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An Analysis of Potential Incompatibility Between the Acts Amendment (Evidence of Children and Others) Act 1992 and Defendants' Rights

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**AN ANALYSIS OF POTENTIAL INCOMPATIBILITY BETWEEN THE
ACTS AMENDMENT (EVIDENCE OF CHILDREN AND OTHERS) ACT 1992
AND DEFENDANTS' RIGHTS.**

BY

V.F. Pearson

A Thesis Submitted in Partial Fulfilment of the Requirements
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USE OF THESIS

The Use of Thesis statement is not included in this version of the thesis.

Abstract

The need to balance the needs and rights of all parties is a central consideration in legal procedure. This is no simple task, however, when the interests of the defendant are often in direct contrast to those of the witness. Much of the contention arises from the ambiguity associated with the nature of both victims' and defendants' rights and the lack of clear guidelines for the resolution of conflict where such competing interests are involved. Because Australia has no document precisely delineating the nature and content of individual rights, the result is a reliance on an ill-defined combination of common law practice, conceptions of both natural rights and utilitarianism, international human rights agreements and legislative stipulations.

In recent times, attention has been focused on the perceived inadequacies of legislation pertaining to the child witness in a criminal trial. There is considerable contemporary evidence to suggest that the traditional justifications given to regulate the reception of children's evidence in courts of law were based on unsubstantiated notions of the inherent unreliability of children. The need to introduce legislative reform pertaining to the evidence of children was first articulated by the Child Sexual Abuse Task Force which finalised its report to the Western Australian government in 1987. In April 1991, the Law Reform Commission of Western Australia published their Report on Evidence of Children and Other Vulnerable Witnesses, having been asked to review the law and practice governing the giving of such evidence in legal proceedings. Their recommendations formed the basis for the *Acts Amendment (Evidence of Children and Others) Act 1992*.

Although there is widespread support for the introduction of measures to address the needs of the child witness, there does not appear to have been sufficient rigorous evaluation of the corresponding effect on defendants' rights, particularly the right to a fair trial. This right, although not protected or defined by statute, is recognised both in Australia's common law heritage and through our ratification of major international human rights agreements. Although there is a general acceptance that the right to a fair trial largely overrides other individual claims to rights within the trial setting, an important consideration is the inherent vulnerability of common law rights to abrogation or removal by statutory law. Similarly, international human rights agreements are not, of themselves, always adequately enforceable, and require the enactment of supportive domestic legislation to ensure that their provisions are upheld. This has not occurred in Australia to any great extent.

The primacy of the right to a fair trial is not supported by the *Acts Amendment (Evidence of Children and Others Act) 1992*. Whilst some of the provisions of this Act, such as the amendments relating to competence and corroboration of evidence, have brought children onto equal footing with other (adult) witnesses, other provisions have encroached on the defendant's right to a fair trial. Of particular concern are the subtle erosion of the presumption of innocence, the effects on the ability of the defence to cross-examine witnesses effectively, and the widespread inequality which the defendant now suffers in contrast to other defendants whose alleged offences do not come under the auspices of the Act. Although in drafting the legislation some care was taken to address these concerns, there still exists a degree of incompatibility between the *Acts Amendment (Evidence of Children and Others) Act 1992* and defendants' rights. Safeguards for the protection of defendants' rights contained in the Act are, at times, insufficient.

The precise extent to which the provisions of the *Acts Amendment (Evidence of Children and Others) Act 1992* encroach on the conception of trial fairness is difficult to ascertain, thus the current research has highlighted only those provisions of the Act which are *potentially* incompatible with defendants' rights. Future research must stringently investigate the *actual* (not perceived) impact of these provisions on all parties to the proceedings, including the defendant, the child, defence and prosecution lawyers, judicial officers and jurors. Subsequent to this investigation, a re-evaluation of the legitimacy of the legislation may be required.

Declaration

"I certify that this thesis does not incorporate, without acknowledgment, any material previously submitted for a degree or diploma in any institution of higher education and that, to the best of my knowledge and belief it does not contain any material previously published or written by another person except where reference is made in the text."

Valerie Pearson

13 November, 1996

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INTRODUCTION

A central consideration in legal procedure in Western legal jurisdictions is the need to balance the rights, responsibilities and obligations of all parties involved (Carmichael & Sarre, 1994, p. 119; Harrison, 1992). This is surely no easy task in a criminal trial where the interests of the defendant are often in direct competition with those of the victim or witness. In recent years, increasing attention has focused upon the particular needs of the child witness, culminating in a number of amendments to both the trial process and various aspects of the law of evidence, the aim of which is to facilitate the reception of children's evidence. Although in calling for legislative change the Law Reform Commission of Western Australia explicitly acknowledged the right of the defendant to a fair trial (1991, p. 60), their assertions that the (then) proposed amendments - which form the basis of the *Acts Amendment (Evidence of Children and Others) Act 1992* (in future, referred to as "The Act") - do not impinge on this right, appear to require more stringent evaluation. In seeking to accommodate the needs and rights of the child witness in a criminal trial, it is possible that the legitimate rights of the defendant have been compromised. The Act has perceptibly shifted the balance of competing interests in a criminal trial, and it is the redefining of the relationship between these interests which is of concern in this thesis.

Although it was asserted in Parliament prior to the enactment of The Act that "Particular care has also been taken in drafting the bill to ensure that accused persons retain their rights, particularly the right to a fair trial" (Berinson, 1992, p. 15), it will be argued that there are a number of specific concerns which have not been rigorously evaluated. Thus the aim of this study is to investigate whether or not there exists a

degree of incompatibility between The Act and defendants' rights. This will be achieved by addressing the following questions:

- What specific rights are held by the defendant in a criminal trial?
- Are any of the provisions of the *Acts Amendment (Evidence of Children and Others) Act 1992* at least potentially inconsistent with the upholding of these rights?
- If so, how may the areas of incompatibility be resolved or, at least, minimised?

These questions will be addressed through the application of the principles of logical reasoning to the analysis of potential incompatibilities between The Act and defendants' rights. The premises for this argument will be established through a detailed examination of both the literature on rights and the law as it stands. It is reasonable to assume, therefore, that the persuasiveness of the argument will rest substantially on the degree to which these premises may be established as true. It may be considered a limitation that, in this purely conceptual research endeavour, undertaken in a contentious field replete with conflicting ideas, values and opinions, "truth" may be perceived as an elusive quality. Furthermore, logical analysis can reach conclusions that are intuitively uncomfortable, yet, as noted by Bates (1992), "the very subject of child sexual abuse has, probably inevitably, spawned entrenched and intractable points of view which, in turn, tend to obfuscate the realities of the situation".

Background of the Law of Evidence

"The evidence of a fact is that which tends to prove it - something which may satisfy an inquirer that the fact exists" (Byrne and Heydon, 1991, p. 1). Thus the law of

evidence is the body of rules which regulates the presentation of evidence in courts of law, ensuring that the evidence introduced is relevant to the proof of the facts in question. Specifically, the law of evidence governs *what* evidence may be presented to the court, *who* may give evidence, and *how* the evidence may be presented. Since the court's decision is based solely on the admitted evidence, and because any given case may be dependent upon whether or not a particular item of evidence may be presented to the court, it is obvious that the law of evidence is a potentially decisive factor in determining the trial outcome.

The three main influences on the development of the law of evidence to its contemporary form are the jury, the oath and the adversary system. Initially, juries were comprised of a group of the defendant's neighbours, whose collective opinion decided guilt or innocence. There was little or no reliance on unbiased factual evidence, with jurymen being those who might, by virtue of their proximity, have some knowledge of the event in question. Thus jurymen were also the earliest form of witnesses (Stone & Wells, 1991, pp. 16-18).

The transition of the jury from neighbours to independent individuals probably began when more than one issue had to be decided at trial: Those neighbours who might know of the circumstances of one issue (for example, a rape) may have no knowledge of another (for example, the privilege of clergy which - at that time - may have afforded the accused exemption from prosecution). Such circumstances would, therefore, have necessitated the formation of more than one jury (Stone & Wells, 1991, pp. 18-19). Expediency gradually separated the responsibilities of witness and jury, with evidence from witnesses being presented before an independent jury.

An oath was originally sworn to invoke divine intervention. With the inclusion of witnesses and the provision of evidence in trials, individuals had to swear an oath on the Gospel, the intention being that such an oath would be binding on the individual's conscience. Although the right to take the oath - and therefore to give evidence - was originally limited to Christians, amendments have gradually introduced a variety of alternatives which enable people of other religions to swear an oath in a manner compliant with their religious beliefs (Australian Law Reform Commission [ALRC], 1982, pp. 1-8). For those who hold no religious belief, evidence may be given upon making a solemn affirmation (*Evidence Act 1906* [WA], s. 7). Clearly these developments have greatly influenced the diversity of people who are deemed competent to give evidence at trial.

The adversary system developed from the ancient tradition of trial by battle, where the parties to a dispute would engage in physical combat to decide the winner (and thus the person in the right). Today the 'battle' is conducted in court, where both parties (or their legal representatives) contend, pursuant to the rules of evidence. At common law, the parties to the dispute conduct their own case: the responsibility of the judge and/or jury is to decide the case on the basis of the evidence presented to them - there is no allowance made for the court to seek additional evidence. It is, however, a reasonable assumption that those parties directly involved in the proceedings, therefore having the greatest interest in the outcome, are most likely to identify and present the most relevant evidence in support of their particular claims (Ligertwood, 1993, p. 33).

There are two fundamental conceptions underpinning the law of evidence. Firstly, a court is not to consider information or evidence unless it is probative of the material facts; and secondly, that "unless excluded by some rule or principle of law, all that is

logically probative is admissible" (Thayer, 1898, p. 266). Evidential rules are, however, largely rules of exclusion (Ligertwood, 1993, p. 43; Bates, 1985, p. 14) and relevant evidence may be deemed inadmissible (Byrne & Heydon, 1986, p. 85; Cross & Wilkins, 1986). The predominant justification for such exclusions is the perceived necessity to protect lay juries from the "dangers of confusion and prejudice" (Stone & Wells, 1991, p. 55) associated with the reception of all but the most reliable and cogent - as well as logically probative - evidence. The exclusion of evidence more prejudicial than probative is, therefore, a direct acknowledgment of the right of the defendant to a fair trial (Ligertwood, 1993, p. 49).

CHAPTER ONE: HISTORY OF THE LEGISLATION

The Traditional Approach to Children's Evidence

One area in which the rules of evidentiary exclusion have had a substantial impact is in respect to the evidence of children. The law has traditionally regarded children as a special class of persons, requiring both special protective measures (for example, freedom from criminal responsibility) and unique restrictions against their involvement in certain activities (such as the prohibition against driving until the age of 17) (Law Reform Commission of Western Australia [LRCWA], 1990, p. 6). In court, children have been traditionally regarded as unreliable witnesses, and it is this notion of inherent unreliability which was the principle justification for the established rules of competence which, until recently, largely precluded their testimony (Warner, 1988; 1991).

At common law, there exists no formal test of competence to give evidence beyond the understanding of the oath (Ligertwood, 1993, p. 363). Although in English law it is not necessary for a child to believe in God for him or her to be deemed able to understand the nature of the oath, in Western Australia the common law test for competency to take the oath had been more strictly construed than the other States, as it incorporated the notion of religious understanding (LRCWA, 1990, pp. 17-18). Such stringent reliance upon the understanding of the oath is now, however, widely regarded as both unrealistic and unfair, because it meant that if a child was unable to understand or adequately describe the concept of *divine retribution* or the significance of taking an oath on the Bible, they were unable to give evidence on oath (Byrne, 1991, p. 12). "This is not a test which a very young child, however intelligent and truthful, may be expected

to pass ... [nor is it] a test which, when strictly interpreted, can properly be applied to a child who has not had any religious training" (LRCWA, 1990, p. 8).

Also at common law, there exists a requirement that a child's evidence - like that of all other witnesses - be given on oath. Coupled with the stringent competency test, the result was largely the exclusion of children's evidence. Gradually, however, Australian jurisdictions, together with those of many other common law countries, have modified this standard, allowing children to give unsworn evidence where they are deemed unfit to take the oath (LRCWA, 1990, p. 17). The new standard for unsworn evidence required that the court be satisfied that the child witness had the capacity to give rational evidence, that they could demonstrate an understanding of the moral duty to tell the truth, and they were adjudicated as being likely to tell the truth (Ligertwood, 1993, p. 363; LRCWA, 1990, p. 8). In Western Australia, this was dealt with under section 101 of the *Evidence Act 1906* (since repealed) (Appendix 1).

As noted in section 101(2), the *Evidence Act 1906* prior to amendment contained the express provision that no person could be convicted of a crime or misdemeanour on the unsworn testimony of a child unless the testimony was corroborated by other evidence. Corroboration is independent evidence which otherwise tends to establish that the offence in question was committed, and also that it was committed by the defendant (Byrne & Heydon, 1991, pp. 12-13). The corroboration requirement attached to children's evidence acted as an exception to the general rule that the uncorroborated evidence of one witness was sufficient in order to obtain a conviction (LRCWA, 1990, p. 19).

At this point it may be pertinent to distinguish who precisely is considered to be a child under Western Australian law. Although at common law those under the age of majority (that is, 18 years) are liable to assessment for competence to take the oath, section 101 of the *Evidence Act 1906* (since repealed) referred only to children under the age of 12 years. For all practical purposes, therefore, children 12 years and over are presumed competent to take the oath in the same manner as adults. Furthermore, the corroboration requirements related to the unsworn testimony of children do not apply to the unsworn testimony of those over the age of 12 years (LRCWA, 1990, pp. 6-7).

At common law, there was a rule of practice that, even when a child gives *sworn* testimony, the trial judge should warn the jury that, although they may permissibly choose to convict the accused it would be dangerous to do so in the absence of corroborative evidence (Warner, 1991, p. 170). Thus even when permitted to give evidence, whether by sworn or unsworn testimony, children's evidence had retained the stigma of unreliability.

The Argument for Legislative Reform

The need for legislative reform in this state was first officially articulated by the Child Sexual Abuse Task Force which finalised its report to the Western Australian government in 1987. This Task Force recognised the need to minimise, as far as possible, the negative impact of legal proceedings on the child. In all, 17 of their 64 recommendations dealt with proposed amendments to legal proceedings (Manley & Bellett, 1994).

The Task Force concluded that "the law regarding the evidence of children presents difficulties in cases of child sexual abuse, since very often there is no physical evidence of the abuse, and it is frequently difficult to present other evidence that corroborates a child victim's testimony" (cited in LRCWA, 1990, p. 3). They asserted that, among the obstacles to successful prosecution in cases of child sexual abuse, certain aspects of the law of evidence were paramount.

Among their concerns were:

- The inability to obtain a conviction on the unsworn, unsubstantiated evidence of a child under 12 years;
- The requirement that children must give evidence in open court, in the presence of the accused; and
- The additional requirements imposed on children, but not adults, who wish to give unsworn testimony (that is, that they be "possessed of sufficient intelligence" to justify reception of the evidence - s. 101 *Evidence Act 1906*).

(LRCWA, 1990, pp. 3-4).

In April 1990, the Law Reform Commission of Western Australia published their Discussion Paper on Evidence of Children and Other Vulnerable Witnesses, having been asked to review the law and practice governing the giving of such evidence in legal proceedings. They specified that the incentive for the review had arisen largely from the growth in public awareness of, and concern about, the sexual abuse of children (p. 3).

The report drew on a growing body of psychological literature which challenged the basic assumptions which regulated legal practice involving the reception of

children's evidence. It had traditionally been accepted that children's evidence could not be relied upon because:

- children have no sense of ethical responsibility and are therefore inclined to tell lies;
- children have difficulty differentiating reality from fantasy; and
- children do not have adequate cognitive skills to either understand or accurately describe what happened

(LRCWA, 1990, p. 9).

These concerns are not validated by more recent psychological literature. Contemporary evidence suggests that children are no more likely to be dishonest than adults, and when they do tell lies, it is for the same reasons as adults - reasons which include the avoidance of punishment or embarrassment, the protection of a loved one, and as a 'social grace' (Flin & Spencer, 1995; Dixon, 1994b; Scutt, 1991). With particular regard to child sexual abuse, it is claimed that demonstrable lying is very rare - probably lower than for adult witnesses (Bussey, 1992, p. 69). Sexual contact is considered unlikely to figure in children's fantasies (LRCWA, 1990, p. 10) and, similarly, the fabrication of sexual encounters is postulated as unlikely, because these are believed to be beyond a child's expected levels of maturity and experience (Brennan, 1993).

There is now general agreement among child psychologists and psychiatrists that the accuracy of recall of children is probably at least as good as that of adults, although older children and adults will remember for longer and in more detail (LRCWA, 1990, p. 10; Foulsham, 1991, p. 215; Davies & Brown, 1978). The age effects are most

noticeable when the memory test is free recall rather than prompted recall (Flin & Spencer, 1995, p. 179), which has resulted in suggestions that the types of questions asked of child witnesses, and the form of testimony required of them, is a more important consideration in terms of the quality of their evidence than is the issue of memory itself. Thus it has been asserted that judges, magistrates, lawyers and police prosecutors involved in cases involving child witnesses should receive special training in the social, physiological and cognitive development of children (Scudds, 1991, p. 87), even to the point of developing a legal subspecialty in this area (Oates and Tong, 1987). If, as has been suggested (Warner, 1991, p. 170), even young children are able to provide reliable testimony if questions are appropriately tailored to their level of cognitive development, then greater understanding of the strengths and weaknesses of children's intellectual abilities "should assist the interviewers in adopting an effective technique - one which will enable the child to share their memories without diminishing the evidential value of the interview" (Flin & Spencer, 1995, p. 186).

In light of these developments, the corroboration requirement imposed on the testimony of younger children must be viewed as indicative of the basic distrust with which the court regards all unsworn evidence - but more particularly that of a child. An important result of this distrust is a general belief that corroborative evidence cannot take the form of further (independent) unsworn testimony. The consequence of this belief is "that, even in a case where there may be a large number of witnesses, if those witnesses are all children judged unable to take the oath ... then no conviction will follow unless there is other independent sworn evidence implicating the alleged offender" (LRCWA, 1990, pp. 8-9). The apparently consistent recall of a number of children is considered to be no different than one child's recollection.

This is particularly pertinent when you consider that children are most often called to give evidence with regard to their own experience as victims (ALRC, 1992, p. 1). In cases of child sexual abuse, for example, the corroboration requirement has been described as presenting a "formidable" (Davies, 1993, p. 284), if not virtually "insurmountable" (Scutt, 1991, p. 130) difficulty for successful prosecution. Abusive acts are frequently conducted in private with no witnesses other than the victim, leave no medical evidence or produce inconclusive clinical findings, and the alleged perpetrator denies any wrongdoing (Davies, 1993, p. 284; Harrison, 1992, p. 30; Scutt, 1991, p. 130). Thus, if corroborative evidence was not available, legal proceedings were rarely commenced (Warner, 1991, p. 171). Because of this, "... it is argued that a corroboration requirement unduly discriminates against the testimony of children and thereby effectively prevents the conviction of persons who have committed offences against children" (Ligertwood, 1993, p. 360).

This is obviously far from ideal. Although it is unacceptable in light of current knowledge to brand children's evidence inherently unreliable, however, it is equally unacceptable to proceed on the assumption that all children's evidence is credible and reliable (Carmichael & Sarre, 1994, p. 118). The focus needs to be on the evaluation of the individual child witness, rather than on children as a class of witness. The aspects of The Act which facilitate this individual assessment are, therefore, seemingly justified. Rather than creating special provision for hearing the evidence of children, these reforms bring children on to equal footing with other witnesses. This may facilitate the reception of their evidence, however the effect on the *rights* of the defendant are seemingly minimal.

The second express concern voiced by the Law Reform Commission was the need to alleviate, or at least minimise, trauma for the child witness. There is a limited amount of research pertaining to the psychological effects experienced by witnesses due to their involvement in a criminal investigation and trial (Flin, 1990, p. 275). However, it is generally accepted that involvement in legal proceedings can be traumatic to a child, inhibiting their testimony or possibly even contributing to a false retraction or refusal to testify at all (Warner, 1988). High levels of anxiety are not conducive to effective testimony in either children or adults (Davies, 1993), and although the specific impact of stress and anxiety on witnesses' ability to recall and recount events is somewhat uncertain, there is abundant anecdotal evidence to the effect that witnesses believe that the quality of their evidence was negatively affected by the anxiety they experienced in the witness box (Flin, 1990, p. 277).

Introduction of The *Acts Amendment (Evidence of Children and Others) Act 1992*

In November 1992, legislation was enacted in the form of the *Acts Amendment (Evidence of Children and Others) Act 1992* (Appendix 2). The stated intention of this legislation was to address some of the difficulties encountered by children, and other witnesses designated as particularly vulnerable, when giving evidence (Berinson, 1992, p. 15). The major provisions of this legislation to be discussed here are as follows:

- Section 100A, allowing the unsworn evidence of a person not competent to take the oath or swear their solemn affirmation, was amended to specifically include a child who is of or over the age of 12 years.

- Section 101 of the *Evidence Act 1906* was repealed. The most significant feature of this is the abolition of the mandatory statutory requirement that the unsworn evidence of a child under 12 years must be corroborated in order to obtain a conviction.
- By the insertion of section 106B, children aged under 12 years are deemed competent to give sworn evidence if, in the opinion of the court, the child understands that -
 - (a) the giving of evidence is a serious matter; and
 - (b) he or she in giving evidence has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

This removed the requirement that a child must believe in God or in a divine sanction for telling a lie. Furthermore, this section permits a child who is competent to take the oath, but does not wish to do so, to make a solemn affirmation in the same way as an adult.

- Section 106C permits a child under 12 to give unsworn evidence if he or she *does not* appear to understand that 'the giving of evidence is a serious matter' and/or the special obligation to tell the truth in giving evidence (which were the previous requirements under section 101). The main criteria is that the child is able to give an *intelligible account* of events which he or she has observed or experienced. Thus very young children are now able to provide testimony.

- Section 106D explicitly precludes a corroboration warning being given to the jury solely on the basis that the witness whose evidence is uncorroborated is a child, whether that evidence be sworn or unsworn. The "age of the witness should not be a basis for comment as this may imply that child witnesses are inherently less trustworthy or reliable than other witnesses" (Dixon, 1994a). However, this does not override the authority of the court to issue such a warning where, with regard to the evidence of a *particular individual*, there is considered an appropriate need for a warning to be issued on other grounds.
- Child witnesses aged under 16 years now have the right to have a support person seated near them throughout the trial. This person must be approved by the court, and must not be a witness in, or party to, the proceedings (s. 106E);
- Counsel may seek the assistance of an appropriately qualified person in communicating with a child witness who may have difficulty in understanding questions or in framing answers which satisfy the questioner (s. 106F). The function of this person is, if requested by the judge, to communicate and explain to the child the questions put to the child, and to communicate and to explain to the court the evidence given by the child.

Any person appointed under this section must take an oath, or make a declaration in such form as the Court sees fit, that they will perform their duties "faithfully". If, in the course of their duties, they wilfully make any false or misleading statements - either to the child or to the court - they commit an indictable offence.

- Under section 106G, an unrepresented accused - one who has not engaged the services of legal counsel - may not directly cross-examine a child witness under the age of 16. Instead, all questions must be put to the child through an intermediary. This intermediary will be either the judge, or another person approved by the court, and questions must be repeated accurately to the child.

It is believed that this will facilitate the child giving evidence by reducing any perceived threat the child may feel in the presence of the accused.

Further provisions apply in Schedule 7 proceedings. In addition to applications for care and protection orders under the *Child Welfare Act 1947*, Schedule 7 proceedings incorporate a variety of criminal hearings relating primarily to alleged sexual offences or other offences causing physical harm (Appendix 3). These provisions are usually justified on the basis of the need to reduce the trauma associated with both face-to-face confrontation with the defendant, and with telling embarrassing stories in the "intimidating atmosphere of a traditional courtroom" (Dixon, 1994a). The provisions include:

- Under section 106H, the admissibility of certain out-of-court statements deemed "relevant" to the proceeding, which were made by the child to another person prior to the proceedings being commenced. The defendant must be provided with a copy of the statement if recorded, otherwise with full details of the statement, and the child must be available for cross-examination.

- Sections 106I - 106M allow for the admission of video-taped statements, video-recorded evidence in chief and/or video-recorded evidence taken at a pre-trial hearing.
- Section 106N provides for the utilisation of closed-circuit television or screening arrangements as a standard requirement, unless the trial judge is satisfied that the child witness is able, and wishes, to give evidence in the courtroom in the presence of the defendant. Thus the child does not have to be in the presence of the accused (in the case of closed-circuit TV) or in view of the accused (when CCTV is unavailable). The child must remain visible to the court - specifically to the parties involved and to the jury - throughout their testimony.

There is an additional requirement under section 106P of The Act that the judge in a jury trial must instruct the jury that the procedure involving use of CCTV is a routine one, and they are not to draw any inference from it as to the defendant's guilt or innocence.

The Act also makes provision for a person other than a child to be designated as a special witness, giving them access to a support person and to the use of video-recorded evidence and closed-circuit television.

Although there is widespread support for the introduction of such measures to address the needs of the child witness (Dixon, 1994a; LRCWA, 1991; Flin, 1990), it does not appear that sufficiently rigorous evaluation has been given to the corresponding effect on defendants' rights. It will be argued that it is the measures introduced to reduce the trauma associated with involvement in the trial process which are the most

controversial in terms of their incompatibility with the rights of the defendant. Although the traditional treatment of children as a "special class" of persons under the law has already been acknowledged, a central consideration in this instance is whether, in so doing, we create a "special class" of defendant whose rights receive less consideration than a defendant facing different criminal charges.

Whilst cross-jurisdictional comparisons are always difficult, similar legislative reforms in other jurisdictions have been criticised on a number of grounds. In the United States, for example, where individual rights are clearly delineated in the Constitution, a special provision enacted in the state of Texas to admit the videotaped testimony of a child under the age of thirteen was held to be unconstitutional on the basis that it infringed the constitutional right to due process (Warner, 1988). Similarly, the use of screening techniques and closed-circuit television have been successfully contested as infringing a defendant's Sixth Amendment right to confront their accuser (*Coy v. Iowa*, 487 U.S. 1012 [1988]). By contrast, in the United Kingdom support has been generated for the view that there is no absolute right to face-to-face confrontation. In the case of *Smellie v. R* ([1919] 14 Cr App R 128), where the defendant was removed from the courtroom while his daughter gave evidence, an appeal based on the (alleged) common law right to "be within sight and hearing of all the witnesses throughout his trial" was dismissed. As the United Kingdom has been instrumental in providing Australia with a constitutional "model" since white settlement, and since neither England nor Australia recognise a constitutional right to confrontation, the considerations raised in these countries are bound to differ from those in the United States (Cashmore, 1990).

Current arguments which seek to downplay the effect of Western Australian legislative reform on the rights of the defendant are often far from compelling. For

example, section 635 of *The Criminal Code* [WA] specifies that criminal trials must take place in the presence of the persons accused unless, by their conduct (for example, continued interruptions), they render continuation of the proceedings in their presence impracticable. Claims such as that offered by the Law Reform Commission of Western Australia (1991, p. 67) that Section 635 cannot be held as an "insuperable objection" to the use of closed circuit television because this medium was unforeseeable when the legislation was enacted are not sufficiently convincing to justify the overriding of accepted practice without more stringent or reasoned argument. Whilst there is no question that modern technological advancement has exceeded all expectations of the legislators responsible for the original statute, mere availability of technology is not always sufficient grounds to warrant its utilisation.

Much of the contention arises from the ambiguity associated with the nature of defendants' rights, and the lack of clear guidelines for the resolution of conflict where competing interests are involved. Australian jurisdictions have no document or charter which clearly specifies the precise nature of the rights of the criminal defendant, rather we are dependent on a somewhat piecemeal concoction of common law practice, conceptions of natural law and natural rights, rights created or reinforced through the ratification of various treaties (although these are not automatically legally enforceable) and legislative stipulations. Until a clear delineation of defendants' rights is established, we have no basis from which to evaluate the legitimacy of legislative reform.

CHAPTER TWO - THE NOTION OF RIGHTS

The term "human rights" - which replaces what were formerly referred to as the "rights of man" or, at an earlier time, "natural rights" (Cranston, 1983) - is commonly heard in modern society. Despite frequent exhortations to the notion of rights, there appears little agreement, either today or historically, as to the precise definition of what a right actually *is*. Accordingly, in discussing the (alleged) human right to privacy, Wellman (1978, p. 368) raises three philosophical questions equally applicable to any human right: firstly, how do we know that there really is such a human right; secondly, assuming that the right exists, what duties or obligations does it imply; and finally, precisely how is the content of the right to be defined?

Natural rights theorists propound the existence of rights, common to all people, which are inherent in, and integral to, human existence. In the 17th century, for example, Locke promoted a conception of natural law based on three propositions: that the natural order of the universe was ordained by God; that, through the use of reason, man is able to discover the valid and objective rules of conduct which were prescribed by God; and that these rules can be known with certainty (Cranston, 1983). Locke (1690) also argued that men were equally entitled to enjoy the rights and privileges of the law of nature, specifically the natural right to life, liberty and estate (property).

Natural rights philosophy has been undeniably influential in motivating political action. The Bill of Rights enacted by the English Parliament in 1689 translated the natural rights espoused by Locke into positive legal rights, incorporating (among other things) the right for any person charged with a criminal offence to a fair and public trial by jury (Cranston, 1983), which had been acknowledged since the Magna Carta. Claims

in the preamble to the 1776 American Declaration of Independence that it is "self-evident that all men are created equal [and] that they are endowed by their Creator with certain inalienable rights" and the assertions in the 1789 French Declaration of the Rights of Man that "Men are born, and always continue free and equal in respect of their rights" and that "The end of all political associations is the preservation of the natural and imprescriptible rights of man" (translated in O'Neill & Handley, 1994, pp. 8-9) are but two examples of the increasing affiliation with natural rights principles which was evident throughout the 18th century. When viewed objectively, it must be concluded that, irrespective of the truth of natural rights philosophy and its failure to consider the realities of social groups, classes and power elites, the natural rights doctrine was a powerful and influential political philosophy which inspired action on the part of a great many people (Boller, 1977).

Bentham, one of the most outspoken early critics of natural rights, adhered to the view that only from "real" (or positive) law could one acquire "real" rights. He termed natural law "imaginary", claiming that, as such, it could spawn only imaginary rights which, rather than being imprescriptible as claimed, were the equivalent of "rhetorical nonsense, - nonsense upon stilts" (Bentham, 1843). From Bentham's perspective, political obligation to such an untenable precept as natural rights was entirely unrealistic and could not create enough of an obligation on legal and political structures to act. Similarly, Sumner (1913, pp. 79-83) asserted that nature was more harsh than benign, that men were not born equal, and that human rights were not naturally bestowed, rather they were the product of civilisation. Legislatively framed positive law, in contrast to the metaphysical concepts of natural law and natural rights, was increasingly propounded as the only means through which rights could be attained and enforced: politicians such as Burke asserted that belief in natural rights implanted "false

ideas and vain expectations into men destined to travel the obscure walk of laborious life" (Burke, 1832, pp. 180-181), encouraging revolutionary action which posed a threat to the methods of compromise, employed by competing interests, which were necessary for the prosperity of civil society (Margolis, 1978).

The rise of utilitarianism in the 19th century - originally derived from the work of Bentham - challenged the legitimacy of natural rights doctrine. The utilitarian emphasis on maximising the greatest happiness for the greatest number, in contrast to the natural rights concern with the specific interests of individuals (Jones, 1994) was indicative of this changing political focus. Whereas the rights espoused in the 18th century were largely concerned with protecting the individual from arbitrary state powers, the 19th century saw the development of interest in socio-economic rights which were directed not only at the state (through claims for the provision of services and facilities), but also against other citizens (such as employee against employer). Western democratic governments gradually began to recognise and accept a responsibility to address a variety of social and economic injustices at a societal level, particularly those pertaining to working conditions and exploitation of labour, public health, welfare and education (O'Neill & Handley, 1994, p. 10). In such instances, concern for the citizen acquired a collective, rather than individual, focus. Although there remained a feeling for individual rights, it became conceivable that the rights of the individual and the rights of society might, at times, be incompatible. Consequently, it became possible to view the rights of the individual as subservient to the wider needs of society as a whole.

Here rests perhaps the most fundamental concern with the concept of natural rights. As suggested by Edwards (1996) there is an intuitive feeling that natural rights "are, or should be, absolute and infeasible", yet one must question how these rights are to be

upheld if the interests of the individual to whom the rights must, of necessity, apply are not always held to be of paramount importance. Indeed, it is the notion of the indefeasibility of natural rights which has attracted some of the most vociferous, and the most enduring, criticism. In order to be absolute, rights must have a solid conceptual foundation, the content of the right - and any correlative obligations - must be clearly delineated and there must be appropriate channels through which to seek redress for alleged breaches of rights. As the Australian Law Reform Commission has noted, "rights without remedies may be no more than rhetoric" (cited in Evans, 1984; cf. Allen, 1990, p. 159); if a particular right cannot be claimed in practice it becomes difficult to substantiate it as a right *per se*.

More recent theorists have endeavoured to explain and define the nature and content of rights in a manner which facilitates their being upheld in the political arena. Although it is often suggested that rights necessarily correlate with duties, Hohfeld's (1919) classification of rights recognised that legally enforceable rights could take one of four forms: a claim, a privilege (or liberty), a power or an immunity. *Claims* parallel the traditional narrow understanding of a right, whereby the right of one party is matched by an obligation or duty imposed on some other party. The *liberty* or *privilege* to undertake or participate in a particular activity exists provided, in so doing, no prohibition against such activity is broken (that is, there is no claim against the agent participating in such activity). A legal *power* is dependent upon a person's legal competence to perform an act which impacts upon another party (invoking the correlative of legal liability), and a legal *immunity* arises when there is a disability (or, in Hohfeldian terms, a "no-power") on the part of others to do a particular thing (Hohfeld, 1919; cf. Martin, 1993, pp. 29-30). As a category, legal rights are defined by Wellman (1978, p. 369) as "institutional ... [being] created, defined and maintained by

the legal system in some society". As such, they are neither fixed nor, as a result, absolute: whenever circumstances require, they can be redefined by the prevailing legal system.

Internationally, a proliferation of rights-based declarations, covenants and agreements have sought to put the issue of human rights squarely on the political agenda. Although it must be acknowledged that such covenants are not automatically legally enforceable in specific jurisdictions, they provide a visible indication of the stated intent of the relevant signatories to uphold the rights contained therein. Tay (1986, p. 11) suggests that international human rights agreements should be more accurately viewed as indications of the direction the law *should* take: as redress through international courts of law is unlikely except for gross breaches of human rights agreements, there is a need for individual jurisdictions to enact appropriate (that is, supportive) legislation. Whilst this may be seen as a concession to the superiority of positive law, there is a tacit understanding that legislation should enhance, not override, the consideration of certain fundamental or natural rights.

It is important to note that even many rights-based covenants in the natural rights tradition in effect qualify the notion of "absolute" rights. For example, The United Nations' International Covenant on Civil and Political Rights acknowledges, in the preamble, the "equal and inalienable rights of all members of the human family". In Article 6, however, the "inherent right to life" shared by every human being is qualified by the injunction that "No one shall be *arbitrarily* deprived of his life" [italics added]. Again in Article 9, the right to liberty is acknowledged "except on such grounds and in accordance with such procedure as are established by law". There is perhaps no more

concrete indication of the modern day realisation that even the so-called natural rights are defeasible - not only in principle, but also, in prescribed circumstances, in practice.

Protection of Rights in Australia

Having established that, unless enacted positively in law, even the so-called natural rights are defeasible, it is necessary to identify the precise means through which human rights are protected in Australia. In practice, natural rights may be incorporated into a common law legal system by one of three means: through incorporation into the Constitution, in the meta-physical principles of the common law, or as statements of political aims for society (Edwards, 1996). Human rights protection in Australian society is, in varying degrees, dependent upon each of these.

Constitutional rights have been championed as the highest order rights within our legal system (O'Neill & Handley, 1994, pp. 26-28). The Australian reality is, however, that constitutional guarantees of fundamental rights are remarkably few, raising concern as to the adequacy of legal protection for individual rights in this country (Jones, 1994). It is widely accepted that explicit rights within the Australian Constitution are limited only to trial by jury (s. 80), freedom of religion (s. 116), acquisition of property (s. 51), voting rights (ss. 24 and 41), prohibition of discrimination against interstate residents (s. 117) and freedom of movement between the states (s. 92) (Jones, 1994; cf. O'Neill & Handley, 1994, pp. 44-74). In framing the federal constitution, the incorporation of a Bill of Rights similar to that enacted by the United States was "consciously and deliberately rejected" (Tay, 1986, p. 18). Instead, there is a traditional acceptance in both legal and political spheres that the common law principles upon which Australian

law is founded are sufficient to ensure that citizens are entitled to "due process and equality before the law" (Fletcher, 1993).

Jones (1994) suggests that our common law inheritance was indicative of the prevailing "conservative" philosophy in 18th and 19th century Britain, whereby it was maintained that the only rights were those identifiable in the laws and customs of previous social orders. It was this "inheritance of collective wisdom about rights" rather than the philosophy of natural rights, which drove Government policy: it was believed that "Common law precedents provided a stronger protection for individual liberties than abstract and ill-defined rights" (Jones, 1994). This perspective is not without its dissenters. Opponents contend that, although the common law has developed over numerous years on a case-by-case basis, it "has not developed general statements of principle which may be relied upon in the courts to protect human rights" (O'Neill & Handley, 1994, p. 85). Thus the ambiguity associated with the concept of rights - and more particularly, the enforcement of rights - has not been satisfactorily resolved.

There are a number of concerns raised with regard to common law conceptions of the protection of individual rights. Perhaps most important is the inherent vulnerability of common law rights to abrogation or removal by statute law (Jones, 1994; O'Neill & Handley, 1994, p. 89). As noted previously, all legal rights are both created and maintained by a given legal system. If a specific aspect of common law tradition (or precedent) comes to be regarded as either obsolete or as insufficient to accommodate new situations or cases, the applicable rule may be redefined by legal institutions such as the courts or the legislature (Wellman, 1978). Where the legislature intervenes, citizens are left to take it 'on trust' that, in accordance with the notion of a responsible and representative government, individual rights will be upheld (Jones, 1994). This is

by no means guaranteed. There is virtually unlimited scope for the legal - that is, statutory - curtailment of common law rights unless such restriction is itself constitutionally forbidden (Jones, 1994). Furthermore, whilst the judiciary is perceived as the protector of individual rights through the application of the rule of law (Jones, 1994), a "court cannot deny the validity of an exercise of a legislative power expressly granted merely on the ground that the law abrogates human rights and fundamental freedoms or trenches upon political rights which, in the court's opinion, should be preserved" (Brennan J, cited in Jones, 1994).

The push for rights-based legislation has been a recurrent theme in modern political history. In 1973, a Human Rights Bill introduced by Senator Lionel Murphy - which sought to protect the rights contained in the International Covenant on Civil and Political Rights - was blocked in the Opposition-controlled Senate (Tay, 1986, p. 22). A second attempt to introduce federal legislation little more than a decade later also faltered when the *Australian Bill of Rights* 1985 was allowed to lapse. On this occasion, heated political and community debate focused on "the issue of States rights and the incursion of Commonwealth power into areas of State responsibility" (Fletcher, 1993) rather than on the proposed rights *per se*. Under our federal system, the power of the Commonwealth government to legislate for the nation as a whole is constitutionally limited: there is little provision for legislating in the human rights area, and attempts to justify proposed legislation under sections such as 51(29) - "External Affairs" - the section which prompted debate in 1985/86, have been largely unsuccessful (Weeramantry, 1990, p. 240). It seems, therefore, a reasonable suggestion that the decision not to proceed with an Australian Bill of Rights was influenced by a perceived need to retain the limits applicable to Commonwealth power, rather than being necessarily indicative of public and / or political attitudes to human rights legislation

in general. This is perhaps reflected by the more recent (albeit limited) federal enactment of rights-based legislation mandating (among other things) anti-discrimination and equal opportunity policies, areas which were conceivably inadequately protected under common law practice.

Australia's federal government has also demonstrated a commitment to protection of human rights through its ratification of all major 20th century international declarations of rights. Certainly, many of the fundamental rights proclaimed in documents such as the Universal Declaration of Human Rights and the Covenant on Civil and Political Rights - for example, the concept of equality before the law, the right to a fair trial, and the presumption of innocence - are conceptions which have evolved in common law history and are, therefore, a pre-existent component of our legal inheritance (Tay, 1986, p. 17). Thus it is through both our common law heritage and the ratification of the major international human rights treaties that Australia has assumed an obligation to ensure that the rights contained therein are upheld within its boundaries (O'Neill & Handley, 1994, p. 113). Australia has also ratified the Optional Protocol of the International Covenant on Civil and Political Rights, which allows an individual claiming a violation of their specified rights, and having exhausted all available domestic remedies, to request investigation by the International Human Rights Committee. As with many issues under international law, however, the Committee's adjudication may be construed as only politically influential or persuasive rather than legally enforceable (Fletcher, 1993). Indeed, it has been suggested that the faith placed in international supervision is rather over-optimistic and we should instead be developing the means through which greater domestic scrutiny is facilitated (Jones, 1994).

CHAPTER THREE: THE RIGHT TO A FAIR TRIAL

That the right to a fair trial is of international concern is evident from most 20th century declarations of human rights. In 1948, the right to a fair trial was incorporated into the United Nations' Universal Declaration of Human Rights (Article 10), and has since been reiterated in Article 14 of the United Nations' International Covenant on Civil and Political Rights. It is similarly acknowledged in various documents of more localised jurisdictions, such as Article 18 of the 1948 American Declaration of the Rights and Duties of Man and Article 6 of the 1966 European Convention on Human Rights.

Pre-dating Australia's ratification of various international agreements, Mason (1995) states that, from our common law traditions, the right to a fair trial was already established as a central precept of our legal system. The necessary elements of a fair trial are, however, neither absolute nor immutable: the specification of these elements falls under the jurisdiction of the courts - and ultimately the High Court, which is Australia's final Court of Appeal (Mason, 1995). As part of the process of law reform generally, this process has been described as the "onward march to the unattainable end of perfect justice" (*Jago v District Court [NSW]* [1989] 168 CLR 23 per Brennan J at 41), a statement which encapsulates the conviction that the judicial process, no matter how strictly regulated, cannot *guarantee* that all parties involved will perceive an equitable or 'fair' outcome.

Uglov (n.d.) asserts that there are three aspects to legal fairness: the fairness of the rule, the fairness of the procedure, and the fairness of the decision. "The doctrine of sovereignty of Parliament meant that from the 17th century the courts would not

interfere in the substantive quality of a statute" (Uglove, n.d.), thus the substantive nature of any given rule - and, as a consequence, responsibility for fairness of the rule - must rest with the legislature. At this point it is pertinent to reiterate the concern, outlined previously, that the legislature does not always - or at least, of necessity - give adequate regard to individual rights.

The practices relevant at the trial stage are those which are encompassed under the banner of procedural fairness. At common law, Uglove (n.d.) cites the elements of procedural fairness as being:

- the right for the defendant to be made aware of the nature of the charges and evidence against him or her
- the right to legal representation
- the presumption of innocence, which incorporates the right to silence and the burden of proof being placed on the prosecution
- the applicable standard of proof being beyond reasonable doubt
- the right to a public trial in a neutral forum
- the right to cross-examine and test the prosecution evidence
- the right to call evidence and give evidence on the accused's behalf
- the right of appeal.

From an analysis of a number of documents, namely the International Covenant on Civil and Political Rights, the European Convention on Human Rights, and the Inter-American Convention on Human Rights, Harris (1967) identifies four categories to which the notion of fairness is applicable: the character of the court, the public nature of the hearing, the rights of the accused in conducting his or her defence, and a

miscellany of other single rules. He asserts that: courts must be established by law and must remain both independent and impartial; that, with few exceptions (such as the interests of justice, for reasons of public order, or for reasons of national security), the hearing must be conducted in public; that accused persons must be informed of the charge against them and must be given adequate time and facilities to prepare a defence; that the accused has the right to obtain legal representation, the right to cross-examine witnesses, the right to obtain the attendance of and to examine witnesses on behalf of the defence, the right to be present at his or her trial, the right to an interpreter, the right to freedom from self-incrimination and the right of appeal; and that the defendant must be afforded the presumption of innocence.

Importantly, Harris (1967) acknowledges that "there are other indefinable characteristics of a fair trial. It is possible for all the rules which can be formulated with any precision to be observed and yet for the trial to be such that a fair hearing is not given". He offers as an example the need for the conduct of the court to be appropriately "serious". This concern was similarly voiced by Gaudron J (in *Dietrich v The Queen*, [1992] 177 CLR 292 at 70), who stated "the law recognises that sometimes, despite the best efforts of all concerned, a trial may be unfair even though construed strictly in accordance with the law". Thus there is a sense that fairness and the law pertaining to legal practice are independent constructs which are not necessarily entirely compatible, a perspective supported by Gaudron J who recognises that there are various contexts in which the requirement of fairness is "independent from and additional to the requirement that a trial be conducted in accordance with law" (*Dietrich v The Queen* [1992] 177 CLR 292 at 363). In overturning the original conviction in *Dietrich*, the High Court emphasised the right to a fair trial as a "fundamental prescript of the law of this country" (per Deane J at 31) indicating that the defining characteristic of fairness must

be given primacy over other procedural concerns. It is apparent, therefore, that procedural objectives and legal practice must be developed and implemented in accordance with the right of the accused to a fair trial.

Although Machan (1989, p. 63) claims that proponents of the natural rights tradition seek to explain human rights in a way which eliminates the possibility that specific rights can conflict either among each other for the one individual, or among each other between different individuals, this proposition is difficult to sustain. One of the principal concerns in the loosely defined nature of natural rights - the fact that the specific rights claimed under this doctrine differ between individual theorists on the basis of their conception of nature (O'Neill & Handley, 1994, p. 8) - is evidence of the difficulty involved in actually specifying rights with any degree of certainty. Exhortation to legal rights does not, however, necessarily resolve this dilemma: evidence of conflicting goals, values and interests inherent in the legal system are commonplace in jurisprudential literature (Spader, 1984), whereby prioritisation of respective rights becomes a central concern. There is perhaps no better example of this conflict than that between opposing parties in a criminal trial:

Invariably invocation in a given case of the right to a fair trial generates an element of tension between the implementation of the right and some other competing interest; for example, the public interest in securing the conviction of persons who have committed criminal offences. In that respect, the right to a fair trial may be compared with free-standing fundamental rights protected by a statute or constitution (Mason, 1995).

The conflict created by competing interests in a criminal trial is not satisfactorily resolved by the various international human rights documents. This is particularly apparent in trials involving juveniles. For example, Article 14(1) of the United Nations

International Covenant on Civil and Political Rights states that "any judgment rendered in a criminal case ... shall be made public except where the interest of juvenile persons otherwise requires"; Article 6(1) of the European Convention on Human Rights requires that all judgments be made public, however allows that "the Press and public may be excluded from all or part of the trial ... where the interests of juveniles or the protection of the private life of the parties so require". Although the protection of the interests of juveniles involved in criminal proceedings is a notable concern, an equally important consideration is the realisation that, in the enthusiasm to promote victims' rights (irrespective of whether or not the victim is a child), the legal system must not lose sight of the necessary regard for the rights of alleged offenders (Anderson, 1995). Thus the legitimacy of legislating to address the perceived needs of the child witness is not fully justified when the resultant legislation impacts upon the legitimate right of the defendant to a fair trial.

Thomas Paine also argued that equality of rights is not necessarily matched with equality of powers: In a state of nature, some people will always be more able to achieve or exercise their rights than others. Additionally, there is no guarantee that even the strongest will necessarily be able to do as they please, "for their natural powers fall somewhat short of their natural wants" (cited in Boller, 1977). Associated with a lack of power is the concept of vulnerability: just as different groups in society hold more or less power than others, so too do different groups experience a greater or lesser degree of vulnerability than others. Children are acknowledged as particularly vulnerable by virtue of their lack of autonomy and, in some cases, inability to speak for themselves (Sieber, 1992, p. 94). The particular vulnerability of the child is, indeed, acknowledged through the enactment of the particular legislation under investigation in this thesis, much of which is directed at enabling the child to give evidence more readily.

Interestingly, however, another classification of vulnerability relates to those who, for whatever reason, are deemed unlikely to attract public sympathy (Sieber, 1992, p. 93). It seems prudent to assume that defendants in (predominantly) child sexual abuse cases - upon whom the provisions of The Act impact - could be so classified.

The resolution of conflicting interests in a trial situation is difficult. There is, however, a widespread acceptance that the right to a fair trial largely overrides other individual claims to rights within the context of the trial setting (Jones, 1990, p. 8; Uglow, n.d.). The conception of a fair trial is given priority over more "pragmatic aims such as the determination of truth or law enforcement In the court, the accused's rights are paramount because the covert function of the trial is its concrete illustration of a fair and just society" (Uglow, n.d.). The notion of fairness, extraneous to resolution of the dispute in question, highlights the fact that such resolution is not, of necessity, the ultimate goal of the court (Ligertwood, 1993, p. 538). Therefore, although attempts must be made to balance competing interests in a criminal trial, the defendant's right to a fair trial must be preserved as the definitive consideration. If an equal balance between the rights of the defendant and those of the victim can not be achieved, procedural fairness demands that the defendant receive any benefit of the imbalance.

CHAPTER FOUR - IMPACT OF THE ACT ON THE RIGHT TO A FAIR TRIAL

Having briefly reviewed the philosophy pertaining to rights, the provisions for the protection of individual rights which are currently available within the Australian legal system, and the specific components of the individual right to a fair trial, the remainder of this thesis will provide an analysis of potential incompatibilities between The Act and defendants' rights. Specifically, this discussion will address the right to a fair trial, and the various provisions contained in The Act which impact upon this notion of fairness.

Closed Circuit Television, Screening, and the Presumption of Innocence

Australian criminal law dictates that, where allegations are made against an accused person, that person is held to be innocent until proven guilty (Cahill & O'Neill, 1991, p. 103). Specifically, the presumption of innocence serves as a means of assigning the burden of proof to the prosecution (Morton & Hutchison, 1987, p. 14; Heydon, 1984, p. 43). The prosecution must provide evidence of the guilt of the accused, and this evidence must establish guilt beyond a reasonable doubt in order for a conviction to be sustained (Morton & Hutchison, 1987, p. 2).

It has been argued (Turner, 1994, p. 357) that, in cases of child sexual abuse, "... the defendant starts out with a double advantage - there is not merely a presumption of innocence but a presumption that the crime is unthinkable. Most people, including jurors, do not want to believe that an adult is capable of sodomising a child". This view is supported by Dixon (1994b), who suggests that adults may find it attractive to assume that a child's allegations of sexual abuse are no more than fanciful imaginings, because

acceptance of such abuse as a reality is intolerable. She concludes that this abhorrence extends to jurors who, due to an unwillingness to accept that anyone could commit such a horrific crime, may be swayed by such suggestions should they be raised by the defence during the trial. She concludes that the ultimate outcome is an increased likelihood of acquittal.

Conversely, it has been suggested that members of the public have a tendency to consider a person accused of a crime to be in fact *guilty* of that crime without necessarily giving adequate regard to the evidence of the case (Netteburg, 1987, p. 288), raising concern that the defendant actually starts out at a disadvantage. Additionally, rather than viewing children as inherently unreliable witnesses, it has been suggested that juries might in fact be inclined to underestimate the ability of a child witness to lie (McGinley & Wayne, 1988). This is perhaps even more likely when the alleged offence is one as emotive and distasteful as child sexual abuse:

Recognising that the offender against children is almost universally despised within the general community should emphasise the need to ensure that a person who is merely the subject of an allegation of child abuse is given a fair hearing before they are 'branded' as a child molester. Because the crime is so seriously regarded a person in that position needs and deserves, if anything, a greater level of protection against being wrongfully convicted (Byrne, 1991, p. 8).

From this perspective, and in recognition of the fact that the defendant may commence the trial already at a disadvantage, "the presumption of innocence cautions the jury to put away from their minds all the suspicion that arises from arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced" (Morton & Hutchison, 1987, p. 3).

Irrebuttable or conclusive presumptions must be accepted by the courts absolutely, whereas persuasive presumptions are accepted until such time as the court is persuaded otherwise and evidential presumptions are accepted until credible evidence to the contrary is provided (Ligertwood, 1993, p. 315). "Facts may be presumed either as a general rule or only upon the establishing of other (basic) facts" - the presumption of innocence is an example of the former (Ligertwood, 1993, p. 315).

Considerable evidence - both anecdotal and, to a lesser extent, empirical research - indicates that one of the most stressful aspects of legal proceedings for the child is being in the presence of the defendant (Whitcomb, Shapiro & Stellwagen, 1985; Flin, Davies & Tarrant, 1988; Cashmore, 1990; Spencer & Flin, 1990, pp. 229-231; Flin, 1990, p. 278; ALRC, 1992, p. 1; Goodman, Levine & Melton, 1992). Concern has been raised that the likely result of such stress or trauma is the inability of the child to provide satisfactory testimony - if indeed they are able to testify at all (ALRC, 1989, p. 4). Largely from this (and similar) evidence it is argued that there is a need to separate the child witness from the defendant throughout the trial, more particularly at the time the child is required to give evidence. If removed from the physical presence of the defendant, it is posited that the ensuing reduction in anxiety will facilitate the provision of more coherent, accurate and comprehensive testimony (Cashmore, 1990; Spencer & Flin, 1990, p. 83).

In Western Australia, this recommendation has been acknowledged as being of sufficient importance to warrant legislative amendment, and is dealt with under section 106N of The Act permitting the use of closed circuit television or screening arrangements. Under these provisions, either:

- the child gives testimony from outside the courtroom, but from within the court precincts, and the testimony is transmitted to the court via closed circuit television - a practice which is also considered beneficial in that it removes the child from the "intimidating" atmosphere of the courtroom (Davies, 1993); or
- the defendant is removed from the courtroom whilst the child gives evidence, however this evidence is transmitted to the defendant via closed circuit television; or
- where closed circuit television is unavailable screening is utilised, ensuring that while the child cannot see the defendant, the child remains visible to the Judge, the jury, the defendant and defence counsel.

Although section 106P of The Act specifically requires that where the use of closed circuit television or screening arrangements are employed the Judge is to instruct the jury that it is a routine practice and no inference as to the defendant's guilt or innocence should be drawn from it, this practice is, at least potentially, problematic. The ability of the jury to overlook the obvious contradictions between the instruction and the practice of separation has not been substantiated with any degree of certainty (Cashmore & Cahill, 1990). This is a fundamental concern because the ultimate effectiveness of the jury warning is most certainly dependent upon whether the jury *perceive* "that the procedure has been adopted because of the accused's presumed guilt, or because there are other significant considerations which make it desirable" (Szwarc, 1991, p. 134). In separating the child witness from the defendant, there is a tacit acknowledgment that the child has reason to be hesitant in giving evidence in front of the accused. "The assumption that the fear is caused by having been abused by the defendant already assumes guilt and violates the presumption of innocence" (Underwager & Wakefield, 1992). Additionally, this assumption ignores the possibility

that any fear expressed by the child may reflect a variety of influences in the interim between making their accusation and delivering their testimony: in particular, "Fear may be learned from adults repeatedly telling a child that the accused has hurt them, is bad, wicked, should be punished, and is to be feared" (Underwager & Wakefield, 1992), rather than a genuine emotion based on past incidents of abuse perpetrated by the accused. Additionally, a witness who has knowingly made a false accusation is likely to be fearful of confronting the accused and giving testimony, thus the expression of fear must not be viewed as indicative of the guilt of the defendant (LRCWA, 1991, p. 72).

Furthermore, although anecdotal evidence provided by jurors suggests that they do not believe their ability to adjudicate on the basis of the evidence was affected by the use of closed circuit television (LRCWA, 1991) there appears to have been no direct empirical evaluation of the adequacy of the jury warning with regard to the presumption of innocence. Empirical studies regarding the effect of closed circuit television on jurors decisions have produce no definitive findings (Cashmore, 1990).

There are ways in which the erosion of the presumption of innocence can be minimised. The Australian Law Reform Commission (1989, p. 16) suggests that making either closed circuit television or screening arrangements a mandatory requirement reduces the likelihood of the jury inferring guilt from the use of the procedure. This eliminates any potential bias associated with the procedure being deemed as warranted by the circumstances of a particular case. Accordingly, under section 106O of The Act, the use of this procedure is mandatory in Western Australia for all Schedule 7 proceedings unless specific application to give testimony in open court is made by the prosecution and approved by the presiding Judge. Cashmore (1990) further suggests that

the preferable mode of giving evidence is for the child to give evidence from outside the courtroom. She suggests that this can be explained to the jury in terms of the intimidating nature of giving evidence in the courtroom generally, without specific reference to the presence of the accused, whereas the removal of the defendant from the courtroom or the use of screens or partitions in the courtroom can only be explained in terms of the effect the accused may have on the child witness. For this reason, removing the child from the courtroom may be viewed as the less prejudicial alternative (Cashmore, 1990; cf. Szwarc, 1991, p. 136). This is also more consistent with the wording of section 635 of *The Criminal Code* [WA], whereby the defendant should be removed from the courtroom only if, by his or her conduct, they render continuation of the proceedings in their presence impracticable.

Thus it is argued that the Western Australian legislation is of concern: in order to minimise the impact of the use of closed circuit television on the presumption of innocence it is the child, rather than the defendant, who should be removed from the courtroom. This is not at present specified as the desired option in The Act. There is also a need to ensure that appropriate closed circuit television equipment is made available in all courtrooms as required to negate the need to use partitions, because whenever such partitions are used the presumption of innocence is, at least potentially, jeopardised. Although this would involve significant cost, it would appear necessary in order to ensure minimal erosion of the rights of the procedural rights of the defendant to a fair trial.

The presumption of innocence does not purport to eliminate mistaken *decisions* because that is an impossible ideal, rather the aim is to ensure the elimination of mistaken *convictions* (Morton and Hutchison, 1987, pp. 4-5), acknowledging the fact

that the defendant must retain the benefit of any doubt. Although the need to minimise the trauma associated with giving evidence in open court, in the presence of the defendant, is a credible concern, this need must be balanced with the right of the accused to a fair trial. The presumption of innocence must remain intact until sufficient evidence to the contrary is adduced - and this presumption, rather than the protection of the child witness, must remain the fundamental focus of criminal proceedings (ALRC, 1989, p. 6).

Right to Conduct Own Defence

Traditionally, the defendant may either seek legal representation or choose to conduct their own defence. In recent times, much has been made of the right of the defendant to procure legal representation. The Honorable Justice Mitchell of the Supreme Court of South Australia asserted that the right to be defended by duly qualified counsel was implicit in the recognition of the right to equality before the law (1975). In *Dietrich v The Queen* ([1992] 177 CLR 292) the High Court of Australia determined that the court had a duty to ensure that the accused received a fair trial, and that in the case of an unrepresented accused facing serious charges - who had, in this instance, unsuccessfully sought legal representation through the Legal Aid Commission of Victoria - the discretion of the court to stay or adjourn the trial in order to allow the defendant the necessary time to obtain representation should have been favourably exercised in order to ensure fairness. Although the majority decision indicated that there is no absolute right to legal representation at public expense, there was an explicit acknowledgment that competent legal representation in serious criminal cases is highly desirable.

Just as there is no absolute right to legal representation at public expense, there is no requirement that the defendant endeavour to obtain such representation. Under the amended legislation, however, the right of the defendant to conduct their own defence has been impinged upon by section 106G of The Act, which mandates that an unrepresented defendant may not question the child witness directly, but must put their questions to the child through an intermediary - either the Judge or some other court-approved person - who must then repeat the question accurately to the child. This requirement is not limited to Schedule 7 proceedings, rather it extends to proceedings for any offence where the defendant wishes to cross-examine a child under the age of 16 years.

As with the concerns raised regarding the use of screens and closed circuit television, this practice was promoted on the basis that the child would be likely to find cross-examination by an unrepresented accused particularly stressful (LRCWA, 1991, p. 94). Again there is a tacit acknowledgment that the child has reason to feel intimidated, an assumption which must certainly be viewed as prejudicial to the presumption of innocence. If the defendant is allowed to cross-examine other witnesses but not the "affected" child, it becomes difficult to see any way in which this deviation from standard practice could be viewed by the jury except in terms of the effect the defendant would have on the child. Additionally, unlike the jury warning mandated when screens or closed circuit television are utilised, the legislation does not contain a similar requirement for a warning to be issued when questions are put to the child through an intermediary. Thus there is no attempt to moderate the impact of this procedure on the jury's perception of the innocence of the defendant, a situation which is, at least potentially, prejudicial to the accused.

Admissibility of Hearsay

The rule against hearsay has been described as "undoubtedly the most important exclusionary rule in the law of evidence" (Waight and Williams, 1990, p. 643) governing, as it does, much of what may or may not be presented in court. This rule seeks to exclude the presentation of statements and assertions made by persons other than the witness who is testifying, where the evidence is offered as *proof of the truth* of what is stated (Australian Law Reform Commission, 1982b, p. 3). If, however, the evidence is tendered solely for the purpose of establishing the fact that the statement was indeed made, it is deemed admissible, thus the important elements for consideration are the nature and source of the statement, and the purpose for which it is tendered (Hallen, 1988, pp. 41-42).

Prior to the introduction of the Act, a number of exclusions to the rule against hearsay were in existence, some of which were of possible relevance in cases of alleged child sexual abuse. These included the doctrine of *res gestae*, whereby spontaneous utterances made by the child contemporaneous with (that is, either shortly before or after) the alleged assault were deemed admissible, as was evidence of a complaint "recently or promptly made by the victim of sexual assault" (Warner, 1991, p. 172), whether by a child or adult victim. The second of these exceptions did not extend admissibility to statements regarding other forms of physical abuse (LRCWA, 1991, p. 37). Although it has been asserted that "The general approach to statutory reform of the law of hearsay in Australia has been extremely cautious" (Tapper, 1992) the scope of admissibility of hearsay evidence has been extended by the new legislation. Under section 106H of The Act, certain out of court statements deemed relevant to the proceeding, which were made by the child to another person prior to commencement

of the proceedings, are deemed admissible. "A relevant statement is defined as one which (a) relates to a matter in issue in the proceeding; and (b) was made by the child to another person before the proceedings commenced" (Dixon, 1994a). Thus there is now broad scope for hearsay evidence to be admitted.

Warner (1991, p. 173) describes the traditional rule against hearsay as "irrational" in cases of child sexual abuse, because second-hand accounts may be more reliable than first-hand accounts due to the difficulties children experience in giving evidence. Additionally, she suggests that second-hand accounts are a necessary inclusion where first-hand accounts are unavailable (for example, when the child is incompetent to testify), a position supported by the Law Reform Commission of Western Australia, which asserts that justifications for reform are predominantly centred on the unavailability of other evidence (1991, p. 35). To enact change on this basis, however, must be viewed as precarious: exclusionary rules exist for a purpose, and to amend these rules merely to facilitate the reception of a particular form of evidence - rather than as an acknowledgment that the grounds for exclusion are demonstrably false or inapplicable - sets a dangerous precedent. If, on the other hand, the grounds for exclusion are demonstrated to be invalid - a fact which has *not* been demonstrated in this instance - the rule should be amended or removed not only with regard to the evidence of children, but also for all other witnesses whose evidence is so excluded.

The prejudicial impact of the admissibility of out-of-court statements has perhaps been minimised by the requirement that the child who was the original maker of the statement must be available for cross-examination by the defence (s. 106H [1b]). This, however, negates the argument that a second-hand account should be admitted where a first-hand account is unavailable - the argument upon which the call for admissibility

of out-of-court statements was largely founded. If the child must be available for cross-examination, the defence will have the opportunity to demand a first-hand account of the events in question - an opportunity which would doubtless be acted upon.

Video-recordings and the Confrontation and Examination of Witnesses

The rationale supporting the utilisation of video-taped evidence is a belief that, by allowing their evidence to be obtained and recorded at an earlier stage, the effects of delays in the trial process upon the ability of child witnesses to provide a clear and detailed account of their recollections will be minimised (Dixon, 1994a; Cashmore, 1990). Although this is, once again, a credible concern, there are additional - albeit unintended - effects on the defendant.

The use of video technology is addressed by sections 106I - 106M of The Act, allowing for the admission - in Schedule 7 proceedings - of video-taped statements, video-recorded evidence in chief and/or video-recorded evidence taken at a pre-trial hearing. Applications under these sections must be initiated by the prosecution (s. 106I [1]) and, in response, the Judge determines the procedure to be followed in taking the evidence, presenting the recording, and excising matters from the recording, as well as the manner in which any cross-examination or re-examination of the affected child is to be conducted at the trial (s. 106J).

The use of video technology has been opposed on the basis that it interferes with the right of the defendant to confront prosecution witnesses. The Supreme Court of California has outlined four objectives which the United States' Constitutional right to confront witnesses is intended to achieve, namely:

- to ensure that the evidence is presented under oath;
- to ensure that the jury have the ability to assess the demeanour of the witness;
- to facilitate direct face-to-face confrontation; and
- to provide the defendant with the opportunity to effectively cross-examine his or her accuser.

(Bayardi, 1990)

In response to these concerns, video technology does not affect the ability to detect whether the evidence is given on oath, provided that the taking of the oath (or affirmation) forms part of the recording. Similarly the demeanour of the witness can be assessed, as the witness must remain visible throughout the duration of the recording. This may, however, be affected where the technical quality of the recording is such that it distorts or fails to convey the appropriate tone of the evidence, affecting the ability of the jury to assess the credibility of the witness (Rayner, 1991, p. 63). The determination of the extent to which the quality of the recording must be affected before it is deemed unsatisfactory remains arbitrary - firstly because there appears to have been no research conducted on this issue, and secondly because it is not specifically addressed under the current legislation.

As has already been established, our Australian legal tradition does not recognise the absolute right to face-to-face confrontation of witnesses. Although the defendant is, in the normal court hearing, able to confront their accuser face-to-face, this has occurred in the absence of legislation to the contrary rather than in recognition of a specific right to do so. This objection has not, therefore, been considered defensible with regard to the provisions of The Act. Interestingly, the right of the defendant to be present throughout the trial has been stipulated in international human rights agreements (for example, in

Article 14[4] of the International Covenant on Civil and Political Rights), however these documents fall short of providing an adequate definition of this requirement. The fact that the defendant's "presence" continues to be defined or interpreted differently in various jurisdictions is indicative of the ambiguous nature of this phrase, whereby Western Australia now deems the defendant to be present even when they are located in a specified area outside of the actual courtroom, a situation which is, at best, intuitively uncomfortable.

Another concern lies with the ability of the defence to cross-examine the child witness effectively. This has, to a degree, been addressed by the amended legislation: because a video-taped statement does not substitute for the child's appearance at trial, the child must be available during the trial for cross-examination. Similarly, where the evidence-in-chief is video-recorded, the child must still be available in court for cross-examination and re-examination. Alternatively, however, allowance has been made for the whole of a child's evidence to be taken at a special video-recorded pre-trial hearing, and for that video-recording to be presented in lieu of the child's appearance (s. 106K [4]). The pre-trial hearing may take place at any time prior to the trial, and is attended only by those persons whose presence is authorised by the Judge (s. 106K [1]). Defendants are held in a room separate from where the hearing is conducted, although they are able to observe the proceedings via closed circuit television. Thus they are forced to communicate with their legal representatives from a remote location. Furthermore, if they are unrepresented, they have to attempt to conduct their own defence from this location. Although they will be provided with the means to communicate with a mediator in such circumstances, their level of control over their own cross-examination is, at least potentially, affected. For example, research indicates that defence counsel who utilise closed circuit television to examine a child situated in

a remote location find this requirement less daunting as they gain experience (ALRC, 1992, p. 142); unrepresented defendants do not receive the opportunity to gain such experience prior to their trials. Although the court-appointed mediator may be experienced in such procedures, they are constrained by Section 106G (b) of The Act to merely repeat the defendant's questions to the witness. Whether these circumstances are sufficient to affect the defendant's ability to cross-examine witnesses effectively is open to conjecture.

A final objection is that The Act does not incorporate or mandate any explanation to the jury as to why the evidence of this particular witness (that is, the "affected" child) is being presented in a different format to that of other witnesses. Deviation from standard procedure allows speculation which, in itself, could be construed as potentially prejudicial. Warner (1988) states that conflicting views have been expressed as to whether presentation of evidence by video - whether this be a pre-recorded video or closed circuit television - actually increases or decreases the impact of the evidence on the jury (cf. Cashmore, 1990; ALRC, 1992, pp. 139-140). While she concludes that concern over the prejudicial impact of video evidence "merely reflects a mistrust of juries and is an insufficient reason for rejecting the procedure" (Warner, 1988), this represents an inappropriate disregard for a very legitimate concern. Although there is a lack of conclusive proof demonstrating that video-recorded evidence has a prejudicial impact on juries, this is an insufficient basis from which to defend the implementation of legislative reform. This is particularly so when there is a similar lack of proof to suggest that such evidence may be presented without inducing a prejudicial outcome. The effect of video evidence on the jury requires more detailed investigation. If the use of such technology can be demonstrated as in any way prejudicial to the interests of the accused, its utilisation must be re-evaluated.

While there are certainly less concerns where the videotape is presented in addition to the child giving evidence during the trial (Rayner, 1991, p. 63), any ensuing cross-examination or re-examination would undoubtedly take place in accordance with the procedures allowing for the utilisation of closed circuit television and screening (outlined above), thus the objections raised with regard to these procedures remain relevant. Where the child is not made available at the trial for cross-examination, however, the recording becomes the sole means through which the jury evaluate the evidence of the child witness, effectively negating any opportunity to overcome the problems associated with video evidence.

CHAPTER FIVE: DISCRIMINATORY ASPECTS OF THE LEGISLATION

The concerns raised in the previous chapter are illustrative of the fact that The Act has had a significant impact on the trial procedure for specified offences. Although drafted with the need for procedural fairness in mind, The Act has, in some areas, redefined this notion of fairness with respect to the offences which fall under the scope of the legislation. Although many of the concerns outlined are not intended to demonstrate *in themselves* that the defendant no longer receives a fair trial, they exemplify a number of situations in which the defendant is subjected to potentially prejudicial treatment. Furthermore, when these individual concerns are grouped and reviewed together they provide strong evidence of inequality before the law. The Act has effectively ensured that, in trials where the provisions of the legislation are applicable, the rights of the defendant are construed differently than are the rights of the defendant in other cases. This overt inequality is certainly somewhat difficult to reconcile with the notion of fairness.

Equality and Benign Discrimination

Equality "may be construed as consistency of practice relative to any political values" (Margolis, 1978). The principle of equality before the law is explicitly recognised in both the United Nations Declaration of Human Rights (Article 7) and the International Covenant on Civil and Political Rights (Article 14). Similarly, the Commonwealth Human Rights Commission expressly states that all people have the right to equal treatment under the law (Human Rights Commission, 1983, p. 2). Although, however, the concept of equality before the law is strongly embedded in Anglo-Australian legal tradition, the practical reality is that not all classes of people are

afforded equal treatment (Phillipps, 1987, p. 191). As explained by Evans (1974) the notion of equality is "rhetoric, not law. With the exception of a handful of federal constitutional provisions of limited scope prohibiting discrimination as between the States, there are no constraints on the ability of the Australian legislature to discriminate for or against whomsoever it pleases". Whether the legislature *should* hold such (virtually unlimited) power is questionable, particularly in light of the concerns, raised earlier, regarding the inadequacies of current accountability procedures for ensuring the legislature gives adequate regard to various human rights.

There has been increasing international recognition that equality before the law does not necessarily result in equality *in fact*: to "obtain equality in fact, it may be necessary for some people to be given favourable treatment unavailable to others" (O'Neill & Handley, 1994, p. 387). This is described by Evans (1974) as "benign discrimination" - "the singling out by the state of a designated group for more favourable treatment than is accorded to others". He suggests that the fundamental concern with benign discrimination is how such treatment may be reconciled with the principle of equality.

Justifications for benign discrimination are usually argued from the perspective that exact "like" treatment is unnecessary, rather "people should be treated alike to the extent that they are alike. Different treatment is appropriate when, but only when, there are relevant differences" (Evans, 1974). The introduction of this idea of "relevant differences", however, makes a *subjective evaluation* of the need to apply either standard or preferential treatment to a given class of person unavoidable. Two important questions this raises are: firstly, what criteria are to be employed in making this determination; and secondly, to what extent is it permissible to accept that, in seeking

to promote the equality of one group, the preferential treatment extended to that group impacts adversely on another?

With this latter concern in mind, Evans (1974) suggests that opposition to benign discrimination arises from two sources. Firstly, the non-recipient of favourable treatment may object for reasons of prejudice, self-interest, or envy. With respect to the provisions of The Act, the non-recipient could be viewed as either the defendant upon whom the provisions impact, or other classes of witness who do not receive such preferential treatment. The second source of objection arises from people who have no direct or immediate involvement in the proceedings who may raise an objection, "founded on genuine egalitarian beliefs, that there is something wrong in principle about any program which treats persons other than exactly alike" (Evans, 1974). It is this perspective which emphasises the difficulties in reconciling the beneficial and prejudicial aspects of so-called "benign" discrimination.

If, in accordance with the definition of equality offered by Margolis (above), the notion of a fair trial is construed as a political value, then the principle of equality would demand that the notion of fairness be consistently applied. Accordingly, procedural fairness, when viewed from the perspective of the defendant, would demand that defendants receive consistent treatment. Although intended to address the apparent difficulties and inequalities children face when they become involved in the legal process, The Act has achieved this at the expense of adequate consideration of the defendant's claims to equality. In extending preferential treatment to the child witness, the unavoidable consequence is that defendants become differentiated on the basis of their alleged offence: the procedure applied during the trial of the defendant charged, for example, with child sexual abuse is not consistent with that applied in a trial where

the provisions of The Act do not apply. Thus in this situation defendants affected by this legislation appear to have a legitimate objection - albeit based on self-interest - that, in relation to other defendants, they are not receiving equitable treatment. Perhaps the most disturbing aspect of such differentiation is that, at the time the procedural differences are applied, the guilt or innocence of the defendant has not been established. From this perspective, it is difficult to justify why one defendant should not be afforded the same consideration as another. This is a fundamental objection which should be of concern to anyone who perceives a need for procedural fairness to be founded on equal treatment.

CONCLUSION

Balancing competing interests in a criminal trial is both a complex and contentious issue. When a child is involved as a witness in the trial process, the incompatibilities between the rights and needs of opposing parties are seemingly magnified. The interests of justice, however, require that an appropriate balance be struck between these rights. As explained by Bates (1992), it is equally unacceptable either for unsubstantiated allegations of child abuse to be upheld, or for offenders not to be brought to justice for their actions. However, as Underwager (1989) asserts, whenever we endeavour to decrease the occurrence of a specified behaviour or outcome, there is an increased risk of "erring on the other side". Thus, if we focus on the introduction of measures to facilitate the successful conviction of child abusers, we may also increase the risk of wrongful conviction. For this reason, the rights of both victim and defendant must be adequately addressed.

The psychological evidence upon which the provisions of the *Acts Amendment (Evidence of Children and Others) Act 1992* were based is compelling. Traditional beliefs regarding the inherent unreliability of children's evidence have been demonstrated to be unfounded, necessitating the reform of legislation pertaining to the competency and corroboration requirements applied to child witnesses. To the extent that the provisions of The Act have addressed this issue, bringing children into line with other witnesses, there is no perceptible impact on the rights of the defendant.

Certain provisions of The Act have, however, introduced procedural changes which are at least potentially prejudicial to the accused. These include the subtle erosion of the presumption of innocence and a degree of interference with the ability of the defence

to cross-examine witnesses effectively. Furthermore, the legislation has resulted in the unequal treatment of accused persons involved in trials which fall under the scope of The Act when compared with accused persons facing other criminal charges. Differentiation on the basis of the defendant's alleged offence is inconsistent with the concept of equality before the law, which is strongly embedded in Anglo-Australian legal tradition.

Through our common law traditions, the right to a fair trial is established as a central precept of Australia's legal system. In the Hohfeldian sense of a claim right, if a defendant has the right to a fair trial, then there is a corresponding duty placed on the legislators, administrators and practitioners - who have the ability to impact on and regulate the judicial process - to ensure that this right is upheld. Although laying claim to protecting the defendant's right to a fair trial, The Act has focused exclusively on the needs of the child witness. Whilst based on legitimate concerns to minimise the trauma experienced by the child and to facilitate the reception of their evidence, the effect of the legislation has been a perceptible shift in the balance of competing interests in the criminal trial, whereby the interests of the defendant are not always adequately safeguarded.

Although no single provision of The Act is necessarily sufficiently prejudicial to the accused to negate the right to a fair trial, when the provisions are considered in total there is a tangible effect on this right. This is incompatible with the understanding that the right to a fair trial, extraneous to the resolution of the dispute in question, holds priority over the pragmatic aim of the determination of truth (Uglow, n.d.; Ligertwood, 1993, p. 538). Thus the discrimination inherent in The Act is most certainly not benign.

This thesis has emphasised the areas of potential incompatibility between The Act and defendants' rights. The extent to which this potential prejudicial effect engenders an actual prejudicial outcome has not been addressed. Thus future research must be conducted to explore the actual (not perceived) impact of The Act on all parties to the proceedings, including the defendant, the child, defence and prosecution lawyers, judicial officers and jurors. Subsequent to this investigation, a re-evaluation of the legitimacy of the legislation may be required.

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APPENDICES

APPENDIX 1***Evidence Act 1906 (WA): Section 101 (Since repealed)***

101. (1) In any civil or criminal proceeding, or in any inquiry or examination in any court, or before any person acting judicially, where any child who has not attained the age of 12 years is tendered as a witness and does not in the opinion of the court, or person acting judicially, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if in the opinion of the court, or person acting judicially, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No person shall be convicted of any crime or misdemeanour on the testimony of a child who gives evidence under the provisions of this section unless the testimony of such child is corroborated by other evidence in some material particular.

(3) Any witness whose evidence has been admitted under this section shall be liable to indictment and punishment for perjury in all respects as if he or she had been sworn.

APPENDIX 2***Acts Amendment (Evidence of Children and Others) Act 1992 (WA)***

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PART 2 — EVIDENCE ACT 1906**Principal Act**

3. In this Part the *Evidence Act 1906** is referred to as the principal Act.

[* Reprinted as at 14 August 1986.
For subsequent amendments see 1990 Index to
Legislation of Western Australia p. 52 and Act No. 15
of 1991.]

Section 35 amended

4. Section 35 of the principal Act is amended by repealing subsection (2).

Section 50 amended

5. Section 50 of the principal Act is amended by repealing subsection (3).

Section 100A amended

6. Section 100A of the principal Act is amended by inserting after subsection (5) the following subsections —

- “ (6) References in this section to —
- (a) a person who is tendered as a witness; or
 - (b) a person who desires to lay a complaint or information,

extend to a child who is of or over the age of 12 years and who is tendered as a witness or who desires to lay

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a complaint or information; and the provisions of this section have effect accordingly.

(7) Except as provided in subsection (6), this section does not apply to a child, as defined in section 106A.

Section 101 repealed

7. Section 101 of the principal Act is repealed.

Heading and sections 106A to 106S inserted

8. After section 106 of the principal Act, the following heading and sections are inserted —

“ *Evidence of Children and Special Witnesses*

Interpretation

106A. In sections 106B to 106S and in Schedule 7, unless the contrary intention appears —

“**affected child**” means —

- (a) in relation to an application referred to in clause 2 of Part A of Schedule 7, the child in respect of whom the application is made;
- (b) in relation to any other Schedule 7 proceeding, the child upon or in respect of whom it is alleged that an offence was committed, attempted or proposed;

“**child**” means —

- (a) any boy or girl under the age of 18 years;

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- (b) in the absence of positive evidence as to age, any boy or girl apparently under the age of 18 years; and
- (c) in any proceeding in the Children's Court, any boy or girl dealt with under section 19 (2) of the *Children's Court of Western Australia Act 1988*;

"counsel" includes a solicitor;

"defendant" —

- (a) in relation to an application referred to in clause 2 of Part A of Schedule 7 —
 - (i) means any party to the proceeding, other than the affected child and an applicant who is a police officer or an officer of the Department for Community Services;
 - (ii) in sections 106K (3) (e) and 106N as they apply to such an application means any such party specified by the Judge;
- (b) in relation to any other Schedule 7 proceeding, a person complained against for an offence;

"proceeding" means any civil or criminal proceeding or any examination in any Court or before any person acting judicially, and includes a preliminary hearing under the *Justices Act 1902* and a pre-trial hearing under section 106K;

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“prosecutor”, in relation to an application referred to in clause 2 of Part A of Schedule 7, means the applicant in that application;

“Schedule 7 proceeding” means a proceeding that comes within the provisions of Schedule 7;

“trial”, in relation to an application referred to in clause 2 of Part A of Schedule 7, means the hearing of that application;

“video-taped recording” means any recording on any medium from which a moving image may be produced by any means, and includes the accompanying sound track.

Sworn evidence of children

106B. (1) A child who is under the age of 12 years may in any proceeding, if the child is competent under subsection (2), give evidence on oath under section 97 (3) or after making a solemn affirmation under section 97 (4).

(2) A child who is under the age of 12 years is competent to take an oath or make a solemn affirmation if in the opinion of the Court or person acting judicially the child understands that —

- (a) the giving of evidence is a serious matter; and
- (b) he or she in giving evidence has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

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Unsworn evidence of children

106C. A child under the age of 12 years who is not competent to give evidence under section 106B may give evidence without taking any oath or making a solemn affirmation if the Court or person acting judicially forms the opinion, before the evidence is given, that the child is able to give an intelligible account of events which he or she has observed or experienced.

**Particular form of corroboration warning
not to be given**

106D. In any proceeding on indictment for an offence in which evidence is given by a child, the Judge is not to warn the jury, or suggest to the jury in any way, that it is unsafe to convict on the uncorroborated evidence of that child because children are classified by the law as unreliable witnesses.

Support for child witness

106E. (1) A child who is under the age of 16 years is entitled, while he or she is giving evidence in any proceeding in a Court, to have near to him or her a person who may provide the child with support.

(2) The person referred to in subsection (1) is to be approved by the Court and is not to be a person who is a witness in or a party to the proceeding.

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Assistance in communicating questions and evidence

106F. (1) Where a child under the age of 16 years is to give evidence in any proceeding in a Court, the Court may appoint a person that it considers suitable and competent to act as a communicator for the child.

(2) The function of a person appointed under this section is, if requested by the Judge, to communicate and explain —

- (a) to the child questions put to the child; and
- (b) to the Court, the evidence given by the child.

(3) A person appointed under this section is to take an oath or make a declaration, in such form as the Court thinks fit, that he or she will faithfully perform his or her function under subsection (2).

(4) A person appointed under this section who, while performing or purportedly performing his or her function under subsection (2), wilfully makes any false or misleading statement to the child or to the Court commits an indictable offence and is liable on conviction to imprisonment for 5 years.

Cross-examination by unrepresented defendant

106G. Where in any proceeding for an offence a defendant who is not represented by counsel wishes to cross-examine a child who is under 16 years of age, the defendant —

- (a) is not entitled to do so directly; but
- (b) may put any question to the child by stating the question to the Judge or a person approved by the Court,

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and that person is to repeat the question accurately to the child.

**Admission of child's statement in
proceeding for sexual offences, etc.**

106H. (1) In any Schedule 7 proceeding, a relevant statement may, at the discretion of the Judge, be admitted in evidence if —

- (a) there has been given to the defendant —
 - (i) a copy of the statement; or
 - (ii) if the statement is not recorded in writing or electronically, details of the statement; and
- (b) the defendant is given the opportunity to cross-examine the affected child.

(2) Subsection (1) does not affect the operation of —

- (a) section 106G; or
- (b) section 69 of the *Justices Act 1902*, other than subsection (1) of that section.

(3) In subsection (1) "relevant statement" means a statement that —

- (a) relates to any matter in issue in the proceeding; and
- (b) was made by the affected child to another person before the proceeding was commenced,

whether the statement is recorded in writing or electronically or not.

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**Video-taping of child's evidence,
application for directions**

106I. (1) Where any Schedule 7 proceeding has been commenced in a Court, the prosecutor may apply to a Judge of that Court for an order directing —

- (a) that the affected child's evidence in chief be taken, in whole or in part, and presented to the Court in the form of a video-taped recording of oral evidence given by the affected child; or
- (b) that the affected child's evidence be taken at a pre-trial hearing.

(2) The defendant is to be served with a copy of, and is entitled to be heard on, an application under subsection (1).

Giving of evidence by video-tape

106J. (1) A Judge who hears an application under section 106I (1) (a) may make such order as the Judge thinks fit which may include directions as to —

- (a) the procedure to be followed in the taking of the evidence, the presentation of the recording and the excision of matters from it; and
- (b) the manner in which any cross-examination or re-examination of the affected child is to be conducted at the trial.

(2) An order under subsection (1) may be varied or revoked.

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Giving of evidence at pre-trial hearing

106K. (1) A Judge who hears an application under section 106I (1) (b) may make such order as the Judge thinks fit which is to include directions as to the persons who may be present at the pre-trial hearing.

(2) An order under subsection (1) may be varied or revoked.

(3) At a pre-trial hearing ordered under subsection (1) —

- (a) no person other than a person authorized by the Judge under subsection (1) is to be present at the hearing;
- (b) subject to the control of the presiding Judge, the affected child is to give his or her evidence and be examined and cross-examined;
- (c) except as provided by this section, the usual rules of evidence apply;
- (d) the proceedings are to be recorded on video-tape;
- (e) the defendant is to be in a room separate from the room in which the hearing is held but is to be capable of observing the proceedings by means of a closed circuit television system.

(4) The affected child's evidence at the trial is to be given by the presentation to the Court of the recording made under subsection (3), and the affected child need not be present at the trial.

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(5) Where circumstances so require, more than one pre-trial hearing may be held under this section for the purpose of taking the evidence of the affected child, and section 106I and this section are to be read with all changes necessary to give effect to any such requirement.

Status of video-taped evidence

106L. A presentation to a Court of video-taped evidence under section 106H, 106J or 106K is admissible as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of that Court.

Recording not to be altered without approval

106M. (1) The original recording of video-taped evidence made at a pre-trial hearing under section 106K for the purposes of a trial is not to be edited or altered in any way without the approval of a Judge before it is presented to the Court at the trial.

(2) A video-taped recording that is edited or altered contrary to subsection (1) is inadmissible in evidence at the trial for which it was made.

(3) In subsection (1) "Judge" means the Judge who presided at the pre-trial hearing or a Judge who has jurisdiction co-extensive with that Judge.

**Use of closed circuit television
or screening arrangements**

106N. (1) This section —

- (a) applies only to a Schedule 7 proceeding, but subject to any order under section 106O;

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- (b) is to operate only to the extent that the giving of evidence by the affected child is not provided for by an order under section 106K; and
- (c) has effect notwithstanding section 635 of *The Criminal Code*.

(2) Where the necessary facilities and equipment are available one of the following arrangements is to be made by the Judge for the giving of evidence by the affected child —

- (a) he or she is to give evidence outside the courtroom but within the court precincts, and the evidence is to be transmitted to the courtroom by means of closed circuit television; or
- (b) while he or she is giving evidence the defendant is to be held in a room apart from the courtroom and the evidence is to be transmitted to that room by means of closed circuit television.

(3) Where subsection (2) (b) applies the defendant is at all times to have the means of communicating with his or her counsel.

(4) Where the necessary facilities and equipment referred to in subsection (2) are not available, a screen, one-way glass or other device is to be so placed in relation to the affected child while he or she is giving evidence that —

- (a) the affected child cannot see the defendant; but

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- (b) the Judge, the jury (in the case of proceedings on indictment), the defendant and his or her counsel can see the affected child.

Order that section 106N does not apply

106O. (1) Where any Schedule 7 proceeding has been commenced in a Court the prosecutor may apply to a Judge of that Court for an order that section 106N does not apply to those proceedings.

(2) A Judge who hears an application under subsection (1) may grant the application if it is shown to the Judge's satisfaction that the affected child is able and wishes to give evidence in the presence of the defendant in the courtroom or other room in which the proceedings are being held.

(3) An order under subsection (2) may be varied or revoked.

Instructions to be given to jury

106P. Where in any proceeding on indictment evidence of an affected child is given in a manner described in section 106N (2) or (4), the Judge is to instruct the jury that the procedure is a routine practice of the Court and that they should not draw any inference as to the defendant's guilt from the use of the procedure.

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Identification of defendant

106Q. Where evidence of an affected child is given in a manner described in section 106N (2) or (4), and the identification of the defendant is an issue, the affected child is not to be required to be in the presence of the defendant for that purpose —

- (a) for any longer than is necessary for that purpose; and
- (b) before the affected child's evidence (including cross-examination and re-examination) is completed.

Persons may be declared special witnesses

106R. (1) A Judge of a Court may make an order —

- (a) declaring that a person who is giving, or is to give, evidence in any proceeding in that Court is a special witness;
- (b) directing that one or more of the arrangements referred to in subsection (4) are to be made for the giving of that evidence; and
- (c) providing for any incidental or related matter.

(2) An order may be made under subsection (1) on application by a party to a proceeding, on notice to the other parties, or of the Court's own motion.

(3) The grounds on which an order may be made are that if the person is not treated as a special witness he or she would, in the Court's opinion —

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(a) by reason of mental or physical disability, be unlikely to be able to give evidence, or to give evidence satisfactorily; or

(b) be likely —

(i) to suffer severe emotional trauma; or

(ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily,

by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the Court considers relevant.

(4) The arrangements that may be made under this section are —

(a) that the person have near to him or her a person, approved by the Court, who may provide him or her with support;

(b) in any proceeding for an offence —

(i) that an arrangement of the kind described in section 106N (2) or (4) is to be made; and

(ii) that the evidence be given at a pre-trial hearing in the manner provided for by section 106K.

(5) The Court may at any time vary or revoke an order in force under this section.

(6) This section does not apply to an affected child.

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**Pre-trial hearings to consider
what orders should be made**

106S. (1) In any proceeding in which —

- (a) the giving of evidence by a person; or
- (b) a matter affecting a person as a witness,

is likely to require the making of an order or the giving of directions under sections 106E (2), 106F (1), 106J, 106K, 106O, or 106R, the party who is to call that person as a witness is to apply for a pre-trial hearing for the purpose of having all such matters dealt with before the trial.

(2) In subsection (1) “pre-trial hearing” in relation to a Court means a hearing provided for by rules of that Court for the purposes of this section. ”.

Section 119 amended

9. Section 119 (2) of the principal Act is amended —

- (a) by deleting the full stop at the end of the subsection and substituting the following —

“ ; and ”; and

- (b) by inserting after paragraph (b) the following —

“ (c) persons appointed under section 106F. ”.

Schedule 7 added

10. After Schedule 6 to the principal Act, the following Schedule is added —

APPENDIX 3

Schedule 7 Offences

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"

SCHEDULE 7

(section 106A)

PART A

1. A proceeding comes within the provisions of this Schedule if —

- (a) it is a proceeding in which a person stands charged with an offence under a section or Chapter of *The Criminal Code* mentioned in Part B or C —
 - (i) whether as a single offence or together with any other offence as an additional or alternative count; and
 - (ii) whether or not the person is liable on the charge to be found guilty of any other offence; and
- (b) the affected child was under the age of 16 years on the day on which the complaint of the offence was made or, in the case of an indictment under section 579 of *The Criminal Code*, on the day on which the indictment was presented; and
- (c) in the case of a proceeding for an offence mentioned in Part C, the defendant is a person to whom this paragraph applies.

2. A proceeding also comes within the provisions of this Schedule if it is an application under section 30 of the *Child Welfare Act 1947* for a declaration that a child is in need of care and protection.

3. A proceeding also comes within the provisions of this Schedule if it is a proceeding by way of appeal from a decision made, or a penalty imposed, in any proceeding that comes within clause 1 or 2.

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4. Paragraph (c) of clause 1 applies to —

- (a) a parent, step-parent, grandparent, step-grandparent, brother, sister, step-brother, step-sister, uncle, aunt, nephew or niece of the complainant and a child of any uncle or aunt of the complainant;
- (b) a person who is or was, at the time when the offence was committed, living in the same household as the complainant; or
- (c) a person who at any time had the care of, or exercised authority over, the child in the household on a regular basis,

and it is immaterial whether a relationship referred to in paragraph (a) is of the whole blood or of the half blood.

PART B

Chapter or Section	Matter to which Chapter or section relates
181	Carnal knowledge of animal
184	Indecent practices between males in public
186	Occupier or owner allowing certain persons to be on premises for unlawful carnal knowledge
191	Procuration
192	Procuring person to have unlawful carnal knowledge by threats, fraud, or administering drugs
195	Permitting boys to resort to brothels
XXXI	Sexual offences

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PART C

Chapter or section	Matter to which Chapter or section relates
XXVIII	Homicide; suicide; concealment of birth
292	Disabling in order to commit indictable offence
293	Stupefying in order to commit indictable offence
294	Acts intended to cause grievous bodily harm or prevent arrest
294A	Dangerous goods on aircraft
297	Grievous bodily harm
298	Causing explosion likely to endanger life
299	Attempting to cause explosion likely to endanger life
300	Maliciously administering poison with intent to harm
301	Wounding and similar acts
302	Failure to supply necessaries
304	Endangering life of children by exposure
306	Negligent acts causing harm
313	Common assaults
317	Assaults occasioning bodily harm

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Part C — continued

Chapter or section	Matter to which Chapter or section relates
318	Serious assaults
332	Kidnapping
333	Deprivation of liberty
347	Child stealing