistency              | [ ]                  | [ ]            | [ ]                  |
| Its accordance with other known facts | [ ]                  | [ ]            | [ ]                  |
| The amount of detail it contained     | [ ]                  | [ ]            | [ ]                  |
13. Based on your knowledge of the case, was the evidence the child gave in live testimony:-
- |                     |     |
|---------------------|-----|
| Complete            | [ ] |
| Almost complete     | [ ] |
| Moderately complete | [ ] |
| Minimal             | [ ] |
14. In your opinion, what aspects of the child's testimony and demeanour would tend to persuade a jury a jury that his/her evidence was:-
- Believable
- Not believable





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