Scottish Law Commission

DISCUSSION PAPER NO. 75

The Evidence of Children and Other Potentially Vulnerable Witnesses

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This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 14 October 1988. All correspondence should be addressed to:

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NOTES

1. In the past, papers circulated by the Scottish Law Commission for consultation purposes were known as Consultative Memoranda. The Commission has now decided that such papers will in future be known as Discussion Papers. However, the numerical sequence which was used to identify Consultative Memoranda will continue for this and subsequent Discussion Papers. This Discussion Paper is accordingly number 75 in the series.

2. In writing its Report with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion Paper can be used in this way.

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SCOTTISH LAW COMMISSION

DISCUSSION PAPER NO 75

THE EVIDENCE OF CHILDREN AND OTHER POTENTIALLY VULNERABLE WITNESSES

PART 1 - INTRODUCTION

1.1 For some years there has been mounting concern both in the United Kingdom and elsewhere about the problem of child abuse. This concern has focussed not only on the enormous physical and psychological harm which such abuse can cause to the children and families involved but also on the difficulties which are perceived to exist in bringing such cases to trial. It is often claimed that children, and particularly young children, can suffer severe trauma if they are required to give evidence in court in such cases, and that, because of understandable and commendable efforts to avoid that happening, many who are in fact guilty of child abuse go unconvicted and unpunished.

1.2 In recent times there have been attempts in various parts of the world, and particularly in the United States, to find solutions to those problems. So far as the United Kingdom is concerned, the first attempt to find a legislative answer occurred in 1986. The Criminal Justice Bill of that year contained a provision (applying only to England and Wales) enabling a court to allow a child, in certain circumstances, to give evidence by means of a closed circuit television link. That Bill fell with the calling of the 1987 General Election, but thereafter a further Criminal Justice Bill, containing the same provision, was introduced in July 1987. That Bill is still under consideration in Parliament.

1.3 At the time when the 1986 Bill was being debated in Parliament a Scottish Criminal Justice Bill was also under

discussion. It did not contain any provision relating to the giving of evidence by children and, not surprisingly, there was some pressure for the introduction of a provision going at least as far as that in the English Bill, and it was also suggested that there should be provision to enable pre-recorded video evidence to be used in child abuse cases. At that time Scottish Ministers indicated that they would prefer to have the whole matter fully considered by the Scottish Law Commission before reaching any concluded view as to the most appropriate form of legislation that might be required. Thereafter the Lord Advocate expressly invited us to give priority to a consideration of this matter as part of our general work on the law of evidence which is itself included in our First Programme of Law Reform.[1] We agreed to do this, but suggested to the Lord Advocate that, if there were to be an examination of new ways for children to give evidence, it might be prudent to consider whether any innovations might also be appropriate for other vulnerable witnesses such as the elderly and some adult victims of sexual offences such as rape. Accordingly, while most of this Discussion Paper is devoted to the particular problems which may surround the giving of evidence by children, we also consider in Part 6 whether there is scope for reconsidering the rules of procedure and evidence in the case of other witnesses as well.

1.4 From the beginning it was clear to us that, unlike many other law reform projects in which we have engaged, this one would involve an examination not only of substantive law but also of procedure, of the opportunities presented by modern technology, and of the psychological and other considerations which may attend the giving of evidence. Because of the wide range of factors that would require to be taken into account, it seemed to

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[1] Scot Law Com No 1 (1965).

us to be essential to examine practice and experience in other countries in as much detail as possible, and also to take note of contemporary professional opinion on matters such as the reliability and suggestibility of children in general, their capacity to give full and reliable testimony after a lapse of time, and the possibly traumatising effect of their having to give evidence in open court in the presence of an accused person.

1.5 In carrying out our work on those matters we are fortunate to have received considerable help from many quarters. During the summer of 1987 Mrs Kathleen Murray, an Honorary Research Fellow in the Department of Social Administration and Social Work at Glasgow University, who was in any event to be in the United States for some weeks, offered to carry out on our behalf some research into the many innovative practices and procedures in use in that country. Her report[1] on those matters has been of considerable assistance to us in the preparation of this Discussion Paper. In addition, one of our Commissioners was able to join Mrs Murray for meetings with officials of the US Department of Justice and the Federal Bureau of Investigation in Washington, DC. The help and advice of all those concerned is gratefully acknowledged. Our wider comparative studies were greatly assisted by researches carried out on our behalf by Miss Shona Spence, a graduate of Strathclyde University, who worked with us during the summer vacation of 1987. Finally, throughout our work in preparing this Discussion Paper we have also had helpful contact with Dr Rhona Flin of the Robert Gordon's Institute of Technology in Aberdeen. She has been engaged on a study of the child witness sponsored by the Scottish Home and Health Department.

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[1] Mrs Murray's report "Evidence from Children" is published by us simultaneously with this Discussion Paper. Although some of the material in that report is duplicated in the Discussion Paper, we think that Mrs Murray's perspective on the issues involved will serve to widen the debate on this important topic. For ease of reference Mrs Murray's report is referred to hereafter in this Discussion Paper as "Murray".

1.6 In considering all the different ways in which children (and possibly others) might in future be able to have their evidence presented in court we have throughout endeavoured to keep clearly in mind two matters which we regard as being of great importance. The first is that the circumstances of criminal behaviour and the circumstances of those who may be the victims of crime are infinitely variable. Thus, a technique or procedure for securing evidence from a 5 year old who is allegedly the victim of sexual abuse at the hands of her father may be inappropriate or unnecessary in a case where a 15 year old boy has allegedly been the victim of homosexual advances by a stranger. The second matter is that, although every effort should be made to find ways of reducing the trauma that is caused to children who have been the victims of physical or sexual abuse, it is of equal importance to maintain an accused person's right to a fair trial. It is our impression that this right is sometimes ignored by those who argue strenuously for relaxations in the rules of evidence in the interests of children.

1.7 In Part 2 of this Discussion Paper we shall describe the more relevant of the existing provisions under Scots law for the giving of evidence by children and others in criminal proceedings. In Part 3 we shall describe and comment on the problems which are perceived to exist in respect of the giving of evidence by children. In Part 4 we shall describe and comment on the techniques and procedures which are in use in other countries; and in Part 5 we shall consider some changes in law and practice which might be introduced in this country. Although most of this Discussion Paper is concerned with the giving of evidence in criminal proceedings, we also consider in Part 5 whether any new

techniques or procedures might usefully be extended to cases where children are required to give evidence in other forms of proceedings. In Part 6 we consider how changes, made in relation to children, could be adapted for other witnesses. Finally, in Part 7 we set out a summary of the provisional conclusions and questions on which we seek the views of consultees.

PART 2 - EXISTING LAW AND PRACTICE

Competency of children as witnesses

2.1 In some countries there is a legal presumption to the effect that children below a certain age are not competent to give evidence at all, or at least are not competent to give evidence on oath. Where there is a presumption against competency, that has to be overcome (possibly by some kind of preliminary proof) before the child in question can be permitted to give evidence. The position in Scotland appears to be somewhat uncertain.

2.2 According to some older authorities a child is admissible if he appears to be able to understand what he has seen or heard and to give an account of it and to appreciate the duty to speak the truth.[1] Moreover, it has been said that it is for the judge to determine whether a child should be examined, after a preliminary interrogation of the child and, if necessary, after hearing other evidence.[2] Statements such as these would appear to suggest that Scots law, like that of some other countries, presumes that a child is not a competent witness unless the contrary is shown. On the other hand, this scarcely appears to be a presumption in the normal sense when it is noted that it is the judge (and not the party adducing the child as a witness) who has to initiate the necessary enquiries. At all events our predecessors in this Commission saw fit to propose the retention of this quasi-presumption (if it may be so termed) in the draft Evidence Code which was published in 1968.[3] Although the draft Evidence Code did not progress further than its first draft, a somewhat similar approach to the competency of children as witnesses was expressed in our subsequent Consultative Memorandum on the Law

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[1] Dickson, Evidence (3rd ed) para 1543.

[2] Ibid para 1548; and see Walker and Walker, Law of Evidence in Scotland, 374 (hereafter referred to as 'Walkers').

[3] Scot Law Com No 8, 1968, Art 6.2; and see Macphail, Evidence (1987) para 3.27 (hereafter referred to as 'Macphail').

of Evidence.[1]

2.3 By contrast, we have the impression that nowadays many judges tend to approach the question of competency from the other end. That is to say, they assume that a child is prima facie a competent witness but may, upon a preliminary conversation with the child, reach the conclusion that the child is either incapable of giving intelligible evidence or is not yet able to understand the difference between right and wrong, and so is unable to undertake to tell the truth. It seems to us that this approach has much to commend it since in many instances, particularly where the children are older, there will be no doubt as to the child's competency in the strict legal sense. We are inclined to think that, if there is to be new legislation concerning child witnesses generally, it might be helpful to clarify this matter by providing that, as regards competency, children should be presumed to be competent witnesses unless there is good reason to reach a different conclusion.[2]

2.4 Apart from questions of competency in the sense just discussed, a judge also has to determine whether or not to administer the oath to children who are adduced as witnesses. It has been said[3] that "children under 12 are not put on oath, but admonished to tell the truth, children over 14 are usually sworn". That statement is probably a fair reflection of normal practice, but there is no statutory or other rule governing the matter and, so far as we can tell, this is very much a matter for the discretion of the judge. A discretion of this sort is in our opinion sensible since it enables account to be taken of actual differences

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[1] Scot Law Com No 46 (1980), para C.19.

[2] We return to this in para 5.25 below.

[3] Walkers, supra, 375.

in maturity and intellectual capacity. Moreover, it makes little practical difference whether a child takes the oath or not since in Scotland (unlike some other countries) a child's evidence is entitled to be treated in exactly the same way by a judge or jury regardless of whether or not it is given on oath.

General rules of evidence

2.5 A child's evidence is subject to all the rules of evidence which govern the evidence of an adult. For present purposes two of those rules, namely those relating to corroboration and hearsay, may be of greater importance than others, and we think that it may be helpful to some readers of this Discussion Paper if we were to give a brief summary of them.

(i) Corroboration

2.6 It is a general rule of evidence in criminal proceedings in Scotland that every material fact which requires to be proved by the Crown before a person can be convicted must be proved by corroborated evidence. That is to say, every such fact must be proved by evidence coming from more than a single source. Thus, it may be proved by the evidence of two eye witnesses; by the evidence of one eye witness together with circumstantial evidence coming from another source; or, exceptionally, by circumstantial evidence alone, provided such evidence comes from more than a single source. In recent times there have been cases[1] in which only a small amount of circumstantial evidence has been held to be sufficient to amount to corroboration of the evidence of a credible eye witness. It has to be borne in mind, however, that a criminal charge must be proved beyond reasonable doubt whereas a civil claim need only be established on a balance of probabilities.

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[1] See, for example, CB v. Kennedy, 1987 SCLR 647; Stephen v. HMA, 1987 SCCR 570.

It may be, therefore, that as a general rule more will be required by way of corroboration in criminal than in civil cases. Indeed, the Civil Evidence (Scotland) Bill, which is presently before Parliament, will remove the need for corroboration in civil cases altogether.

2.7 Since some offences, and in particular sexual offences, are by their nature unlikely to take place in front of witnesses, Scots law has developed a rule which has the effect, in certain circumstances, of enabling corroboration of one incident (spoken to by a single witness) to be found in evidence about another incident (albeit also spoken to by a single witness). This rule is commonly referred to as the "Moorov" rule, after the name of the case[1] in which it was first fully enunciated. Stated shortly, what the rule provides is that "where the accused is charged with a series of similar offences, closely linked in time, character and circumstances, the evidence of one witness as to each offence will be taken as mutually corroborative, each offence being treated as if it were an element in a single course of conduct."[2]

2.8 Over the years the Moorov rule has been fairly strictly intepreted in relation to its requirements that there should be a similarity of offence and that there should be a close link in time. Thus, it has been held that evidence of sodomy and evidence of incest are not mutually corroborative,[3] and that, while a charge of lewd and libidinous practices may be corroborated by evidence of incest, at least where the incest was preceded by similar lewd acts, evidence of lewd practices does not corroborate a charge of incest.[4] In relation to time the courts have refused to

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[1] Moorov v. HMA 1930 JC 68.
[2] Renton and Brown, Criminal Procedure (5th ed), 18-63.
[3] HMA v. Cox 1962 JC 27.
[4] HMA v. Brown 1969 JC 72.

apply the Moorov rule in cases where two incidents were separated by periods of four years,[1] three years,[2] and even 15 months.[3] It seems to be the case that there need not always be a complete inter-relation of all the required features, namely character, circumstances and time,[4] but the absence or weakness of one may require extra force from the others.[5]

2.9 Before leaving the topic of corroboration we should draw attention to an important distinction which exists between Scots law and the law of certain other countries. In some countries (and in particular those whose laws of evidence derive from English law) there is no general corroboration requirement in criminal proceedings. However, under such systems of law a duty is often placed on a trial judge to warn a jury that they should be cautious about accepting the testimony of certain classes of witness in the absence of corroboration. A child who gives evidence on oath is usually within this class of witness. Moreover, there may be a positive requirement of corroboration where unsworn evidence is given by a child.[6]

2.10 This sort of approach discriminates between witnesses of different kinds, and in effect appears to suggest that certain witnesses are intrinsically less acceptable than others. Because of its general requirement of corroboration, Scots law does not make such distinctions; and any witness, whether a child or an adult, is

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[1] McHardy v. HMA 1982 SCCR 582.
[2] HMA v. Cox, supra.
[3] Tudhope v. Hazelton 1984 SCCR 455.
[4] Ogg v. HMA 1938 JC 152, 157.
[5] Tudhope v. Hazelton, supra, per Lord Justice Clerk at 460.
[6] See Phipson, Evidence (13th ed), 32-04, 32-13.

entitled to have his evidence considered in the same way as any other witness.

2.11 It might, of course, be suggested that Scots law should abandon its general requirement of corroboration, or at least that it should introduce a distinction of another sort by providing that certain categories of offence should be capable of being proved by the evidence of a single witness. We doubt whether there would be support for a departure from our general corroboration requirement which most people regard as an essential safeguard for the accused. If that is right, we can see no merit in diminishing that safeguard in certain classes of case only. It is of course true that the corroboration requirement has already been removed by statute in relation to certain very minor statutory offences, but that, in our view, provides no justification for taking the same course in relation to serious crimes. We return to this point in Part 5 below.

2.12 Notwithstanding our views on corroboration generally, it may be that the Moorov rule which we have described above would benefit from some reappraisal and possibly a statutory formulation. We also consider this further in Part 5 below.

(ii) Hearsay

2.13 Hearsay is what a person said on another occasion, used as evidence of the facts contained in the statement in question. As a general rule hearsay evidence is inadmissible in criminal proceedings. The main reasons for this are that the statement may not be reported accurately, and that the original maker of the statement is not available for cross-examination. There are, however, certain exceptions to that general rule of which, for present purposes, the following are the most important.

2.14 Hearsay may be admitted to prove the facts contained in a statement when the maker of that statement is dead. It may also be admitted where the statement in question forms part of what is known as the res gestae, that is to say the actual incident which is the subject of subsequent inquiry in court proceedings. It has been said[1] that res gestae statements are real evidence which may found inferences as to the nature of the acts they accompany or which give rise to them. Whether regarded as real evidence or not, res gestae statements provide a limited exception to the general rule against hearsay.

2.15 A further limited exception exists in relation to what are known as de recenti statements. A de recenti statement is a statement made by a witness shortly after an event. Typically it may take the form of a complaint or an account of events made to the first person seen by the witness after the events themselves. The use of de recenti statements is limited, however, in that they can be used only to support the credibility of the witness in question. They are not themselves evidence of the facts stated in them, nor may such a statement be admitted in evidence where the witness in question does not himself give evidence. It is also to be noted that the use of a prior consistent statement to support a witness's credibility is restricted to statements made de recenti. Other prior statements cannot be used for that purpose.

2.16 By contrast any prior statement by a witness which is inconsistent with that witness's subsequent evidence may be proved and, if proved, may be used to detract from that witness's credibility.[2] It may not, however, be used as evidence of any

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[1] Walkers, 398.

[2] Criminal Procedure (Scotland) Act 1975, ss 147, 349.

contrary version of the facts.[1]

2.17 Many other countries have rules prohibiting the use of hearsay evidence similar to those which apply under Scots law. However, in recent times several jurisdictions have introduced exceptions to the normal rules in respect of hearsay statements made by children. These will be examined later.[2]

Identification of an accused

2.18 It is self-evident that, when a person is charged with having committed a criminal act, the prosecution must not only prove that the act was committed but also that the particular accused was the perpetrator. Moreover, as a highly material fact, the identification of the accused must be established by corroborated evidence.

2.19 There are various ways in which the connection between a particular accused and the act in question can be established. Probably the most common method is for an eye witness who is giving evidence in court to be asked if he can pick out the perpetrator from all the people sitting in the courtroom. Alternatively, or sometimes additionally, a witness may be asked to attend an identification parade in advance of a trial to see whether he identifies a suspect from a line-up of people of about the same age and appearance as the suspect. Increasingly nowadays there are arrangements whereby one-way mirrors are used at such parades. In such cases the witness who is viewing the parade cannot be seen by the persons making up the parade. If, at a subsequent trial, a witness who has made an earlier

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[1] See Macphail, 19-53 et seq.

[2] See para 4.34 et seq below.

identification at an identification parade is unable to identify anyone in court, or even denies having made the earlier identification, evidence of what took place at the parade may be used to supplement, or even to supplant, any evidence of identification given by the witness at the trial.[1] Apart from formal identifications of the kind just described an accused may also on occasions be linked to a crime by other evidence such as, for example, his possession of stolen property or other articles taken from the victim, or in some cases forensic evidence such as finger prints.

2.20 Despite the varied ways in which an accused may be linked to a given criminal act, it is likely that in many cases, and in particular those involving some form of assault, the only way of establishing that link will be by means of a visual identification carried out by the eye witnesses including the victim. In cases of child assault or abuse where the accused is a family member it may be thought that the law is being unnecessarily pedantic in requiring a young child to make a formal identification of someone he has consistently referred to as "daddy". In fact the law probably does not require any formal identification in this sense. All that the law requires is that there should be sufficient evidence to establish that the accused was the perpetrator of the offence in question. In practice, however, prosecutors will normally ask a witness to carry out an identification in court if only as a safeguard in case other evidence of identification should turn out to be inadequate. And in many cases, of course, an identification of an accused by a particular witness will be essential. This, of course, poses immediate problems in relation to any technique for giving evidence which does not allow for some sort of confrontation between accused and accuser. We consider those problems in more detail later.[2]

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[1] Muldoon v. Herron 1970 JC 30.

[2] See para 5.23 et seq below.

Evidence on commission

2.21 It has long been possible, under civil procedure, to take the evidence of a witness on commission where, through age or infirmity or other good reason, he is unable to attend court to give evidence in person. What this involves is that either the witness will be required to answer a series of written questions, known as interrogatories, prepared in advance by all the parties to the case, or the witness will be examined and cross-examined in person by counsel or solicitors representing the parties with the proceedings being supervised by a commissioner (usually an advocate or solicitor) appointed by the court. Until comparatively recently there was no power to take evidence on commission in criminal proceedings.

2.22 Such a power was, however, introduced for the first time by section 32 of the Criminal Justice (Scotland) Act 1980. Under that section (which applies to any criminal proceedings in the High Court or the sheriff court, but not the district court) the prosecutor or the defence may apply to the court for the appointment of a commissioner to examine a witness who by reason of being ill or infirm is unable to attend the trial.[1] Although the statute appears to imply that the examination of the witness will be conducted by the commissioner, it seems that, as in civil proceedings, he merely presides over the examination which is in fact conducted by the parties or their representatives.[2]

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[1] Slight modifications to the provisions of s 32 were made by the Criminal Justice (Scotland) Act 1987, but these are not of significance for present purposes.

[2] See Act of Adjournal (Procedures under Criminal Justice (Scotland) Act 1980 No 1) 1981, para 8(7); Renton and Brown, 18-76; HMA v. Lesacher 1982 SCCR 418.

2.23 The provisions of section 32 contain an important qualification. The judge may grant an application to take evidence on commission only if he is satisfied that (a) the evidence which it is averred the witness is able to give is necessary for the proper adjudication of the trial, and (b) there would be no unfairness to the other party were such evidence to be received in the form of the record of an examination conducted on commission.[1] The qualification about "unfairness to the other party" is an important one, and we would doubt whether the present provisions for taking evidence on commission would be considered appropriate in the case of a key witness such as the alleged victim of physical or sexual abuse.[2] Moreover, it seems unlikely that the provision which permits an application to be made where a witness is unable to attend court "by reason of being ill or infirm" is capable of being construed so as to include a witness who is physically fit but who may suffer mental or psychological trauma by reason of giving evidence in court.

Physical arrangements in court

2.24 Sections 166 and 362 of the Criminal Procedure (Scotland) Act 1975 provide:

> "(1) Where, in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality, a person who, in the opinion of the court, is a child is called as a witness, the court may direct that all or any persons, not being members or officers of the court or parties to the case, their counsel or solicitors, or persons otherwise directly concerned in the case, be excluded from the court during the taking of the evidence of that witness:

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[1] 1980 Act, s 32(2).

[2] See Muirhead v. HMA 1983 SCCR 133, 142.

Provided that nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency."

2.25 Several features of the foregoing provision are worth noting. First, the power to clear the court of persons not involved in the case is merely permissive and not mandatory. Second, the power is available only in proceedings "in relation to an offence against, or any conduct contrary to, decency or morality". The precise meaning and scope of those words is obscure, but it seems likely that they would not extend to a case where the offence was one of purely physical, as opposed to sexual, assault upon a child. The third feature to note is that the provisions in sections 166 and 362 do not authorise the exclusion of the press while a child is giving evidence, though their reporting of the proceedings in question may be restricted by the court under the powers conferred by sections 169 and 374 of the 1975 Act.

2.26 In practice, as we understand it, the power to clear the court while a child is giving evidence is frequently exercised. Moreover, it is common for judges, counsel and solicitors to remove their robes and wigs while children, and particularly young children, are giving evidence. We also understand that in some instances, where a child is very young, judges may permit the child's mother or other relative to be present alongside the child while in court.

2.27 Procedures such as those just outlined are clearly designed to reduce as far as possible the stress and sense of unfamiliarity which are likely to accompany the giving of evidence in court by a child. It may, however, be open to question whether existing procedures go far enough in that direction. In Part 5 of this

Discussion Paper we consider some improvements that could be made.

Previous consideration of the giving of evidence by children

2.28 Just over ten years ago the Thomson Committee on Criminal Procedure considered the giving of evidence by children in cases of sexual offences. They concluded[1] that there was no reasonable alternative to the present practice of giving oral evidence in court. Moreover, they observed that the majority of their witnesses, including psychiatrists and social workers, had argued that children are not so seriously affected by giving evidence of this kind as is generally assumed, and that there is no solid evidence of children being harmed by their court experience. A few years later, in our Consultative Memorandum on Evidence[2] we simply expressed ourselves as sharing the view of the Thomson Committee.

2.29 It is probably fair to assume that, in the context of an examination of the whole of criminal procedure in Scotland, the Thomson Committee gave only limited attention to the giving of evidence by children, just as we ourselves did in the context of an examination of the whole law of evidence. Moreover, since 1980 there has been an enormous upsurge in the amount of research and writing on children's testimony; there have been far-reaching legislative innovations in various parts of the world, but particularly in the United States; and there has occurred a much greater appreciation of the opportunities presented by various aspects of modern technology, including in particular television and

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[1] Criminal Procedure in Scotland (Second Report), 1975, Cmnd 6218, paras 43.31, 43.32.

[2] No 46 (1980), C.19.

video recording. In the circumstances we are approaching our present inquiries with an open mind unfettered by the views expressed by the Thomson Committee and by ourselves in the past.

PART 3 - IS THERE A NEED FOR REFORM?

The background

3.1 In recent years there has been a considerable upsurge of interest around the world in cases involving the abuse of children, and there have been some suggestions that the incidence of such abuse may actually be increasing, though others have suggested that all that is happening is that this new world-wide interest has brought into the open many cases which formerly would have remained concealed and unreported. Whatever the true position, much of the current interest has focussed on the giving of evidence by children who have themselves been the victims of, or who have witnessed, such abuse.

3.2 Before proceeding further we think it may be helpful to indicate what we understand by the term "abuse", and to set the context in which we have considered the problems. Although much of the debate in recent times appears to have been concerned only with sexual abuse, it seems to us that any problems which are perceived to exist must be viewed from a wider perspective. At the level of purely sexual abuse it is our opinion that we should be considering not only those cases where a child has been the victim of rape or incest or of an activity which would fall generally within the concept of indecent assault or, in appropriate cases, lewd and libidinous practices, but also other cases of sexual exploitation, for example child pornography or inducing child prostitution. The latter kinds of case may be less common, but should not be excluded from consideration. Nor are we solely concerned with sexual abuse cases occurring within a family or domestic setting. Consideration must also be given to cases where the perpetrators are complete strangers to the child.

3.3 Additionally, consideration must in our view be given to cases involving purely physical ill-treatment. Such cases may cover a wide spectrum from incidents of serious physical assault to incidents of neglect of a kind that might be struck at by section 12 of the Children and Young Persons (Scotland) Act 1937.[1] It may be that the giving of evidence in cases involving physical ill-treatment presents somewhat different, and possibly lesser, problems than the giving of evidence in cases with a sexual content, but we are clearly of the view that any examination of this topic should not be restricted to sexual abuse cases alone.

3.4 Apart from cases where children have been the victims of, or have been the witnesses of, any kinds of abuse, there will also be other cases where a child may be required to give evidence in the course of criminal proceedings in a court. A child may have witnessed an assault or other incident involving adults, and may be required to give evidence in a trial which could even be a trial for murder. Although such cases may present less serious problems than those where a child has been the victim of abuse, we think nonetheless that they should be kept in mind when any reform of law or practice is being considered.

Perceived problems

3.5 The most commonly voiced complaint when children are required to give evidence in person in court is that this can be a harmful experience for them not only because being subjected to examination and cross-examination in unfamiliar and possibly frightening surroundings is likely to be distressing in itself, but

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[1] That section covers, among other things, ill-treating, neglecting, abandoning, or exposing a child.

also because in some cases the "reliving" of terrifying or shameful experiences may cause acute embarrassment or may impede the gradual healing process being brought about as a result of therapy or simply by the natural process of the passage of time. It is said that this may be all the worse if the child is required to give evidence in the presence of the accused.

3.6 A further point to bear in mind is that, when a child is required to give evidence in court proceedings, possibly many months after the events in question, it may be necessary to subject him to multiple interviews prior to the giving of evidence - at the instance of doctors, the police, prosecutors, defence lawyers, and very possibly members of his own family as well. This, it is said, does nothing to alleviate the trauma caused by the events in the first place.

3.7 A practical consequence of the foregoing problems, it is said, is that many cases of child abuse are either not prosecuted at all, or have to be abandoned mid-way through the proceedings when child witnesses break down and are unable to continue. The non-prosecution, or the abandonment, of such cases may be the result of an understandable desire on the part of prosecutors to spare children from stress and trauma. On the other hand, and more pragmatically, it may be that they realise that the cases simply cannot be proved if, for whatever reason, a key witness is going to be unable to give evidence.

3.8 Problems of the kind which we have just summarised have been mentioned frequently in recent times in the popular press and other media; but are they problems which really exist, or at least are they problems which exist sufficiently commonly to

justify some reform of our law and procedure? As recently as 1985 a senior Scottish judge was reported[1] as saying that "he could find no clear evidence that the child suffered unnecessary trauma and distress other than of a temporary nature and what one would normally expect of a witness before a court". By contrast many writers on the topic have suggested that children, and especially those who have been abused, are subjected to particularly undesirable stress not only from the giving of evidence itself but also from all the pre-trial interviews and procedures that precede the trial.

3.9 One writer[2] has listed the components of the legal proceedings which are particularly stressful for a child as being: repeated interrogations and cross-examination; facing the accused again; the official atmosphere in court; the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony; and the conviction of a molester who is the child's parent or relative. Another writer[3] has observed:

> "For the child victim of sexual abuse this confrontation [with the accused] may be an extremely traumatic event which can affect their ability to testify. If the child is related to the offender, the child may resist testifying altogether."

3.10 Some of those problems have also been stressed in recent times by the United States National Institute of Justice which, in

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[1] In Irvine and Dunning, The Child and the Criminal Justice System, 30 JLSS (1985), 264, 265.

[2] Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne Law Review (1969) 977, 984

[3] McAllister, A Legislative Response to the Needs of Children in the Courtroom, 18 St Mary's Law Journal (1986) 279, 304.

August 1985, published the results of research into the needs of child witnesses in a volume entitled "When the Victim is a Child". In a summary of that Report[1] the author observes:

> "By definition, children are immature in their physical, cognitive, and emotional development. This immediately takes its toll when children are involved in court proceedings .... Children often do not understand the reasons for repeated interviews and delays. Many choose to end the process by recanting the accusation before their cases can be adjudicated. When these cases do go to court, an entirely different set of problems arises for children who are called to testify. Judges may seem to loom large and powerful over small children who may feel isolated in the witness stand. Attorneys often use language children do not understand and seem to argue over everything the children say. Defense attorneys ask questions intended to confuse them for reasons children cannot comprehend. Many people are watching every move the child witness makes - especially the defendant. Under such conditions, children cannot be expected to behave on a par with adults. It is not unusual for them to recant or freeze on the witness stand, refusing to answer further questions. At best, this behaviour weakens the Government's case; at worst, it leads to dismissals for lack of evidence."

3.11 It seems, then, that there is at least some reason to suppose that the stress caused to a child by appearing in court as a witness may be greater, and therefore less acceptable, than the stress which any adult might expect to experience in similar circumstances.[2] There is, however, also a body of opinion which suggests that in some instances the giving of evidence in court, so far from being stressful, may in fact be beneficial.[3] This may well be so, but for the present we are disposed to proceed on the basis that, in at least some cases, the giving of evidence in court is unacceptably stressful. But the problem is not confined to a question of stress. There is also the important practical

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[1] Whitcomb, Prosecuting Child Sexual Abuse - New Approaches, NIJ Reports, May 1986, 2.

[2] See, also, Murray, 2.

[3] Ibid 72.

consequence that, because of that stress, children may in the end be unable to testify at all with the result that criminal proceedings have to be abandoned, or perhaps not even commenced. Quite apart from the interests of the child such consequences are plainly not in the public interest.

3.12 A further consideration which we think may be worth bearing in mind in this context is that, since trials often take place many months, or even years, after an event, many witnesses, and perhaps particularly children,[1] may have difficulty in recalling the details of the event with accuracy by the time of the trial. Moreover, this problem may be exacerbated in child sexual abuse cases by the fact that, in some instances, the children in question may be unaware that anything wrong is happening to them at the time when the abuse is taking place, particularly if the abuser is a trusted member of the family.[2] There may thus be no particular reason for such children to store the events in their memories in the first place.

3.13 Even if a child does successfully give evidence in criminal proceedings there may then be a question surrounding the weight and the credence which is to be given to his evidence. Certainly, as we have already noted,[3] Scots law, unlike some other systems, does not single out children as witnesses who may be inherently unreliable, but it is at least possible that some judges and some members of juries may for reasons of their own assume that children are likely to be untruthful or unreliable. While we ourselves are not competent to question such assumptions we note

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[1] See, for example, Yun, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Columbia Law Review (1983) 1745, 1750.

[2] Yun, supra, 1756.

[3] Para 2.10 above.

that there appears to be a growing body of professional opinion[1] which takes the view that in general children are as accurate and reliable as adults in their recall of events though their memory for details, and their ability to give a complete account in response to open as opposed to directed questions, may be inferior, at least in the case of younger children. While Scots law traditionally leaves the assessment of reliability and credibility entirely to the judge or jury, some other jurisdictions have, as we shall see,[2] taken the view that unjustified misconceptions about particular classes of witness are a bar to justice. Accordingly the laws of some countries permit experts to give evidence about the general reliability of certain classes of witness such as children, and in some cases even permit an expert to testify as to the reliability and truthfulness of a particular child. While such approaches may be thought to depart too much from accepted practices in this country, we think that they do merit some consideration if only as part of a comprehensive examination and evaluation of the techniques in use around the world for presenting the evidence of children in court.

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[1] See, for example, Flin, Davies & Stevenson, Children as Witnesses: Psycho-legal Aspects of the English and Scottish System, Medicine and Law (1987) 275, 280 et seq; Jackson, Child Molestation: A Research Note, Home Office Research Bulletin (1987) 34, 37; Murray, 58 et seq.

[2] Paras 4.7, 4.60 et seq below.

Conclusion

3.14 It has often been remarked that there is now a considerable contrast in many legal systems between the ways in which children are treated when they themselves have offended against the law and the ways in which they are treated when they are the victims of someone else's offending. In the former case the child's own interests are held to be paramount and special arrangements are made for his case to be disposed of speedily and informally, whereas in the latter case he is dealt with for all practical purposes as though he were an adult, save perhaps in respect of his credibility and reliability. This paradox is, of course, particularly marked in Scotland where the children's hearing system has been developed largely in recognition of the fact that the needs of children are likely to be ill-served by conventional court procedures. By contrast, when a child is a witness he is required to attend an adult court which may offer only limited recognition of the fact that his needs and understanding may be quite different from those of an adult.

3.15 We doubt whether this paradox can ever be completely resolved because, in the trial of a person charged with a criminal offence, the principal focus of attention must inevitably be on that person rather than on the welfare and needs of a child who may happen to be a witness at the trial. Nonetheless, there are, in our view, compelling reasons why the welfare and needs of a child witness should be given as much attention as is compatible with the proper demands of the criminal process. If, as we have seen, unacceptable trauma may be caused to a child who is required to give evidence in court, then in our view it is clearly desirable to consider ways in which that trauma might be reduced.

If, on a more pragmatic level, guilty offenders are escaping conviction because children are unable to give evidence at all, or because, after a lapse of time, they are unable to give sufficiently complete evidence, then it is in the public interest to see if ways of improving that situation can be found. In the next Part of this Discussion Paper we examine a variety of techniques which are intended to achieve those purposes. Since it is, we believe, important to be aware of all the possible techniques which are available before coming to any conclusions about which, if any, of them might be introduced in this country, we do not ourselves make any provisional proposals until Part 5 of this Discussion Paper.

PART 4 - TECHNIQUES TO IMPROVE THE POSITION OF THE CHILD WITNESS

Introduction

4.1 Although much attention has been given to developments which have taken place in recent times in the United States (and we shall be examining those in some detail), that country is by no means alone in making special provision for child witnesses. We accordingly begin this Part of the Discussion Paper by describing certain procedures which are in use in Israel, West Germany, Denmark and Sweden. We shall then go on to describe in turn a variety of techniques and procedures which have been tried, or are in use, in the United States and elsewhere.

Practice in Israel

4.2 A wholly new system for dealing with the problem of child victims as witnesses was introduced in Israel as long ago as 1955.[1] Under this system the whole pre-trial interrogation of child victims was taken out of the hands of the police and entrusted to specially selected experts known as "youth interrogators". These youth interrogators are people who have been trained in the subtleties of human behaviour, and who are experienced in interviewing techniques. They may be clinical psychologists, psychiatric social workers, psychiatrists, probation officers, or child care workers. Once a youth interrogator has completed his investigations he prepares a written statement of what he has learned from the child together with a report in which he gives his own assessment of the whole case. These documents are then passed to the police.

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[1] Law of Evidence Revision (Protection of Children) Law, 5715 - 1955; and see descriptions of Israeli system in Libai, Protection of the Child Victim, 15 Wayne Law Review (1969) 977, 995 et seq, and in Irvine and Dunning, The Child and the Criminal Justice System, 30 JLSS (1985) 264.

4.3 During the stage of the youth interrogator's investigations he has complete authority in relation to any matter involving the child and the police. Thus, any question of the child's participation in an identification parade, for example, is entirely at the discretion of the youth interrogator. The law of 1955 implicitly provides[1] that conflicts between the child's protection and law enforcement which cannot be accommodated without causing serious damage to the child's welfare are to be resolved in favour of protection of the child. Nor does the youth interrogator's function terminate once he has submitted the child's statement and his report. If the child is under the age of 14 the youth interrogator then has an absolute discretion to decide whether or not the child will give evidence, having regard to the possible damage which might be caused to the child by appearing in court.

4.4 Where the youth interrogator decides that a child may be called as a witness he will prepare the child, and his family, for that experience by explaining what it will involve, possibly by taking the child to see the courtroom in advance of the trial, and by accompanying the child to court on the day that he is due to give evidence. Where the youth interrogator decides that a child should not give evidence, the youth interrogator goes into the witness box himself and in effect gives evidence as a surrogate for the child, based on his pre-trial investigations and interviews.

Practice in Denmark and Sweden

4.5 In both Denmark and Sweden specially trained policewomen are used to interrogate child victims. Except for medical or therapeutic purposes no other interrogation of the child is

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[1] ss 2, 4, 7, 10.

permitted. The policewoman's interview, or interviews, with the child are tape-recorded, and these tapes may be used as evidence at a trial. The investigating policewoman normally supervises any identification parade or other out of court identification procedure that may be required.

4.6 It is normal for the child to give evidence in court in Denmark and Sweden, but the procedures used there have the advantage that the child need only make one pre-trial statement - that to the investigating policewoman. That statement, in its tape-recorded form, can then be made available to the prosecution, the defence, and anyone else having a legitimate interest in it. Moreover, the policewoman will herself attend the trial as a witness and may give evidence regarding the child's statement and any identification which he has made of the offender. As noted above, the tape-recording itself can be used as evidence at the trial either to support or to supplement oral evidence given by the child.

Practice in West Germany

4.7 In West Germany (which operates an inquisitorial system of prosecution) a prosecutor, or at a later stage in the proceedings the court, is entitled to appoint an expert psychological witness to participate in the fact-finding process which is a central feature of the inquisitorial system. That expert will interview the alleged child victim in a suspected abuse case and will thereafter present a report which will not only contain a narrative of what the child has said, but also will contain the expert's assessment of the child's credibility and reliability. This assessment of credibility and reliability is based on a technique known as statement analysis, which apparently has a long tradition in German forensic

psychology.[1] The use of an expert witness in this very specific way is, as we shall see,[2] in marked contrast to the much more general use of expert witnesses which is permitted in some parts of the United States.

Practices and Procedures in North America [3]

(i) Improvements in court practices and facilities

4.8 Quite apart from more major innovations, attention has been given in the United States to a number of fairly simple improvements which can be made to courtroom practices and facilities so as to cater more specifically for the needs of child witnesses. None of these has required enabling legislation. Improvements of this sort have included -

(a) Judges and lawyers are required to remove their robes when a child is giving evidence: this is no longer at the discretion of the presiding judge.

(b) Where it is known that a child is to give evidence at a trial, attempts are made to hold the trial in the smallest and least intimidating courtroom compatible with the other requirements of the proceedings.

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[1] See Undeutsch, Statement Reality Analysis, in Trankell (ed), Reconstructing the Past (1982).

[2] Para 4.60 et seq below.

[3] A summary of existing statutory provisions throughout the United States is to be found in the Appendix at the end of this Discussion Paper. This shows the position in the middle of 1987.

(c) Small children are permitted to give their evidence sitting at a table rather than from the witness box. Where that happens the lawyers in the case and the judge will also sit around the same table.

(d) Whether a child is giving evidence from the witness box or at a table, the child is always given a chair of a suitable size, and a microphone is always provided to amplify his voice. These practices are followed because it is thought to be intimidating for a small child to be required to sit in a chair designed for a large adult, and because a child, whose natural tendency is to speak in a low voice, or even a whisper, can be upset and possibly even silenced by repeated requests to speak up "so that all the members of the jury can hear you".

(e) Prior to the commencement of the trial a child witness is often taken on a tour of the courtroom by the prosecutor so that he can see where he will sit, and generally be familiar with the layout of the courtroom. Depending on the age of the child the prosecutor may briefly describe to the child the functions of the judge, the jury, the defence lawyer etc. In some cases it is, we understand, the practice for prosecutors to arrange for the child to meet the judge and defence lawyers informally before the start of the trial.

(f) Special waiting rooms are set aside for child witnesses awaiting their turn to give evidence. Such waiting rooms are not only closed to all other witnesses, but also are furnished and equipped in a style and manner suitable for

children. They may, for example, be painted in bright colours, and be equipped with low furniture and a supply of books or toys.

(g) Members of the public are frequently excluded from court when a child is giving evidence, and on occasions the press have also been excluded. It seems, however, that exclusion, at least of the press, may be regarded as unconstitutional in that it violates the public's First Amendment right of access to criminal trials.[1]

4.9 Many of the above improvements to courtroom practice and facilities are of course to be found in Scottish courts also. But others, and particularly those involving some capital expenditure, such as microphones and specially adapted waiting rooms, are generally not to be found in Scotland so far as we are aware. In Part 5 we consider whether any further improvements of that kind should be made in Scotland.

(ii) Changes in court design and layout

4.10 It has often been said that the most disturbing thing for a child giving evidence in court is having to come face to face with the accused. In order to circumvent this there have been various attempts to alter the layout or design of courtrooms so that the child can give evidence without seeing the accused. In a recent trial in London a simple wooden screen was placed between the witness and the dock so that the child could see, and be seen by,

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[1] Globe Newspaper Co v. Superior Court, 101 S Ct 259 (1980); and see Melton, Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings, in Child Sexual Abuse and the Law, ed Bulkley, for American Bar Association (4th ed 1983), 184, 191 to 193.

all those in court except the accused. It seems to us that the possibility of using such an arrangement may to some extent be dependent on the original design and layout of a given courtroom; and these vary enormously from court to court.

4.11 A more ambitious variant of the screen arrangement was recommended some years ago by David Libai,[1] and it has since come to be known as the "Libai courtroom". Briefly, his proposal involves constructing a special courtroom within a courtroom. The inner courtroom is to be designed in a manner which will contribute to the security and psychological comfort of the child, but the interior of the inner room will be visible from the outer courtroom through one-way glass. The only persons in the inner courtroom apart from the child will be the judge, the prosecutor, the defence lawyer, and, on Libai's suggestion, a child examiner modelled on the Israeli youth interrogator.[2] The accused and the jury will remain on the other side of the one-way glass unseen by the child, but able to see and hear all that goes on in the inner room. Moreover, the accused will at all times be able to communicate with his lawyer by means of a microphone and small ear pieces.

4.12 The cost implications of Libai's proposal are of course substantial and, so far as we are aware, a special courtroom of the kind envisaged by him has never in fact been constructed. Indeed, it may be that the growth in recent years in the use of closed circuit television, enabling a child to testify from a separate room, has removed any need for the elaborate and costly

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[1] Described by him in The Protection of the Child Victim, 15 Wayne Law Review (1969) 977, 1014 et seq.

[2] See para 4.2 above.

measures advocated by Libai. Nonetheless, one American State, namely Iowa, does permit the use of a one-way screen in court.[1] This can be positioned in such a way that the accused can see the witness but the witness cannot see the accused. A similar provision is contained in a current Bill to amend the Canadian criminal code and the Canada Evidence Act.[2]

4.13 The use of a one-way screen, as permitted under the Iowa statute, has been challenged as contravening the right to confront witnesses against him which is given to an accused person by the Sixth Amendment to the US constitution. The case of Coy v. State of Iowa[3] is, at the time of writing this Discussion Paper, under appeal to the US Supreme Court on that ground.

4.14 While the special features of the US constitution may not at first sight appear to have much relevance for any possible reforms in Scotland, it is as well to remember that there is in the European Convention on Human Rights a provision which is not dissimilar to that found in the Sixth Amendment. Article 6.3(d) of the Convention provides:

> "3. Everyone charged with a criminal offence has the following minimum rights:
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> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

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[1] See Appendix to this Discussion Paper, Part 1.

[2] Bill C-15, cl 14 (this has been enacted, but not yet proclaimed in force).

[3] 397 NW 2d 730 (Iowa 1986).

4.15 We are disposed to think that the words of Article 6.3(d) would be unlikely to be construed as requiring a face to face confrontation between the accused and a witness (which may be the case under the Sixth Amendment), and consequently we doubt whether the Article would strike at the use of screens of the kind which we have just been describing. However, the European Court of Human Rights has recently held[1] that there is a contravention of Article 6.3(d) where an accused is convicted mainly on the strength of written statements by witnesses whom he has had no opportunity to cross-examine. That decision has consequences for some of the other techniques for obtaining evidence from children which we shall be examining later in this Discussion Paper.[2]

4.16 Even if the use of screens does not contravene the European Convention on Human Rights there remains a question whether, in the general interests of justice and of fairness to an accused, it is proper that he should be placed behind a solid screen which not only prevents the witness from seeing him but also prevents him from seeing the witness. This, as we understand it, was the effect of using a screen in the recent London trial which we mentioned in paragraph 4.10 above. It could, we think, be argued that an accused should always be permitted to see a witness against him if only because he may observe something in the witness's behaviour or demeanour which he might wish to bring to the attention of his lawyer. Moreover, it may be questioned whether the use of <u>any</u> form of screen in court can be regarded as fair to an accused because it may predispose a jury to conclude that the accused is guilty since, otherwise, there would be no need for

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[1] <u>Unterpertinger</u> v. <u>Austria</u>, 24 November 1986.

[2] Several of those techniques have also fallen foul of the US Sixth Amendment.

such measures.[1] We return to these points in Part 5 of the Discussion Paper.

4.17 One further question which arises is: On what grounds, or on what evidence, should a judge direct or permit the use of a screen? The Iowa statute is silent on this point, but the new Canadian provision referred to above states that the use of a screen may be ordered "if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant".[2] While noting that the Canadian provision can operate only in respect of a child who is a complainant (as opposed to being a witness to acts committed on another), we also note that the Canadian provision offers no guidance as to how the judge is to be satisfied regarding the matters in question. In several parts of the United States special measures for child witnesses are ordered on the basis of evidence given by experts regarding a child's mental and physical state. It may be that something of that sort is envisaged under the Canadian provision. The grounds upon which special measures are to be ordered is of course an issue in relation to any special techniques and not just to the use of screens. We shall consider this matter again in Part 5.

(iii) Closed circuit television

4.18 Currently 26 States in the United States permit the use of closed circuit television in one form or another as an aid to taking the evidence of children. Although this is sometimes referred to as "video" testimony, we prefer the term "closed circuit television" since the important feature of such a technique is that the child's evidence is live, and not prerecorded. There is,

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[1] See Murray, 26.

[2] cl 14(2.1); and see para 4.12 above.

we think, a danger, at least in this country, that the word "video" may suggest something that has been prerecorded.

4.19 Where closed circuit television is used the child is placed in a room adjacent to the courtroom[1] and, by the use of a television camera, an audio visual image of the child is transmitted to a monitor screen, or monitor screens, in the courtroom. There are essentially two systems in use for achieving this - a one-way system, and a two-way system. Under the one-way system in its most extreme form the child merely hears, but cannot see, the person putting questions to him. In a less extreme form the child may also have a monitor screen in his room on which is projected the image of the person asking questions at the time. Under the two-way system there is a complete interchange of images. In that case the child may have several monitor screens in his room, and will be able to see the judge, the jury, the accused, and the lawyers taking part in the case. Whichever system is in use, some States permit the child to have a supportive adult in the room with him. Furthermore, we note that the Connecticut and Florida statutes require the judge to be in the room where the child is testifying (though not apparently anyone else). By contrast, and somewhat surprisingly, the Alabama statute requires the accused to be in the room with the child.

4.20 The use of closed circuit television has been proposed for child witnesses in England and Wales in the Criminal Justice Bill currently before Parliament. At present the Bill appears to contemplate the use of a two-way system but it does not say anything about who is to be in the room with the child, or about the grounds which will justify the use of closed circuit television.

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[1] The room could be in a quite separate building, but the cost of making the connection would then be greater.

4.21 The advantages and disadvantages of closed circuit television used in either of the ways described above have recently been assessed by an experienced American commentator.[1] She suggests[2] that the advantages include:

"(1) the child does not have to face an open courtroom full of spectators,

(2) the child is less likely to be intimidated by the presence of the defendant in the courtroom, and

(3) the child is less likely to be frightened or distracted by other participants in the courtroom such as bailiffs, the court reporter, the clerk, and other personnel."

Another advantage, according to MacFarlane, is that "objections, arguments, and motions by counsel, often very confusing and distracting procedures, could be 'tuned out' simply by turning off the monitor during interruptions in questioning".[3]

4.22 MacFarlane lists the disadvantages of closed circuit television procedures as including:

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[1] MacFarlane, Diagnostic Evaluations and the Use of Video Tapes in Child Sexual Abuse Cases, 40 Miami Law Review (1985) 135; the author is the Director of the Child Sexual Abuse Diagnostic Center, Los Angeles.

[2] Ibid p 147.

[3] In some instances the judge may have a control panel on the bench enabling him to switch off the system when required: see Maclean, The Use of Video in Court Proceedings, Home Office Research Bulletin (1987) 20, 21.

"(1) increasing a child's feelings of isolation by separating him or her from those with whom the child is communicating and from the room where everything else is going on,

(2) the potential distraction or intimidation of the child by the presence of the camera and other necessary electronic equipment, and

(3) the child's potential difficulty in concentrating on a face and a voice speaking to him or her from a television monitor over a prolonged period of time".

4.23 It seems to us that the foregoing disadvantages merit careful consideration. No doubt they will present less of a problem in the case of some children, but in other cases they could, we think, seriously outweigh any positive advantages which might accrue from the use of closed circuit television. Since, as we have pointed out earlier in this Discussion Paper,[1] it will often be necessary for a child witness to identify the accused, it seems to us that a two-way system would be required so that, at an appropriate stage in the proceedings, the child could be shown the image of the accused. But a two-way system is likely to increase the amount of equipment in the child's room, and therefore increase the potential distraction or intimidation referred to by MacFarlane. Moreover, it may be questioned whether an identification of an accused achieved in this way is really fair to the accused. In the normal case, where a witness in the witness box is asked if he can see in the courtroom the person he has been speaking about, the theory is that the witness will have to select someone (if he can) from among all those present in the courtroom. It would, we think, be considered improper in current

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[1] Para 2.18 et seq above.

practice if the prosecutor were simply to point to the accused and ask the witness: "Is this the person you have been telling us about?" That, however, could be the effect of simply showing a child the accused's face on a television screen. We for our part doubt whether the current theory is really much more than a theory since an accused will normally be seated in a prominent position in the courtroom, namely the dock, and may even on occasions be flanked by two police officers in uniform. In such circumstances it is a little difficult to accept that a witness is making a truly undirected identification when he points to the accused. Upon that basis an identification based on being shown the image of the accused may be less objectionable. We think, however, that potential difficulties of this sort could be largely overcome if, as we shall suggest later,[1] other forms of identification, such as identification parades, were to become the norm in cases involving child witnesses.

4.24 One further matter in relation to the use of television cameras requires notice. It is something which concerns any use of cameras, whether in the closed circuit context which we are presently considering or in other contexts which we shall consider later. The first question is: Should cameras be fixed and static, or should they be manually controlled by an operator? The disadvantage of a fixed camera is that it requires the person being photographed to remain in the same position, possibly for a prolonged period, which may be very difficult, if not impossible, for a young child. The disadvantage of a manually controlled camera is that it potentially permits the operator to select the image that will be seen by the judge, jury and others. Sometimes this may not matter, but suppose that, while a child was giving

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[1] Para 5.23 et seq below.

evidence, the operator were to move the camera to show nervous wringing of the hands or, in full close up, tears running down the child's face. It could be argued that this might unduly influence a judge or a jury.

4.25 Similar problems arise in relation to the use of colour. First, there is the question whether television images should be shown in colour or in monochrome. Second, there is the question of the colour content if colour is to be used since here too it may be possible to create different impressions by showing the child either as pale and wan or as flushed and nervous.

4.26 These are all issues to which we shall return later. Before leaving the subject of closed circuit television, however, mention should be made of a possible variant to the techniques which have so far been described.[1] This in effect involves using two courtrooms for the taking of a child's evidence. The accused, the jury, and, as appropriate, the press and public would remain in the main courtroom while the judge, the prosecuting and defence lawyers, and the child would be in a separate room which could be a courtroom or possibly the judge's chambers. In this setting the child's evidence would be taken in the conventional way, and closed circuit television would convey the proceedings to those in the main courtroom. Two-way headsets and microphones could be provided for the accused and his lawyer so that they could communicate with each other and, if identification of the accused was required, he could be brought into the room for that purpose.

4.27 This kind of approach substantially replicates the main features of Libai's courtroom[2] but without the elaborate construction difficulties which his proposal entailed. Instead of a

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[1] Suggested by MacFarlane, loc cit 148.

[2] See para 4.11 above.

special inner courtroom with one-way glass, the same effect is achieved by the use of closed circuit television. So far as we are aware this proposal has never been put into effect anywhere but it may be that it would help to alleviate the feelings of isolation which, as we have seen, are said to represent one of the disadvantages of the closed circuit television techniques currently in use. On the other hand it may also present other problems.[1]

4.28 Yet another technique employing closed circuit television appears to be contemplated by the recent statutory reforms introduced in Canada. As well as permitting the use of screens[2] the court is also authorised to order that "the complainant testify outside the courtroom".[3] In that event arrangements are to be made "for the accused, the judge or justice and the jury to watch the testimony of the complainant by means of closed circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony".[4] Although not entirely clear it would seem that, under this provision, the prosecuting and defence lawyers will be in the separate room with the child while the judge, jury and accused remain in the main courtroom.

(iv) <u>Pre-trial recorded depositions</u>

4.29 In addition to, or instead of, making provision for the giving of evidence by means of closed circuit television, 33 States in the United States have introduced new legislation authorising in certain circumstances the taking of a pre-trial deposition from a child witness. In all cases the deposition is to be video taped, but otherwise there are many differences between the various statutes.

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[1] See para 5.69 below.
[2] See para 4.12 above.
[3] Bill C-15, cl 14(2.1).
[4] cl 14(2.2).

4.30 In some cases the statutes permit the accused to be present, and in full view of the child, while the deposition is being taken. In others, for example Delaware, the court may exclude the accused from the deposition room but must permit him to observe and hear the child. Presumably a one-way screen or closed circuit television are envisaged for this purpose.

4.31 The statutes also differ as to whether or not the giving of a pre-trial deposition will excuse the child from giving evidence at the subsequent trial. Some of the statutes envisage that the child may attend court to give evidence, but others exclude that totally, or at least in certain circumstances. Under the Alabama statute, for example, a deposition may be admitted in lieu of the child's appearance at trial unless the court finds that this will unfairly prejudice the defendant. In California the emphasis is placed on the well-being of the child: there the video taped deposition can be admitted in place of the child if, at the time of the trial, the court finds that testifying would cause the child witness emotional trauma. In many other cases, for example Oklahoma, the mere ordering of a pre-trial deposition is itself sufficient to ensure that the child will not be required to testify at the trial.

4.32 Apart from the fact that it is video taped, a pre-trial deposition appears to be similar in many respects to evidence obtained on commission under Scottish procedure.[1] In both cases the evidence is obtained in advance by normal examination and cross-examination procedures, and thereafter is used at a trial in place of live evidence given by the witness in person. However, as we have seen,[2] this procedure may be used in criminal cases in

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[1] See para 2.21 et seq above.
[2] Paras 2.22, 2.23 above.

Scotland only where the witness is unable to attend the trial by reason of being ill or infirm, and where there would be no unfairness to the other party in using evidence provided in this way. By contrast, since the American statutes are expressly designed to deal with child witnesses (rather than with all possible types of witness) the grounds for using the deposition procedure tend to be more broadly stated and, with one or two exceptions, unfairness to the accused is not, at least explicitly, a consideration. Thus, to take but one example (Ohio) a pre-trial deposition may be authorised on a simple application by the prosecutor. For it to be used in place of the child at trial the court must find that the child will either refuse to testify in open court, will be unable to communicate because of extreme fear, failure of memory, or for some other reason, or that there is substantial likelihood that he or she will suffer serious emotional trauma from testifying in the accused's presence.

4.33 It has been observed[1] that, although pre-trial depositions could be regarded as hearsay (and therefore not generally admissible), most of the American statutes treat them as the functional equivalent of testimony at trial. There have, however, been several challenges to the constitutionality of the deposition statutes on the ground that they infringe an accused person's right of confrontation with witnesses against him conferred either by the Sixth Amendment to the US constitution or by similar provisions in individual State constitutions. At this stage it is impossible to say what will be the eventual outcome of all the challenges presently being considered by the courts. However, in some cases[2] the courts have upheld the constitutionality of statutes which preserve a right of cross-examination (albeit excluding the accused himself from the room where the deposition

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[1] The Testimony of Child Victims in Sex Abuse Prosecution: Two Legislative Innovations, 98 Harvard Law Review (1985) 806, 814.

[2] For example, State v. Johnson, 729 P 2d 1169 (Kan 1986); State v. Cooper, 353 SE 2d 451 (SC 1987).

is being taken) upon the basis that cross-examination is the most important feature of a right to confrontation. By contrast it has been held[1] that a prior statement which was made outwith the presence of an accused and which was not subject to cross-examination does infringe an accused person's right of confrontation.

(v) Hearsay exception

4.34 In the United States, as a general rule, hearsay is inadmissible in criminal proceedings just as it is in Scotland. This is so mainly on the grounds (a) that the statement in question may have been inaccurately reported, and (b) that the statement cannot be subjected to cross-examination. Hearsay may also be seen as objectionable because to admit it denies the judge or jury an opportunity to observe the demeanour of the witness. Finally, some people may regard it as an objection that the statement was not made on oath, but that may not be a very valid objection in the case of young children who would not take the oath anyway, and whose evidence, at least in Scotland, is not treated any differently for that reason.[2]

4.35 In the United States the Supreme Court has established a number of exceptions to the general prohibition of hearsay evidence. Where the maker of the statement in question actually gives evidence, any prior statement by him is admissible not only in relation to his credibility but also as evidence of any facts contained in the statement.[3] Where the maker of the statement does not give evidence a hearsay statement will be admissible only if (a) it can be shown that the maker of the statement is

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[1] Long v. State, Texas Ct Crim App 1 July 1987.

[2] See para 2.4 above.

[3] Chambers v. Mississippi, 410 US 284, 301 (1973); Nelson v. O'Neil, 402 US 622, 626-627 (1971).

unavailable, and (b) the hearsay evidence bears adequate "indicia of reliability".[1] Apart from the foregoing, most States in the United States also appear[2] to recognise exceptions similar to the res gestae and de recenti exceptions of Scots law.[3]

4.36 Since 1982 several States have enacted new hearsay statutes for children which seek to embody the principles expressed in Ohio v. Roberts. The Washington statute[4] is generally regarded as the model for others that followed. It provides as follows:

> "A statement made by a child when under the age of 10 describing any act of sexual conduct performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings if
>
> (1) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) the child either:
>
> (a) testifies at the proceedings; or
>
> (b) is unavailable as a witness, provided that when the child is unavailable as a witness such statement may be admitted only if there is corroborative evidence of the act."

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1 Ohio v. Roberts, 448 US 56, 66 (1980).

2 See Yun, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Columbia Law Review (1983) 1745, 1753 et seq.

3 See paras 2.14, 2.15 above.

4 Wash Rev Code Ann S 9A 44 120 (Supp 1984).

4.37 The requirement of unavailability in the Washington statute is not further explained, but the comparable Indiana statute[1] specifies the grounds as:

> "(i) a psychiatrist has certified that the child's participation in the trial would be a traumatic experience for the child;
>
> (ii) a physician has certified that the child cannot participate in the trial for medical reasons; or
>
> (iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath."

4.38 So far as the requirement of indicia of reliability is concerned, it has been held[2] that this must come from the circumstances of the statement itself. The indicia cannot be found in the fact that a statement has been corroborated by admissions made by the accused.

4.39 Statutes and rules such as those we have just described are primarily designed to deal with the admissibility of what might be called accidental or informal hearsay statements. By that we mean statements which were not obtained as a result of a structured, formal interview, but which were made, possibly to family members or to friends, in the course of the child's normal day-to-day to life. Increasingly, however, the statutes seem to have been used to secure the admission at trial of video recorded interviews between the child and an investigator or therapist such as a paediatrician, a social worker, or a psychologist. Statements obtained in this way (whether video recorded or not) are, of

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[1] Ind Code Ann s 35-37 4-6(c)(2)(B) (Burns Supp 1984).

[2] State v. Ryan, Washington Supreme Court, 26 November 1984.

course, strictly hearsay; but they also present other problems which merit special attention.

(vi) Pre-trial interviews

4.40 When we speak of pre-trial interviews we are referring to interviews which take place outwith the context of criminal proceedings. Unlike pre-trial depositions[1] they are not ordered or authorised by a court but take place naturally in the course of an investigation into suspected abuse. At the time when such an interview takes place there may have been no criminal charges brought against anyone. Indeed, the primary purpose of the interview may be to establish whether criminal offences have been committed at all and, if so, by whom. Alternatively, the purpose of the interview may be essentially therapeutic.

4.41 Whatever the original purpose of the interview, it now seems to be customary in the United States for such interviews to be video recorded. In some instances this is done primarily for reasons relating to the child's welfare. There is a growing realisation among those who work with children that repeated interviews, undertaken by different agencies for their own purposes, can have a harmful effect on the child. Where a spirit of co-operation exists a single video recorded interview,[2] which can then be viewed by other agencies, is often thought to be preferable.

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[1] See para 4.29 et seq above.

[2] When we speak of a single video recorded interview we strictly mean an interview conducted throughout by the same interviewer: in some instances it may have to be composed over several sessions; but that can lead to difficulties if the video recording is subsequently used at a trial, and inconsistencies are found in the statements made by the child at different parts of the interview.

4.42 Although such therapeutic and welfare considerations will often justify the video recording of interviews with children, it is clear that in many cases this is also done with an eye on the possibility that the recording may subsequently be used either in civil court care proceedings or in criminal proceedings. Apart from the question of hearsay, such recorded interviews can pose other problems of some magnitude. These relate to the way in which any statements by the child were elicited, and to the matter of confidentiality.

4.43 Since interviews of the kind which we are now considering are conducted in the absence of any judicial control, and frequently by people who are not themselves lawyers, it is probably inevitable that in some instances a child's answers or statements may be provoked by leading questions or by other techniques which would not be permitted in a court of law. Furthermore, in cases of sexual abuse some interviewers may choose to use anatomically correct dolls as a means of encouraging children to describe their experiences. Such dolls are themselves a subject of some controversy, and we consider them separately later in this Discussion Paper.[1] For the present we consider the matter of leading questions.

Leading questions

4.44 So far as we have been able to discover, expert opinion is divided on the question of whether or not children are particularly suggestible, and likely to be influenced by leading questions. It has, however, been suggested[2] that this may depend on the nature of the events which are the subject of the leading questions:

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[1] Paras 4.63 et seq, 5.96 below.

[2] Davies, Stevenson-Robb and Flin, The Reliability of Children's Testimony, International Legal Practitioner, Dec 1986, 95, 100.

> "Some contemporary researchers have reported no increase in the impact of leading questions among younger children whereas other equally well conducted studies have reported a consistent increase. Some very recent research suggests the answer to this confusion lies in the nature of the events which are the subject of the leading questions. Where these questions refer to central events and actions which lie within the child's understanding, then suggestive questioning is likely to be rejected by even 5 year olds. If, on the other hand, one is dealing with peripheral detail superfluous to the main action and actors, then the younger child does seem more vulnerable."

4.45 There is, however, another side to leading questions. It may be that children who have been abused require to have their story coaxed out of them. Certainly the authors quoted above have cited studies[1] which appear to suggest that in general younger children may respond better to structured questioning rather than to questions which merely seek a free recall of information. Some practitioners in the field of child abuse go much further. One, for example, has written in relation to sexual abuse:[2]

> "Very few children voluntarily divulge information, particularly details, of this nature. Asking children to share forbidden secrets (for which they feel responsible) is not comparable to asking them what they had for lunch. They need to know that the interviewer is comfortable and familiar with this subject and that they won't be blamed or rejected for talking about it. Interviewers who remain neutral, non-probing and detached, and who conduct evaluations as though they were in a courtroom or other legal arena, rarely succeed in breaking through to small, frightened children."

4.46 Probing interviews of the kind envisaged in the above passage are not found only in the United States. For some years now

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1 Ibid 99.

2 MacFarlane, Diagnostic Evaluations and the Use of Video Tapes in Child Sexual Abuse Cases, 40 Miami Law Review (1985), 135, 153.

interviews of that sort have been used at the Child Sexual Abuse Clinic at the Great Ormond Street Hospital for Sick Children in London.[1] Those techniques have from time to time come under the scrutiny of the Family Division of the High Court in England in relation to civil care proceedings, and have often not been well received.[2]

4.47 The Great Ormond Street techniques have, it appears, undergone some changes in order to make the results of interviews more acceptable to the courts. The techniques have, however, been described in this way:[3]

> "The child is interviewed by a psychiatric social worker and sometimes a doctor. During the course of the interview, use is made of anatomically correct dolls to encourage the child to demonstrate behaviour which she is reluctant or unable to describe in words. Since children are often very reluctant to talk about the matters in issue, the interviewer applies a degree of coaxing and pressure on the child to overcome this reticence. This encouragement to answer may involve leading or hypothetical questions or questions designed to elicit a different answer to one already given. It is felt by the Clinic that such pressure is necessary to enable the child finally to make statements against another family member; as one of the Clinic staff has put it, it is necessary to match the trauma which the child has suffered through the abuse by placing equal pressure on the child to talk about what has occurred."

4.48 Some of the judges in the Family Division who had to deal with cases where statements elicited by such interviewing

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[1] See Vizard, Interviewing Young Sexually Abused Children - Assessment Techniques [1987] Fam Law 28.

[2] A collection of such cases is contained in a special issue of Family Law Reports - [1987] 1 FLR 269-346.

[3] Douglas and Willmore, Diagnostic Interviews as Evidence in Cases of Child Sexual Abuse, [1987] Fam Law 151.

techniques were in issue were less than encouraging in their reaction. Thus Hollis J, in C v. C[1] said that "there is no evidential weight to be attached to this so-called diagnostic interview whatever". A more reflective observation is to be found in the judgment of Latey J in Re M (a minor).[2] He said:

> "If I have understood the dilemma correctly it is this: there is 'an interface', as it has been described, between the needs of clinical therapeutic methods and the needs of the courts in legal proceedings. In doing what has been found so far to be best to meet the needs of the former, methods may be necessary which defeat or do not best meet the needs of the latter. All the professional people involved in this case have agreed that methods should be adopted or adapted which reconcile the two sets of needs, if that can be done .... The problem is whether there is a way of doing it which does not reduce therapeutic efficacy."

4.49 It should be remembered that the above comments were made in the context of civil care proceedings. In such a context evidence of what took place and of what was said during the interviews was, for a start, admissible, and consequently the main issue concerned the weight that should be attached to the statements bearing in mind the interviewing techniques which had been used to obtain them. In criminal proceedings evidence about such statements would be inadmissible, at least for the purpose of proving the facts contained in the statements; and, even if they were to become admissible for that purpose, it seems to us possible that judges might seek an even higher standard in relation to matters such as leading questions than they would in civil proceedings. We shall consider these matters further in Part 5 of this Discussion Paper but, for the present, it is as well to be aware of one potential anomaly which already exists in our law.

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[1] [1987] 1 FLR 321, 328.

[2] [1987] 1 FLR 293, 294.

As we mentioned earlier[1] our law presently permits evidence to be led about a prior statement made by a witness, where that is done to show that on the prior occasion he said something different from his evidence given in court. Where this is done, the consequence is only that the witness's credibility may be adversely affected: the earlier statement cannot prove the alternative version of the facts. The point is, however, that (subject to what we shall say below about confidentiality) an earlier statement falling within the rule just described could be a statement given in the course of a diagnostic interview. So far as we can judge it would not be an objection to such a prior statement being used for the purposes of the existing rule that it had been elicited by leading questions. Thus, evidence which might be regarded as objectionable were it to be used to support or to replace a child's evidence in court might not be so regarded were it to be used to challenge his credibility.

Privilege and Confidentiality

4.50 When a person consults a doctor or other therapist he may assume that what passes between them will thereafter be treated in confidence. Certainly a doctor is under a duty not to publish what has been revealed or disclosed in the course of such a consultation, but under Scots law he may be required to give evidence in court proceedings if called on to do so.[2] It is not, however, entirely clear to us how far this absence of privilege extends.

4.51 It is reasonably clear that a doctor is bound to give evidence regarding any matters which he has observed from an examination

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1 Para 2.16 above.

2 Walkers, 419; Macphail, 18.45.

of his patient, but there seems to be some uncertainty about whether or not he is also bound to disclose the substance of any written or oral communications made to him by the patient. Both Walkers and Macphail suggest that such communications are not privileged unless made in connection with the dispute.[1]

4.52 The foregoing rules of evidence have, of course, been established in a context quite different from that which we are presently considering, namely the interviewing of children by doctors, psychologists, or other therapists or investigators in order to establish whether or not they have been physically or sexually abused. For one thing it may be that such interviews would be regarded by the courts as having taken place "in connection with the dispute" (although that phrase is arguably more apt for civil than for criminal proceedings). If that were to be the view of the courts, questions of confidentiality and privilege might be thought to arise. For another thing it is clear that our existing law could not have contemplated that a complete visual and audible record of an interview might be made available for showing in court. It is uncertain whether the courts would consider that existing law was appropriate in such circumstances.

4.53 The reality of the matter is that, if video recordings of interviews with a child are to be admissible as evidence in subsequent criminal proceedings, then the interests of justice will surely dictate that the recording, or a copy of it, should be made available to the police and possibly to the social services, to the prosecutor, to the defence (including possibly the accused himself), and in due course to the court. One may wonder whether such a degree of disclosure would be likely to be contemplated by, say, a parent who took a child to a doctor or psychologist for a diagnostic interview.

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[1] Ibid.

4.54 In the United States, where the law generally recognises the privileged nature of communications between patients and certain therapists, this issue seems to have caused some concern. Inevitably in cases involving children there is a primary question about who can, or should, consent on behalf of the child to a video tape being made available to other people and for other purposes. When consent is to be given by, for example, a parent, there are questions about the scope and range of that consent. As one writer has put it:[1]

> "A decision to video tape an alleged victim of child sexual abuse should not be made on the grounds that the equipment is waiting in the closet and someone is available to operate it. Issues associated with its use, such as: Who can or must consent to the taping and to the viewing of tapes; how should the consent form be designed; who owns the tapes and who may have copies; and how the tapes will be protected and used, should be carefully researched. Decisions should be made with full knowledge of the potential consequences that relate to each situation."

4.55 There may then be both legal and ethical problems associated with the use of video recordings of pre-trial interviews. In Part 5 of this Discussion Paper we shall consider whether such problems present particular difficulties for the use of video recorded evidence in Scotland.

(vii) A child advocate

4.56 In recent years several important bodies in the United States[2] have recommended that provision should be made for the appointment of a person to support child witnesses in criminal

[1] MacFarlane, op cit 162.

[2] For example, National Conference of the Judiciary on the Rights of Victims of Crime (1983); Attorney General's Task Force on Family Violence (1984).

proceedings. Some States[1] have in fact legislated for this, but elsewhere such arrangements are now often made on an informal, non-statutory basis. It seems that there are two main sources from which child advocates may come.[2]

4.57 The first source comprises volunteers working within community based victim/witness assistance programmes. Probably the nearest British equivalent would be Victim Support Schemes of which there is now a growing number in Scotland. In the United States such persons counsel the victims in advance of a court hearing, explain the legal procedures in appropriate terms, possibly take the child on a tour of the courtroom prior to trial, and then accompany the child to the trial itself. In some instances volunteer child advocates may liaise with prosecutors, and may offer advice about whether or not special measures would be appropriate for taking the child's evidence. Where such measures are being contemplated, the child advocate may be required to give evidence in court in support of the application.

4.58 The second main source for child advocates comprises guardians ad litem who, under American law, are generally appointed to represent children in civil care proceedings in the juvenile court. Increasingly, it appears, they are carrying over their functions into criminal proceedings as well. It is said[3] that the most important benefit of allowing this is the link which it provides between the two court systems since children are often confused by the two sets of proceedings. Moreover, since guardians

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[1] For example, Colorado and Wisconsin.

[2] For a full account of the use of child advocates in the United States, see Whitcomb, Shapiro, and Stellwagen, When the Victim is a Child, US National Institute of Justice (1985), 89 et seq.

[3] Ibid 92.

ad litem are generally themselves practising lawyers, it is apparently permitted in some States for them to intervene in criminal proceedings, for example to seek an adjournment in the interests of the child, or to apply for the use of a special technique, such as closed circuit television, for the taking of the child's evidence. On occasions, however, such interventions have been criticised as contravening an accused's due process rights.

4.59 The Scottish equivalent of the American juvenile court care proceedings would be proceedings before a children's panel where the child's interests are primarily represented by the reporter to the children's hearing. However, the reporter is also the person who brings such proceedings in the first place, and, as such, it would probably not be appropriate for him to take any wider role in protecting the child's interests. There is now, however, provision[1] for the appointment of an official popularly known as a 'safeguarder' whose function is to safeguard the interests of a child in cases where there is or may be a conflict between the interests of the child and those of his parent. It may be for consideration whether the role of the safeguarder could be widened to include the protection of the child's interests as a witness in criminal proceedings. We consider this further in Part 5 of this Discussion Paper.

(viii) Expert witnesses

4.60 As we have seen[2] expert witnesses are used in West Germany to provide an opinion on whether or not a particular child can be regarded as truthful and reliable. Attempts have occasionally been made in the United States to use expert witnesses in this way, but such attempts have generally been unsuccessful on the ground

[1] Social Work (Scotland) Act 1968, s 34A.
[2] Para 4.7 above.

that such evidence usurps the function of the judge or jury.[1] Expert witnesses have, however, been used more successfully in other ways.

4.61 This has involved the giving of generalised expert testimony to show that abused children generally show certain symptoms, or behave in a certain way. Put round the other way, such evidence may be used to counter any suggestion or inference that a child is untruthful or unreliable because he has behaved in a particular manner: the expert may be able to say that, in the case of an abused child, such behaviour is not inconsistent with truthfulness. An example of this kind of use of an expert witness is to be found in a recent case in Minnesota.[2] That case involved a 14 year old victim of extrafamilial sexual abuse. The Minnesota Supreme Court approved expert testimony explaining why adolescent victims of sexual abuse often delay reporting the offence, and why victims sometimes remain in continued contact with the perpetrator following the attack.

4.62 We have mentioned earlier in this Discussion Paper[3] that some people - judges, members of juries, and others - may hold preconceptions about the general reliability and truthfulness of children. For example, in the House of Lords debate on the Criminal Justice Bill which is presently before Parliament, one

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[1] See, for example, United States v. Azure, 801 F 2d 336 (8th Cir 1986); State v. Holloway, 347 SE 2d 72 (NC Ct App 1986). These cases concerned evidence of truthfulness given by a paediatrician and a psychologist respectively.

[2] State v. Hall, 406 NW 2d 503 (Minn 1987).

[3] Para 3.13 above.

member of the House is recorded[1] as saying:

> "Children do not speak the truth naturally .... The point at which a child begins to have any respect for truth is the point when his education begins to succeed."

We have also seen[2] that this may be a viewpoint which is inconsistent with the results of contemporary research into the reliability of children as witnesses. It may therefore be that expert testimony could also be admitted on this sort of matter, though we are unaware of any case where that has been done in this country.

(ix) Anatomically correct dolls

4.63 It is not uncommon in the United States, and to an extent in Great Britain also, for doctors and other therapists to use anatomically correct dolls as a means of helping children to explain sexual incidents in which they have been involved. Such non-verbal procedures may, however, present problems. In relation to the use of toys and models to re-enact a scene it has been said:[3]

> "The obvious danger with such a procedure is that the child will use the prompts as toys for extemporising fantasy which he or she will then incorporate into his account of the witnessed events."

4.64 In relation to the use of anatomically correct dolls the same authors give this warning:[4]

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[1] Hansard (HL) 22 October 1987, Lord Paget, col 282.

[2] Para 3.13 above.

[3] Davies, Stevenson-Robb and Flin, The Reliability of Children's Testimony, International Legal Practitioner (1987) 95, 100.

[4] Ibid.

"However, the use of these dolls needs to be carefully monitored and assessed in order to ensure they are used to maximum effect. Imprecision by the child in indicating the exact area touched or actions undertaken by her or his assailant together with the possibility of the dolls being used as toys are ever present dangers."

That is a warning which we think should not be ignored.

Conclusion

4.65 In this Part of the Discussion Paper we have endeavoured to give a full account of the various techniques (many involving the use of modern technology) which are in use around the world to facilitate the giving of evidence by children. We have done this because, in our view, any possible reforms in our own country will best be approached against a background of knowledge about what has been tried elsewhere. However, the mere fact that certain techniques have been used in other countries does not of itself guarantee that they are the best answer to the problem. As one American author has put it:[1]

"The plight of child victims in the courtroom has generated considerable media attention, much of it focussed on the potential of modern technology to alleviate the stress of testifying. Video tape and closed circuit television, in particular, have received much media coverage, and legislators have felt pressured to adopt these controversial measures with limited opportunity for reflection and study. Our findings suggest that these techniques can be used only in a small fraction of child sexual abuse cases and that there are less obtrusive, and less controversial, ways of achieving similar effects for all but the most seriously traumatised children."

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[1] Whitcomb, Prosecuting Child Sexual Abuse - New Approaches, National Institute of Justice Reports, May 1986, 2, 3; and see Murray, 72 et seq.

On that note of caution we now pass to consider some possible reforms which might be introduced in Scotland.

PART 5 - POSSIBLE REFORMS

Our approach in general

5.1 Our own survey of the various techniques which are in use in other jurisdictions, and in particular in the United States, coupled with Mrs Murray's analysis of the American situation, lead us to the conclusion that there is no single solution which will provide a satisfactory method for children to give their evidence in all cases. Children themselves will vary enormously not only in physical age but also in emotional maturity with the result that, while some may find the giving of evidence by conventional means to be an upsetting and even traumatic experience, others may not find it so, and indeed may even feel cheated if they are not permitted to give their evidence in court. Moreover, the circumstances of individual offences can also vary greatly so that the position, in relation to giving evidence, of a child who has been subjected to repeated intra-familial sexual abuse may be quite different from that of a child who has been the victim of some physical abuse at the hands of a stranger. Conversely, while one might expect that attendance at court to give evidence in, say, a road traffic prosecution would be unlikely to cause trauma, or even upset, to a child, that may not necessarily be so. In such a case many children may be perfectly capable of giving evidence by conventional means, but others may not. When one adds to the foregoing considerations the paramount need to protect the interests of an accused who is presumed to be innocent until proved guilty, it seems to us that, in examining the various techniques which might be made available, we should be doing so not with a view to providing a comprehensive package of measures which will always be used for all children but rather with a view, in at least some cases, to seeing whether certain techniques could be made available in special circumstances, and upon clearly

stated criteria, when more conventional methods can be shown to be inappropriate. Upon that basis we begin our examination of possible reforms on the assumption that in many cases children will continue to give evidence in court by conventional means.

5.2 On the basis of that general approach we now turn to consider, firstly, whether there are any general improvements in practice which might usefully be introduced in Scotland, and secondly, whether any innovative techniques, or modifications to the laws of evidence, such as those which we examined in Part 4 of this Discussion Paper would be appropriate in this country.

General improvements in practice

5.3 In Part 4[1] we listed a number of improvements in court practice and facilities which are now in use in the United States when children are called to court as witnesses. Some of these already exist in Scotland, but in our view it is worthwhile to consider whether further improvements can be made. Such improvements would be relatively modest and undramatic but if, as we have suggested above, the giving of evidence in court is to continue to be a common practice where children are concerned, then it seems to us that even modest improvements are to be encouraged where these are likely to make the experience less disagreeable for children than would otherwise be the case. Even in the United States it has been said[2] that:

> "Many effective innovations do not require statutory reform at all ... there are many ways to relieve the child's anxiety and elicit effective testimony. Drastic interventions - such as closed circuit television and video

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[1] Para 4.8 et seq.

[2] Whitcomb, Prosecuting Child Sexual Abuse - New Approaches, in National Institute of Justice Reports, May 1986, 2, 5, 6.

taped depositions in lieu of live testimony - should be used only in extraordinary cases."

5.4 One simple innovation would be to require judges and lawyers to remove their robes and wigs when a child is giving evidence in court. At present this is common practice in Scotland, but it is not mandatory. One advantage of having a mandatory, and therefore consistent, practice would be that those who seek to prepare a child for the experience of giving evidence in court would be able, with certainty, to tell the child that all the people whom he would see in court would be wearing ordinary clothes. On the other hand, it may be thought to be going too far to make this a requirement in all cases: a child of 15, called as a witness in a road traffic trial, for example, might be surprised and even embarrassed to find himself being treated differently from adults in this regard. A possible solution to the difficulty would be to have a mandatory requirement in some cases while leaving it to the judge's discretion in others. Thus, for example, it could be mandatory for wigs and gowns to be removed where the witness was a child below a certain age, say 12; or where the child was the alleged victim of an assault or a sexual offence. We would welcome consultees' views on this matter.

5.5 It is also quite common practice in Scotland for children, and in particular very young children, to be allowed to give their evidence sitting at the table in the well of the court. Once again, however, this practice is not mandatory. Moreover, even when children are permitted to give evidence sitting at the table, it is, we understand, common for the presiding judge to remain in his seat on the bench. It seems to us that there is no good reason why a judge should not come down from this physically elevated,

and possibly threatening, position and take a place at the same table as the child. Once again, however, there are advantages and disadvantages in making such practices mandatory in all cases. Compromise solutions such as those discussed in the previous paragraph may merit consideration.

5.6 We have also seen that in the United States attempts are made to hold trials involving child witnesses in the smallest and least initimidating courtroom compatible with the other requirements of the proceedings. So far as Scotland is concerned, we appreciate that the physical constraints of existing court buildings together with the demands of concurrent court business may often make this impossible. Nonetheless, we consider that clerks of court and others responsible for the physical arrangements for court business should so far as possible attempt to achieve this objective. That would, of course, in turn depend on prosecutors giving sufficient advance notice that a particular case was likely to involve a child witness.

5.7 Child witnesses in the United States are often, as we have seen, taken by the prosecutor on a tour of the courtroom prior to the commencement of a trial. During that tour they may be given, depending on their age, some general indication of the functions of the judge, jury, and so on. We are aware that this happens in Scotland also, but we do not understand that the practice is as yet widespread. If we were to introduce in Scotland something like the child advocate system in use in the United States,[1] presumably this function would be undertaken by such persons. In the absence of such a system, however, we consider that prosecutors should be encouraged further to expand their present practice in this matter.

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[1] See para 4.56 et seq above, and para 5.84 et seq below.

5.8 The changes in practice which we have so far mentioned could all be implemented without the need for legislation and without any expenditure of public funds. We envisage that they could all be brought about by appropriate practice notes or practice directions. To sum up thus far, therefore, we seek the views of consultees on the following propositions and questions:

1.(a) Consideration should be given to the issue of practice notes or directions relating to trials in which children are witnesses. Such practice notes or directions should provide that -

(i) judges, counsel and solicitors should be required to remove their wigs and robes when a child is giving evidence; and

(ii) children should be permitted to give their evidence sitting at a table in the well of the court; and in that event the judge as well as counsel and solicitors should sit with the child at that table.

(b) If the foregoing propositions are in general acceptable, should they be made mandatory in all cases whre a child is a witness, or only in relation to children below a certain age, or only in relation to children who are the alleged victims of certain offences, say assaults and sexual offences?

2. **Where it is known that a trial will involve a child as a witness the prosecutor should advise the clerk of court of that fact as long in advance of the trial as possible, and the clerk of court should then endeavour to allocate for the trial the smallest and least intimidating courtroom compatible with the requirements of the trial and the other business of the court.**

3. **Prosecutors[1] should be encouraged to expand the practice of taking child witnesses on a pre-trial tour of the courtroom and of explaining to them, in terms appropriate to their age, the functions of the judge, jury, defence lawyers, and other officials.**

5.9 There is one further matter of practice which would not require legislation or public expenditure, but we have not included it with the others so far considered because it should in our view retain some element of judicial discretion. What is involved here is permitting a child to have a relative or other support person seated alongside him while he is giving evidence. It seems to us to be likely that it will often increase a child's confidence to have a known and trusted person nearby while he is giving evidence, but we think that the judge should have some discretion in this matter since, where a child is older, such a practice may be inappropriate, or even embarrassing for the child. There may,

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[1] We express this, and many other propositions, in a way which assumes that a child witness will always be adduced by the prosecution. While no doubt that will normally be the case, there may be instances when a child will be adduced on behalf of the defence. We intend all our propositions to apply equally to such a case also. In the case of Proposition 3 above, therefore, the responsibility for taking a child on a tour of the courtroom would rest with the defence solicitor.

however, be some doubt about whether this practice is strictly permissible in the first place and, if that is the case, we think that any such doubt should be removed. We suggest that this practice should become normal unless, for some good reason, the judge directs otherwise. We accordingly propose:

> 4. **In the practice notes or directions referred to in Proposition 1 above it should be made clear, for the avoidance of doubt, that a judge should permit a child to have a relative or other support person seated alongside him while that child is giving evidence unless for some good reason the judge directs otherwise. The judge should, however, direct that relative or other person that he must not coach or assist the child in any way during the giving of his evidence.**

5.10 We now turn to consider some other improvements in practice which, although still relatively modest in character, would require either changes in existing legislation or some expenditure of public funds. We consider first the provision of sound amplification apparatus in courtrooms.

5.11 It is, we believe, well known that, when giving evidence, children often speak in a very soft voice, or even in a whisper. This is also, of course, the case with some adult witnesses. In such cases we cannot believe that it is likely to encourage the confidence of the witness, or to improve the flow of his testimony, if he is repeatedly being asked to speak up so that everyone can hear what he is saying. There is of course no need for this to happen. Sophisticated sound amplification systems are readily available, and are in fact, as we understand it, installed in

some of the more modern courtrooms in Scotland. We believe that their use should become universal in all courtrooms. Moreover, if effect were to be given to our proposals that children, judges, and lawyers should, at least in certain cases, sit around a table when a child is giving evidence, such systems should incorporate moveable microphones which could be used in that situation. We appreciate that what we are now proposing would have financial implications, but we believe that, at the end of the twentieth century, it is unacceptable that any witness, least of all a child, should require virtually to shout to make his evidence heard in court. Moreover, we should add that, so far as children are concerned, improvements in court facilities, such as the one we are now considering, may reduce the need for other and costlier techniques. It may be, for example, that a child could be seated at the table in the well of the court in such a position that he could not see the accused because the accused would be behind him. This alone might be sufficient to allay the child's fear of coming face to face with the accused. In these circumstances we propose:

5. **As a matter of urgency effective sound amplification systems should be installed in all courtrooms which are not presently so equipped.**

5.12 A further strategy in use in the United States to reduce the apprehensions of children giving evidence is, as we have seen, the provision of specially adapted waiting rooms where children can await their turn to give evidence in agreeable and non-frightening surroundings, and free from any contact with other adult witnesses. Given the limitations on waiting room accommodation which already exist in many Scottish court houses it would clearly

be impracticable to suggest that specially equipped rooms should be set aside solely for the purpose of accommodating child witnesses, particularly since the occasions on which they would be required might be relatively infrequent. On the other hand it seems to us that the principle which lies behind American practice in this regard is both sound and desirable. It is, of course, to be hoped that children will be required to spend as little time as possible in court waiting rooms, and we understand that prosecutors in Scotland try to schedule their calling to court in order to keep such time to a minimum. Nonetheless, children will often have to spend <u>some</u> time in a court waiting room. We wonder, therefore, whether some sort of compromise might not be possible. Would it not be possible, for example, for every Scottish court to keep a modest supply of furniture suitable for children together with a modest supply of toys, books and games, and to place them whenever required in a conventional witness room which would then be closed to all other witnesses, apart from family members or others accompanying the child, for as long as it was occupied by a child or children? No doubt even this might not always be possible because of the demands of other trials in the same court house but we would welcome views as to the feasibility of this proposal. We therefore pose the following question:

6. **Accepting that it would not be practicable to have specially designed and equipped waiting rooms permanently set aside for child witnesses in Scottish courts, would it be feasible instead for each court to be provided with a modest supply of furniture suitable for children, and of toys, books and games; for these, whenever possible, to be placed in a conventional witness room when a child is**

attending court as a witness; and for that witness room then to be closed to all other witnesses, apart from family members or others accompanying the child, for so long as it was occupied by that child?

5.13 The final improvement which falls to be considered within this group which we have called "general improvements in practice" concerns the range of persons permitted to be in court while a child is giving evidence. As we have seen,[1] there is already statutory provision[2] to regulate this matter. We have noted, however, that there are several features of that provision which may be regarded as less than wholly satisfactory. First, the clearing of the court, except for those directly concerned in the case, is merely permissive and not mandatory. Second, the power to clear the court is available only in proceedings "in relation to an offence against, or any conduct contrary to, decency or morality". These words are not only obscure but also they do not seem to extend to cases involving purely physical, as opposed to sexual, assault. Third, the existing statutory provisions do not authorise the exclusion of the press while a child is giving evidence.

5.14 So far as the permissive nature of the existing provisions is concerned, we note that this contrasts with the position in relation to children's hearings, and applications from a children's hearing to a sheriff. Such proceedings are required to be conducted in private.[3] Although there are, of course, significant differences between a criminal trial and proceedings under the

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[1] Para 2.24.

[2] Criminal Procedure (Scotland) Act 1975, ss 166, 362.

[3] Social Work (Scotland) Act 1968, ss 35(1), 35(2), 42(4).

children's hearings system, it does not appear to us that those differences are such as to justify making privacy a mandatory requirement in the latter case but not in the former.[1] However, if in future judges were to be required to clear the court in all cases when a child is giving evidence, there may be a case for allowing the judge a discretion to permit persons, such as members of the child's family, to remain in court despite its general closure to the public. Although such family members might have no direct involvement in the proceedings, their presence in court might be a comfort and support to the child while giving evidence. Such a discretion might also extend to, for example, approved researchers. We therefore provisionally propose:

7. **In cases falling under sections 166 and 362 of the Criminal Procedure (Scotland) Act 1975 the presiding judge should be required, rather than merely permitted, to clear from the court all persons not having a direct involvement in the proceedings. He should also, however, have a discretion to permit members of the child's family to remain in court where their presence seems likely to offer comfort and support to the child. Such a discretion should also extend to persons such as approved researchers.**

5.15 So far as the types of case covered by the provisions are concerned, we think that there would be advantage in modernising the wording of the provisions in the interests of clarity, and in extending the scope of the provisions to include cases of physical, as opposed to sexual, assault. Indeed, there may be advantage in extending the provisions so that they would apply in any case in which a child is a witness. Although, no doubt, the risk of trauma,

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[1] We consider the special position of the press in para 5.16 below.

or even simple embarrassment, may be greater where a case has a sexual content, we tend to think that contemporary views on children's welfare might well support the wider approach. Such an approach would also have the advantage of removing any uncertainty about the classes of case to which the provisions apply. We accordingly seek views on the following proposition:

> **8. Sections 166 and 362 of the 1975 Act should be expanded so that they will apply in any case where a child is giving evidence in court.**

5.16 We now come to the position of the press. If one believes that it is likely to be in the best interests of a child witness that he should be required to give evidence before the smallest possible number of people, it would follow that the press should be excluded from court along with all other spectators. We note, however, that their right to attend children's hearings is expressly confirmed by statute;[1] and it would, we think, be undesirable and unwelcome to seek to exclude them from parts of criminal trials particularly if, as we have just proposed, exclusion of the general public were to become mandatory rather than merely permissive. In these circumstances we seek views on the proposition:

> **9. Despite the exclusion of the general public from a court where a child is giving evidence, the press should continue to be entitled to be present at that time.**

5.17 If what we have called "the press" are to remain entitled to be present in court while a child is giving evidence, but if other amendments to sections 166 and 362 are to be made as we have proposed, it seems to us that the opportunity might be taken to

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[1] Social Work (Scotland) Act 1968, s 35(3).

bring the categories of the press more into line with modern conditions. The present provisions refer to "bona fide representatives of a newspaper or news agency" and it could, we think, be argued that, since these words were originally drafted[1] in an age before the advent of television, they do not extend to representatives of a television service. Possibly they may not extend to representatives of a radio service either. We therefore propose:

10. **If amendments are in any event to be made to sections 166 and 362 of the 1975 Act the opportunity should be taken to make clear that representatives of the press entitled to remain in court while a child is giving evidence include representatives of television and radio services.**

Corroboration

(a) General

5.18 In Part 2[2] of this Discussion Paper we drew attention to the consequences which flow from the different approaches to corroboration to be found in, on the one hand, Scotland and, on the other hand, England and those countries whose laws of evidence are derived from English law. To recapitulate briefly, the position is as follows. Under Scots law (and with only a very few statutory exceptions) there is a general requirement of corroboration in all criminal proceedings. Thus, every essential fact which must be established by a prosecutor before a person can be convicted must be proved by corroborated evidence. For that purpose, however, no distinction is made between children

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[1] The provisions which are now in the 1975 Act first appeared in the Children and Young Persons (Scotland) Act 1937, s 45.

[2] Para 2.9 et seq.

who give evidence on oath and those who are merely admonished to tell the truth. Consequently, two or more unsworn children can corroborate the evidence of each other. Under English law, however, as we understand it, there is no general requirement of corroboration in criminal proceedings, and in many instances an accused can be convicted on the evidence of a single witness. There are, however, several modifications of, and exceptions to, that general rule. Thus, the unsworn evidence of a child must be corroborated, but corroboration cannot be found in the unsworn testimony of another child: it can only come from evidence given on oath. Moreover, even where evidence is given by a child who has taken the oath, the judge may in certain circumstances be required to warn a jury that it may be unsafe to convict on that evidence alone in the absence of corroboration.

5.19 In the Criminal Justice Bill which is presently before Parliament there is a provision[1] (applying only to England and Wales) which seeks to change the situation as described above. That provision firstly removes the requirement of corroboration in relation to the unsworn evidence of a child. Secondly, the provision removes the requirement for a judge to give to a jury a warning about convicting on the uncorroborated evidence of a child in cases "where such a warning is required by reason only that the evidence is the evidence of a child". We understand the words quoted to signify that a warning may still be required where other considerations apply.

5.20 We understand that, in view of the introduction of the above provisions for England and Wales, there have been suggestions in some quarters that the requirement of corroboration should be

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[1] Cl 32 in the Bill, as amended on report in the House of Lords.

relaxed in Scotland in relation to child witnesses. As we have seen, however, the corroboration requirement in Scotland is not one which applies only to certain children but is one which applies to all witnesses, regardless of their age, sex, or other considerations, and which applies to all kinds of criminal case. Consequently, the removal of the corroboration requirement in relation to children in Scotland would not involve the removal of an exception to an otherwise general rule but would instead involve the creation of a major exception to a general rule. We can see no possible justification for creating a privileged class of case, or a privileged class of witness, for which or for whom the normal requirements of corroboration would no longer apply. It may, of course, be argued that child abuse is a particularly objectionable form of criminal behaviour, but that consideration, even if it be right, merely seems to us to strengthen the desirability of ensuring, by retention of the corroboration requirement, that innocent people are unlikely to be wrongly convicted. We accordingly seek views on the following proposition:

11. **In cases of child abuse and other cases in which children are witnesses there should continue to be a general requirement of corroboration of essential facts which the prosecution requires to prove.**

(b) The Moorov rule

5.21 In Part 2 of this Discussion Paper[1] we examined the rule of evidence which has come to be known as the Moorov rule. Under that rule two or more single witnesses to separate incidents may corroborate each other where the accused is charged with a series of similar offences, closely linked in time, character and circumstances. It is for consideration whether that rule could be

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[1] Para 2.7 *et seq.*

expanded in any way, and whether it might with advantage be expressed in statutory form.

5.22 On one view it might be thought that to give the rule statutory expression would be productive of greater certainty and clarity than is possible when the rule is simply to be found in a series of court decisions. Moreover, if ways could be found to widen the rule, it might be easier to prove offences which by their nature are otherwise going to be difficult, if not impossible, to establish. Against that there is, first of all, the counter-argument that a statutory expression of a common law rule may introduce an unwelcome rigidity and lack of flexibility into the law, and may in fact inhibit future development. In this connection it is worth bearing in mind that, although the Moorov rule was first developed in relation to sexual offences, it has over the years been applied in relation to a range of other offences also: any statutory formulation would have to take that into account - probably not an easy task. A second consideration, which affects any possibility of widening the Moorov rule, is that the rule, if it is justifiable at all, is so only on the basis that there is a close connection of time, character and circumstances between a series of separate offences. Any widening of that restriction would, we believe, be likely to remove any basis of principle for the rule, and so be unacceptable. In the result, therefore, we propose:

12. **The rule of evidence, known as the Moorov rule, should not be widened by statute, nor should any attempt be made to give it statutory expression.**

Identification of an accused

5.23 We have already observed that identification of an accused as the perpetrator of an alleged offence will nearly always be an essential matter which must be established by the prosecution in the course of a trial. If, as we have seen, one of the more traumatic aspects of normal court procedures for a child witness is coming face to face with the accused, there may be much to be said for adopting as a standard practice a technique for securing such an identification which does not require the child to pick out his attacker in the courtroom. Moreover, if any of the out-of-court techniques for taking evidence which we described in Part 4 were to be introduced in this country, a method of identification which did not require a face to face confrontation in court might become even more desirable.

5.24 The most obvious way of achieving this would be by means of a conventional identification parade where the child would be concealed from the line-up by a one-way glass or mirror. An alternative, which might be more appropriate in the case of very young children, would be by the use of photographs.[1] The use of photographs as a means of identification has on occasions, to our knowledge, been criticised in court, often on the basis that the availability of a photograph of a suspect may carry an implication that it is already on police records, and that consequently he must have a criminal record. However, the use of photographs as a means of identification is already provided for in the revised Scottish Guidelines on Identification Parades which were approved by the Lord Advocate and the Secretary of State in 1981; and, moreover, there is some evidence to show that identification by the use of photographs may be less stressful for children than

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[1] An interesting example of the use of photographs for the purpose of identification by a 3 year old child is described in Jones, The Evidence of a 3 Year Old Child, [1987] Crim L R 677.

identification at an identification parade.[1] It may be that the Guidelines mentioned above could with advantage be revised so as to make express provision for children carrying out identifications by means of photographs. Once an identification has been made by some out of court means it now seems to be the law that evidence of that identification is admissible both to supplement a visual identification made in court and, in some circumstances, to take the place of an identification in court.[2] Despite that, it is still the practice, so far as we are aware, to invite a witness to make a formal identification in court. It may be that such a practice could be dispensed with where an out of court identification of an acceptable kind has been made by a child. In the circumstances we provisionally propose:

13. In any case where a child witness is required to identify a person who is alleged to have committed an offence, it should, so far as practicable, become standard procedure for that to be done by an out of court technique such as an identification parade involving the use of a one-way mirror, or identification from a collection of photographs. Where that is done it should no longer be necessary to ask the child in court to identify the person alleged to have committed the offence.

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[1] Shepherd, Ellis and Davies, Identification Evidence: A Psychological Evaluation (Aberdeen University Press, 1982) 74, 75.

[2] Muldoon v. Herron, 1970 JC 30; McAllister and McLaughlan v. HMA, (unreported, Criminal Appeal Court, 27 November 1975, Crown Office Circular A9/76); Neeson v. HMA 1984 SCCR 72; Smith v. HMA 1986 SCCR 135.

Competency of child witnesses

5.25 In Part 2 of this Discussion Paper we considered the question whether children are or are not in general presumed to be competent witnesses, and we suggested[1] that there might be advantage in providing expressly that in this respect children should be presumed to be competent witnesses unless there is good reason to reach a different conclusion. We accordingly propose:

14. For the purpose of determining competency as a witness a child should be presumed to be a competent witness unless there is good reason to reach a different conclusion.

Meaning of "child"

5.26 So far in this Discussion Paper we have used the word "child" without any further specification as to the age intended to be covered by that term, although we have in certain instances - for example the mandatory removal of wigs and gowns - discussed the possibility that certain new practices might be restricted to children below a certain age. Many of the American statutes which authorise special techniques for the taking of evidence from children provide for special, and variable, age limits which range from as low as 10 years to as high as 18. The proposals in the current Criminal Justice Bill for the use of closed circuit television in England and Wales apply to children under the age of 14.

5.27 We shall consider shortly whether any special age limits should be applied for the use of the more extreme techniques for

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[1] Para 2.3.

obtaining the evidence of children. For the present we wish to consider whether the proposals which we have made so far should, apart from possible exceptions which we have identified, apply in relation to all children below the age of 16 (that being the age below which for most purposes Scots law recognises a person as being a child). In our view it would be sensible to follow that course, but we would welcome the comments of consultees on the following questions:

15. **Should the proposals made so far in this Discussion Paper, apart from those where we have identified possible exceptions, apply equally to all children under the age of 16?**

16. **If not, to which proposals should a lower age limit apply, and what should that age limit be? If a lower age limit is to apply, should the court have a discretion to bring an older child within the practice or procedure in question?**

Conclusions so far

5.28 With only a few exceptions the proposals which we have made so far could all take effect without the need for any statutory provision. Standing our view that the giving of evidence by conventional means in court should remain relatively common where child witnesses are concerned, we believe that our proposals would go a considerable way towards making that experience more acceptable and less traumatic for the children concerned. We therefore consider that in a great many cases no more would be required; and, as we have seen,[1] this corresponds with the current views of at least some experienced commentators in the United States.

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[1] For example, para 4.65 above.

5.29 There may, however, remain some cases where the giving of evidence by conventional means in court is likely to be positively harmful to a child, or where the risk of the child "drying up" in court is such that it may be impossible to obtain any evidence from him. It may also be the case that in some instances a child will benefit from being subjected to the least possible number of interviews and questioning sessions. Where this can be achieved, a single interview at an early stage in the proceedings may not only capture a child's most vivid and accurate recollection of recent events but also, if a recording of that interview is made available to the accused, may result in an increased number of pleas of guilty. Such considerations may necessitate the use of special techniques, and we now turn to consider whether any of them might be introduced in Scotland. Before doing so, however, there are two general observations which we wish to make.

5.30 The first is that, where general measures are introduced to ease the experience of giving evidence by all witnesses, or by all witnesses of a certain class, there can be no risk that a jury will draw unfavourable inferences in respect of a particular accused. By contrast, where a special measure is introduced in respect of a particular witness, there must in our view be some risk that a jury will conclude that this has become necessary only because the accused is in fact guilty. While some writers[1] have sought to discount this risk, we ourselves are not persuaded that it can be ignored. It can, however, be reduced if the grounds on which special measures may be authorised are expressed in a way which do not suggest, for example, that the child is afraid of the accused. We are of the view that any statutory provision enabling the use of special measures should, as appropriate, set out the

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[1] See, for example, Spencer, Child Witnesses and Video Technology: Thoughts for the Home Office, [1987] Journal of Criminal Law, 444, 445.

grounds upon which this may be done,[1] and we have kept the foregoing consideration in mind when considering what those grounds should be.

5.31 The second general observation is that, if statutory authority for using special measures and techniques is to be introduced, it will be essential that such measures and techniques are made generally available, and that courts should not be precluded from permitting their use in appropriate cases through lack of technical or other resources. Those consultees who have responsibility for the running and resourcing of courts in Scotland may wish to have this consideration in mind when responding to this Discussion Paper.

Special measures for securing the evidence of children

5.32 Special measures along the lines of those described in Part 4 of this Discussion Paper can, we think, be classified into two broad categories. First, there are those like the Israeli youth interrogator system or the American hearsay exception which are designed in certain circumstances to make it unnecessary for a child to give evidence in a formal sense at all. Second, there are those which acknowledge that formal evidence will be taken from a child in person, but which seek in one way or another to make that experience less stressful and less demanding. In this category are modifications to the rules of evidence to allow a child's evidence to be supported or supplemented by prior statements made by him; arrangements involving the use of screens or closed circuit television; and procedures for taking pre-trial depositions. Needless to say, the adoption of measures in the first of the

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[1] Unlike the closed circuit television provisions in the current Criminal Justice Bill.

above categories would remove, or at least reduce, the need for any of those in the second. For that reason we think that it may be helpful to begin our examination of what we have called "special" measures by considering those which may remove the need for a child to give formal evidence at all.

Measures to remove the need for a child to give formal evidence

(a) The Israeli youth interrogator

5.33 As presently advised we are not attracted by a system modelled on that presently in use in Israel. Whatever its merits in that country, we doubt whether it could be adapted to the Scottish system of public prosecution which vests the control of prosecutions, and of the calling of prosecution evidence, in the hands of the Lord Advocate and the Procurator Fiscal Service. Moreover, we doubt whether it would be thought to be acceptable to have a child's evidence submitted at second-hand by a youth interrogator without there being any opportunity to cross-examine the child or even to put an alternative version of the facts to him. Such a practice might, in any event, be thought to contravene Article 6.3(d) of the European Convention on Human Rights.[1]

(b) A general hearsay exception

5.34 Similar objections apply, in our view, to the possibility of changing the laws of evidence so as to admit a hearsay statement in lieu of evidence in person. Such a statement could not be subjected to cross-examination, and so would probably fall foul of the European Convention. Moreover, a hearsay statement by a child might well, as we have seen, have been made in the course of a diagnostic interview and have been elicited as a result of

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[1] See para 4.14 above.

leading questions or other techniques which would not be regarded as acceptable in a court of law, at least in the absence of the child himself giving evidence.[1] We are accordingly not disposed to suggest that such a hearsay exception should be introduced into Scots law, though the existing limited exceptions to the rule against hearsay (eg where the maker of the statement is dead) would of course remain in cases where they were appropriate. To sum up thus far, therefore, we propose:

17. **A system modelled on the Israeli "youth interrogator" system should not be introduced in Scotland.**

18. **Subject to the retention of any existing exceptions to the rule against hearsay, there should be no general exception to that rule so as to admit, in lieu of oral testimony, statements made by children prior to a trial taking place.**

(c) Another way to remove the need to give formal evidence

5.35 Although we have, for the reasons just stated, rejected the Israeli system and a general hearsay exception, we are nonetheless attracted by the possibility of trying to find an acceptable way in which the evidence of a child might be put before a court without the need for the child to give that evidence in person and in formal proceedings. This would not only be for the benefit of very young or seriously damaged children but also could have other advantages. First, if such evidence could be secured at a relatively early stage after the event, it is likely that the child's recollection would be more accurate and reliable than if his evidence were to be taken weeks, or even months, later. Second, if evidence which would be admissible in court could be secured

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[1] See para 5.74 et seq below.

at that early stage, that might reduce, or even remove, any need for subsequent questioning and precognition. As we have seen, some commentators regard such repetitive questioning as being at best counter-productive and at worst positively damaging for the child concerned. Third, if admissible evidence can be obtained from a child at an early stage, this will not only enable a prosecutor to make an early assessment of the strength of his case so that, if the child's evidence does not measure up to expectations, he can make a speedy decision about whether or not to proceed further with a prosecution, but also it will, we imagine, have a considerable influence in determining whether or not an accused will plead guilty in advance of a trial taking place.

5.36 There are then, we think, compelling reasons for trying to find a way in which admissible evidence can be obtained from a child at an early stage, and in non-threatening surroundings. But, of course, any technique designed to achieve that must also be fair to the proper interests of the accused. The competing interests of the child and the accused are not easy to reconcile, but we believe that there may be one, or perhaps two, possible solutions.

5.37 The first solution is based on one which has been advanced more than once by Professor Glanville Williams.[1] Briefly, his proposal involves the child being interviewed at as early a stage as possible by a person skilled in appropriate interviewing techniques. Such a person might be a psychiatrist, a psychologist, or a social worker. The interview, which would be video recorded, would take place in a room which was of a size, and which was furnished in a manner, likely to put the child at ease. During the

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[1] Professor Williams expounds it in some detail in an Essay on Child Witnesses contained in Criminal Law: Essays in Honour of J C Smith (1987) 188.

interview the child might be accompanied by a parent or other supportive adult, but the interviewer would be entitled to ask that person to leave if that seemed likely to make the child speak more freely. One wall of the room would be fitted with a one-way screen and, if an accused had been arrested and charged by the time the interview took place, he and his lawyer would be entitled to view the interview from behind that screen. The lawyer would be able to communicate with the interviewer through a microphone and ear speaker so that the interviewer could be asked to put to the child particular questions requested by the accused. If the interview had taken place before an accused had been arrested and charged, the accused would, following his arrest and charge, be entitled to see the recording of the earlier interview, and would then be entitled to require a second interview so that questions by him might be put to the child. Professor Williams acknowledges that such a second interview is at odds with the desirability of trying to subject the child to only one interview, but accepts that it will be necessary in the interests of the accused.

5.38 It seems to us that the foregoing proposals merit serious consideration. There is, however, a preliminary point on which we diverge slightly from Professor Glanville Williams. His proposal envisages that, in some cases, an interview of the kind which he suggests may take place even before an accused has been arrested and charged. It seems to us that this part of his proposal could create an uneasy confusion between the investigation of crime and the securing of testimony which can at a later stage be used in place of testimony in court. We fully support any moves that may be made to reduce the number of investigative interviews to

which a child must be subjected, but the primary virtue which we see in the Williams proposal is that it may replace testimony in court. On that basis we consider that an interview, recorded for that purpose, should not take place until after an accused has been charged. In that event, of course, the need for a second interview, as envisaged by Professor Williams, would not arise. Subject to the foregoing, we are at present attracted by the Williams proposal.

5.39 However, there are many related issues which in our view have to be addressed before any final conclusions can be reached. For example, what should be the criteria for deciding to use this procedure, and who should make that decision; how should one determine who is to be regarded as a suitable interviewer for this purpose, and who should make that determination; if an interview of the kind described takes place, should the recording of it be automatically admissible in lieu of formal evidence given by the child, or should it be inadmissible in certain circumstances; should an accused, or the prosecutor, be given a residual right to require the attendance of the child as a witness in court? We now turn to consider those and other questions.

5.40 Criteria for use. Professor Glanville Williams does not, in the Essay to which we have referred, suggest any particular grounds or criteria to determine when this special interview procedure should be used. He does, however, appear to accept that it will be used in all cases where the child in question has been the victim of sexual abuse. Nor does he indicate who is to decide that this procedure should be used, though it seems to be implicit that such a decision should rest with either the police or the prosecutor. We, for our part, think that the decision should rest with the

prosecutor rather than the police if only because it is the prosecutor who will decide whether proceedings should be instituted. If, for whatever reason, a prosecutor decides not to institute proceedings, there will be no need for an interview.

5.41 As to grounds or criteria, we are disposed to think that in this case none should be prescribed. If, as we believe, any special measures for child witnesses should be available in respect of any criminal prosecution and in respect of any child who is below the age of 16,[1] it follows that the use of a special interview procedure should not be limited to any kind of offence or to particularly young children. By the same token, however, we would not envisage that this procedure would be utilised in every case where a child was likely to be a witness. In many instances it would be unnecessary and inappropriate. On the other hand, we would imagine that a prosecutor would seriously consider using the procedure in cases where the child was very young, in cases where the child was the alleged victim, or possibly a witness, of acts of sexual abuse or assault, and in any case where, for whatever reason, more formal procedures for taking evidence seemed likely to cause the child undue fear or distress.

5.42 Qualifications of interviewer. Professor Glanville Williams thought that a suitable interviewer might be a psychiatrist, a paediatrician, a police surgeon or other doctor, a child psychologist, or a social worker. Additionally he thought that the interviewer should be experienced in interviewing techniques, and furthermore should have special instruction about the purpose of the interview and about the desirability for court purposes of, for example, avoiding the use of leading questions. We do not disagree with that. We think, however, that there might be advantage in

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[1] See paras 5.89 to 5.91 below.

having lists of "approved" interviewers prepared, possibly in each court or local authority district. What we have in mind is that procurators fiscal around the country might prepare lists of potential interviewers who appeared to possess the necessary skills and experience for the purpose. Those on the list would not necessarily be drawn from any particular professional background: the requisite skills and experience would be the main criterion. Such lists would then be presented, possibly to the local Sheriff Principal, for approval, and those so approved would then be entitled, on request, to conduct interviews with child witnesses. An interview conducted by a person who was not so approved would not be capable of being used as evidence in lieu of testimony in court by the child. In practice we imagine that procurators fiscal would seek to achieve a good geographical spread of approved interviewers so that any practical difficulties attached to setting up an interview could be kept to a minimum.

5.43 The conduct of the interview. Once it has been decided to set up an interview of the kind described, we imagine that the procurator fiscal would normally make his intentions known to the child's parent or guardian, making plain while doing so that the intention was to video record the interview and use that recording thereafter in place of live testimony by the child. The procurator fiscal should make it clear that the accused is entitled to be present, though concealed from the child's view. Thereafter the procurator fiscal and the defence lawyer would consult with the interviewer, and each would explain the line of inquiry which they wished to have pursued with the child. The interview itself would be conducted in an appropriate room having, as Professor Williams suggests, a one-way screen behind which the accused, his lawyer, and, we think, the procurator fiscal can be placed. Some rooms of

this type are, we understand, already in existence in several children's hospitals around the country. During the interview the accused's lawyer and, we would suggest, the procurator fiscal should be able to communicate with the interviewer through microphones and a small ear piece in order to suggest additional or alternative lines of inquiry. At the conclusion of the interview a copy of the video recording would be made available to the accused and his lawyer for further consideration by them.

5.44 Admissibility of video recording of interview. Assuming that an interview has taken place along the lines just described, should it then be automatically admissible in place of formal evidence by the child or should the accused, or possibly even the prosecutor, be entitled to argue that it should not be so admissible? We think that some right of objection must be given to the accused. He might, for example, be able to show that a line of questioning requested by him had not been pursued, or had not been adequately pursued, by the interviewer. Or, he might be able to show that new evidence had come to light since the date of the interview which could not have been put to the child at the time. The prosecutor is, we imagine, less likely to want to have a recording of an interview declared inadmissible but we see no reason why he should not also have a right of objection even though it may rarely be used. For these and similar reasons we suggest that a video recording of an interview with a child should be admissible in place of formal evidence by the child where no objection is taken by any of the parties, but that otherwise the accused and the prosecutor should be entitled to apply to the court, on cause shown, to have the recording declared inadmissible. If such a plea were to be upheld, the court would then have to decide whether the child should be required to give

evidence in court or by means of some other technique such as closed circuit television or a pre-trial deposition.[1] We do not consider that an accused should have a right to insist that a child must give evidence in person in court: such a decision should, in our view, rest only with the court.

5.45 Practicability and acceptability. On a purely practical level we do not think that interviews of the kind we are suggesting should, at least in the long term, pose insuperable problems particularly since, as we have noted above, hospitals and other institutions are already creating for their own purposes interview rooms with one-way observation glasses. We imagine that it might be possible for local arrangements to be made to enable such facilities to be used from time to time for the purpose we have in mind.[2] It is possible, however, that what we are proposing may be regarded as unacceptable for other reasons.

5.46 The most serious argument against the proposal is likely to be that it would deny to an accused the right to cross-examine a principal witness against him. It is, of course, perfectly true that, since the child would not be giving evidence in any formal manner, there would be no opportunity for direct cross-examination. On the other hand, the proposal, as we have outlined

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[1] See, further, paras 5.52 et seq below.

[2] In some parts of the United States special child centres are being established which contain interviewing rooms of the kind described above, and which are staffed by representatives of all the agencies who may be involved in dealing with abused children - prosecutors, doctors, social workers, etc. It is thought that in such a setting the maximum co-operation between the agencies can be achieved with the minimum disturbance of the child. If such facilities were to become available in Scotland, they would be the obvious places in which to hold interviews of the kind we are considering.

it, would permit an accused to have any line of questioning of his choice put to the child, albeit through the medium of an independent interviewer; and additionally we have suggested that an accused should be entitled to ask a court to declare the video recording of the interview inadmissible as evidence on cause shown. Such a cause could be that the interviewer had failed adequately to put to the child questions suggested by, or on behalf of, the accused. In our view those elements in the proposal afford satisfactory protection for an accused, and we do not believe that the proposal could be held to be in conflict with Article 6 of the European Convention on Human Rights.[1]

5.47 A further point which is worth making in relation to the interview procedure which we have been considering is that it will provide a satisfactory method of protecting a child from face-to-face contact with an accused in cases where the accused is unrepresented and wishes to conduct his own defence. Direct questioning by an accused must, we imagine, be a disagreeable experience for many witnesses and, in the case of children, it is likely to be particularly distressing. None of the other techniques which might be introduced (screens, closed circuit television etc) appear to us to be capable of affording any real protection to a child in such circumstances. Such protection is, however, provided

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[1] It may be as well to reiterate here what we have said earlier in this Discussion Paper, namely that, although a child witness will normally be adduced by the prosecution (and we have expressed all our propositions on that basis), he may on occasions be adduced by the defence. We intend that our proposals, including the present one, should apply in that case also. Consequently, under the present proposal, an accused would be entitled to institute the interview procedure and, in that event, any "cross-examination" by the prosecutor would require to be put to the child through the medium of the interviewer.

where questions by the accused are directed through the medium of an independent interviewer.

5.48 There remains the problem of identification of the accused, a problem to which we have made frequent references in this Discussion Paper. It would clearly be inappropriate that the accused should simply be brought into the interview room for identification during the course, or on completion, of the interview. Not only would that be unfair to the accused, especially in cases where identification was a really live issue, but also it would conflict with one of the main purposes of the interview, namely to protect the child from unacceptable distress and trauma. In such cases, therefore, we would regard it as essential that the prosecutor should employ other methods, such as an identification parade or photographs, for the purpose of obtaining, if possible, an identification of the accused.

5.49 To sum up, therefore, we seek views on the following provisional proposals:

19.(a) **Where an accused has been charged and a child is likely to be required to give evidence in a criminal trial the procurator fiscal should be entitled, at his discretion, to arrange for that child to be interviewed by an independent interviewer.**

(b) **For this purpose the interviewer may be from any background, whether professional or otherwise, but should be skilled and experienced in suitable interviewing techniques, and should be approved for**

the purpose by the Sheriff Principal for the court district concerned. The interviewer should also receive suitable instruction in the kind of question that is likely to be acceptable in court.

(c) The interview should be conducted in a suitable room having a one-way glass screen on one wall. The accused and his lawyer, and the procurator fiscal, should be entitled to be behind this screen, out of sight of the child, but they should be able to communicate with the interviewer (using microphones and an ear receiver) so as to suggest desired lines of questioning to be put to the child.

(d) During the interview it should be possible, at the discretion of the interviewer, for the child to be accompanied by a parent or other adult.

(e) The whole interview should be video recorded.

(f) Where a video recorded interview has taken place, the video recording of the interview should be admissible in lieu of formal testimony by the child where none of the parties object.

(g) An accused and the prosecutor should be entitled, on cause shown, to ask the court to declare the video recording to be inadmissible as evidence. Where such an application is granted the court should be entitled to direct the use of any other lawful technique for securing the child's evidence.

5.50 Despite our provisional support for the procedures outlined in the preceding paragraphs we recognise that, at least for some time to come, they may not be entirely practicable inasmuch as the special interview rooms which would be required may not be widely available. In that event an alternative would be to have a video recorded interview of the kind which we have suggested but without the accused and the prosecutor being present. Such an approach would retain the advantage of having the interview conducted by a skilled and approved interviewer but would remove the need for a special room in which the interview would be conducted. It would, of course, be necessary, were that course to be followed, to provide adequately for the interests of the accused, and indeed the prosecutor. We consider that the only way in which that could be achieved would be by giving to both the accused and the prosecutor a right to require that the child should additionally give evidence by some more formal means; and only if that right were not exercised would the video recording be admissible in lieu of live evidence by the child. We cannot judge how often the right to require a child to give formal evidence would be exercised were the procedure which we are now suggesting to be adopted, but we would anticipate that in at least some cases the child would not be called on for further evidence either because the video recorded interview was deemed to be satisfactory or because, having seen the interview, the accused then decided to plead guilty. Even where the child was required to give formal evidence the video recording of the interview would be admissible for all purposes as a prior statement of the child under the proposals which we make in paragraph 5.74 et seq below. In that event the video recording could be used to support, supplement, or contradict the evidence given by the child. We accordingly seek views on the following proposition:

20. As an alternative to the procedures outlined in Proposition 19 would it be acceptable to provide for a video recorded interview with a child along the lines suggested in that Proposition, but without the accused or the prosecutor being present? In that event the recording of the interview would be admissible in lieu of more formal evidence by the child, but both the accused and the prosecutor would have an absolute right to require the child to give evidence in a more formal manner.

5.51 We believe that, in appropriate cases, the foregoing proposals could provide effective and acceptable methods of securing, for subsequent use in court, the evidence of children who are, for example, very young or for whom the experience of giving evidence in a more formal manner would be damaging and traumatic. There will, however, be cases where, for one reason or another, such procedures have not been utilised at all or where, having been utilised, the results have been held by the court to be inadmissible. In some such cases there may still be a possibility that, if required to give evidence in open court, the child will either not be able to testify or will do so only at the expense of suffering unacceptable trauma. It therefore becomes necessary to consider other measures which may assist children to give their evidence. Logically, the first of those is the pre-trial deposition since, if utilised, it may render it unnecessary for the child to give evidence in the course of the trial itself.

Measures which require the giving of formal evidence but which afford some protection to the child

(a) Pre-trial depositions

5.52 As we have seen,[1] many of the States in the United States have legislated for the use of pre-trial depositions by children, that is to say testimony which is elicited by formal examination and cross-examination in advance of the trial and which is recorded in some manner for subsequent presentation at the trial. We noted that in some respects this practice is similar to the Scottish procedure of taking evidence on commission.

5.53 The perceived advantages of this procedure are that, while it still exposes the child to conventional examination and cross-examination by lawyers, that examination can take place out of the courthouse in surroundings which are congenial and non-intimidating; and in some circumstances this procedure may enable evidence to be taken at a sufficiently early stage for the facts still to be fresh in the child's memory.

5.54 As presently advised, we are disposed to think that a form of pre-trial deposition could usefully be introduced into Scottish practice. It is, however, necessary to consider the grounds upon which such a procedure might be authorised, the exact nature of the procedure, and the question whether the accused should be present or not. We consider each of these in turn.

5.55 As to grounds of use, one possibility would be to provide that the procedure should be authorised only where it can be shown

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[1] Para 4.29 et seq above.

that, if required to give evidence by conventional means, the child would be likely to suffer serious mental or emotional harm, or would be incapable of testifying at all. We consider, however, that such a test would be too demanding and could, in any event, simply lead to an unhelpful clash between "expert" witnesses adduced respectively by the prosecution and the defence. In our view the court should be given a more general discretion in this matter, and our present preference would be for a test which draws on some of the elements in the current Alabama statute relating to pre-trial depositions.[1] On that basis we suggest that it might be provided that the court should be entitled to authorise the taking of a pre-trial deposition on cause shown, taking into account matters such as the age and maturity of the child, the nature of the offence, the nature of the evidence which the child is likely to be called on to give, and the possible effect on the child if required to give evidence in court. As can be seen, the grounds which we have just suggested are much more liberal than the existing grounds under Scots law for taking evidence on commission.[2] We believe, however, that child witnesses can properly be regarded as requiring special consideration in this matter. Moreover, although existing provision for taking evidence on commission precludes the use of that procedure when it would result in unfairness to the accused, we do not consider that the procedure which we are proposing would be unfair to an accused provided that his interests can be adequately represented and protected at the time. That consideration brings us to the details of the procedure which we are proposing.

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[1] See Appendix to this Discussion Paper, Part 3.
[2] See para 2.21 et seq above.

5.56 What we have in mind here is that, just as with evidence taken on commission, the procedure should involve live examination and cross-examination of the child conducted by counsel or solicitors representing the prosecution and the defence. The proceedings, which should be video recorded in all cases, would be presided over either by the judge who would be taking the trial (if known) or by a commissioner appointed by the court. A suitably agreeable room should whenever possible be used for the purpose and, at the discretion of the judge or commissioner, it should be possible for the child to have a parent or other supportive adult beside him. We think that the accused should be entitled to see the deposition being taken, but he should be out of sight of the child since otherwise much of the advantage of this procedure might be lost. Accordingly, it would be necessary either for depositions to be taken in a room with a one-way glass behind which the accused could sit or for the proceedings to be relayed to the accused in another room by means of closed circuit television.

5.57 As always, identification of the accused could present difficulties were evidence to be taken from a child in the manner just described. It would, of course, be possible to bring an accused into the deposition room for purposes of identification, but that might be thought to be likely to focus attention on him in a way that would not arise if he were simply being picked out in court or from an identification parade. We think that identification should not be permitted in that manner and that, if identification is in issue, it should, as we have suggested earlier,[1] be established by some other means such as an identification parade.

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[1] Para 5.23 et seq above.

5.58 One problem which a pre-trial deposition procedure would not provide a solution for is that presented by an unrepresented accused. Although a lack of legal representation is relatively uncommon, at least in more serious cases, since the advent of legal aid in criminal cases, accused persons may from time to time wish to present their own defence. Indeed, it is probably not too fanciful to suppose that an unscrupulous person might deliberately choose to conduct his own defence if he thought that, by doing so, he might make it more difficult for a witness such as a child to give evidence against him. This problem would, of course, be overcome in cases where the independent interview procedure (described earlier in this Part of the Discussion Paper) was used, but it would remain a potential problem in all other cases, including those where a child is giving evidence in court. Although, as will be seen,[1] we entertain considerable reservations about the supposed benefits of using closed circuit television as an alternative to direct testimony in court, it may be that in some instances it could provide a partial solution by reducing the immediacy of the confrontation between a child and an accused. We would welcome the views of consultees in relation to this matter.

5.59 To sum up on the matter of pre-trial depositions we seek the views of consultees on the following propositions and questions:

21.(a) Provision should be made to enable the High Court or the sheriff court to authorise the taking of a pre-trial deposition from a child who is to be a witness in a criminal trial. Where that procedure is used it should not thereafter be necessary for the child to attend court as a witness.

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[1] Para 5.66 et seq below.

(b) The court should be entitled to authorise the foregoing procedure on cause shown, taking into account matters such as the age and maturity of the child, the nature of the offence, the nature of the evidence which the child is likely to be called on to give, and the possible effect on the child if required to give evidence in court.

(c) Pre-trial deposition proceedings should be video recorded and the procedure should involve the formal examination and cross-examination of the child by counsel or solicitors for the prosecution and defence. The proceedings should be presided over by the trial judge (if known) or by a commissioner appointed by the court.

(d) The proceedings should be conducted in a room which is as agreeable and non-threatening to the child as possible.

(e) The accused should be entitled to be present while the deposition is being obtained, but should be out of sight of the child. For this purpose he should either be behind a one-way glass or should be able to watch the proceedings by means of closed circuit television.

(f) Formal identification of the accused by bringing him into the deposition room should not be permitted. Alternative methods of identification (such as an identification parade) should be used instead.

22. Apart from the independent interview mentioned earlier in this Discussion Paper, and possibly closed circuit television (see below), are there any other means whereby a child can be protected from a face-to-face confrontation with an accused who has chosen to conduct his own defence?

(b) Screens and closed circuit television

5.60 We now turn to consider screens and closed circuit television as a means of affording some protection to a child while still requiring him to give formal evidence. We take them together for two reasons. First, they both presuppose that the child is required to give his evidence in the course of an actual trial; and second, they are both devices which are intended to screen the child from an accused, and possibly others, the main difference being that one achieves that purpose by purely physical means while the other does so by the use of more sophisticated technology.

5.61 So far as screens are concerned, we are not at present greatly attracted to their use as a means of shielding a child witness from an accused. There are several reasons for this.

5.62 In the first place we are not persuaded that a screen is likely to be very effective in terms of reducing a child's fear or anxiety about giving evidence in the presence of the accused. The child is bound to be aware that the accused is behind the screen and in those circumstances we would have thought that a frightened child might remain as frightened as he would be if no screen were used.

5.63 A second consideration is that in our opinion the erection of a screen between a witness and an accused is probably more likely than any other technique to cause prejudice to an accused. By its very nature the erection and use of a screen is an obviously ad hoc arrangement, and we suspect that, despite warnings to the contrary, a jury might well conclude in those circumstances that the screen had been erected simply because the child was, with good reason, afraid of the accused.

5.64 Against all that it may be argued that a screen would be a simple and inexpensive means of providing at least some protection to a child in court. Up to a point that is no doubt true. We do not think, however, that the simplicity and cheapness of screens should be over-estimated. We would regard it as desirable, if screens were to be used, that they should be so constructed that the accused could see the child although the child could not see him. This would probably involve the use of one-way glass in the screen's construction. Moreover, although the screen should prevent the accused from being seen by the child, we consider that everyone else - judge, jury and lawyers - should continue to be able to see the accused. Given the wide variety of court layouts in Scotland this requirement might necessitate the construction of many screens of different shapes and sizes. Such considerations might, we suspect, make screens less simple and inexpensive than they might at first sight appear.

5.65 On balance, therefore, we do not favour the use of screens in Scottish courts. We would, however, welcome the views of consultees:

23. Do you see any advantage in the use of screens as a means of shielding a child from an accused while the child is giving evidence in court?

5.66 We turn now to a more sophisticated method of shielding a child while giving evidence in the course of a trial, namely the use of closed circuit television. Closed circuit television may be less objectionable than a screen in terms of causing prejudice since a jury may not regard it as having so obviously been installed for the protection of a particular child in the presence of a particular accused. It may instead simply be seen as a means of protecting the child from the general court environment. On the other hand, it seems to us that closed circuit television presents formidable problems of its own. These all relate to the manner in which it is used.

5.67 We have earlier noted[1] that, at least in the United States, there are essentially two methods of using closed circuit television, namely the one-way system and the two-way system.[2] Under a one-way system the child can be seen by all the persons involved in the trial in the courtroom, but cannot himself see any of them. Under a two-way system the child is provided with a television screen or screens in his separate room and can see some or all of the participants in the courtroom.

5.68 Whichever system is used consideration must obviously be given to the location of all the other participants in the trial. As we understand it, the most common procedure in the United

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[1] Para 4.19 above.

[2] The current Criminal Justice Bill appears to contemplate the use of a two-way system when closed circuit television is introduced in courts in England and Wales.

States is for the child to be alone in the separate room save for a television technician and, possibly, a parent or other support person: all the other participants remain in the courtroom. Such an arrangement, of course, has the advantage that the normal court proceedings are disturbed as little as possible since all the participants other than the child can remain where they are. It seems to us, however, that a considerable disadvantage in this arrangement is that the child will be remote and isolated in a separate room, surrounded perhaps by cameras and all the other equipment needed to transmit his image and his evidence to the courtroom. We are not aware of any evidence about how children in fact react in such circumstances, but we find it hard to imagine that such an arrangement would be likely to relieve a child's fear and anxiety about giving evidence.

5.69 An alternative to the foregoing arrangement would be to place some of the trial participants in the same room as the child; but then one would have to decide which participants they should be. They might be the prosecution and defence lawyers only. This might make the child feel less isolated, and he might find it easier to communicate with people who were physically present rather than with a disembodied voice coming out of a microphone. On the other hand this arrangement would separate the trial lawyers from the judge, and it might be more difficult for him to control the examination and cross-examination in those circumstances. Moreover, arrangements would have to be made for the accused to be able to communicate with his counsel or solicitor. Yet another possibility would be for the judge to be in the separate room as well. Any problems associated with controlling the examination and cross-examination of the child should then disappear, but it would then be impossible for the

judge to exercise any control over what was happening in the courtroom where, under this model, the accused and the jury would still remain.

5.70 We are not persuaded that there is any perfect solution to problems of the kind just described, and for that reason we at present have some doubts as to whether closed circuit television really has the advantages, as a means of securing a child's evidence, which its proponents claim for it. It seems to us, moreover, that the considerations which might point to the use of closed circuit television in the case of a particular child witness could equally point in the direction of using either an independent recorded interview or a pre-trial deposition as a means of presenting his evidence in court. It is true, of course, that those techniques, and especially the former of them, are primarily designed as methods of securing a child's evidence <u>before</u> a trial has begun; and so they might not be appropriate in cases where a child's distress becomes apparent only on the day of the trial. In that event, however, it seems to us that the pre-trial deposition procedure could be used either at the commencement, or even in the course of, a trial.

5.71 This, of course, would depend on a suitable room and suitable recording facilities being fairly readily accessible and available. Subject to that, however, what we have in mind is that, at the commencement of a trial or in the course of a trial, and on the same grounds as would justify a pre-trial deposition, the judge should be entitled to adjourn the proceedings to enable a deposition to be taken from the child in the same manner as if it had been a pre-trial deposition. If such a procedure were to be used the child would not suffer the feelings of isolation which

might arise under certain forms of closed circuit television procedure, but at the same time the trial judge (who, we assume, would preside at the taking of the deposition in this case) would not be faced with the problem of trying simultaneously to control proceedings in the courtroom[1] since those proceedings would have been adjourned during the taking of the deposition. In making the foregoing suggestions we appreciate that, in relation to cases on indictment, Scots law imposes considerable limitations on the length of an adjournment.[2] We do not suggest, however, that this "in trial" deposition procedure should be used in circumstances which would necessitate a considerable delay before the proceedings could be recommenced. What we have in mind is that the deposition procedure might take place in the course of a morning or an afternoon with the trial being adjourned until the afternoon or the following day as the case may be.

5.72 To sum up thus far we consider that the use of live closed circuit television as a means of presenting a child's evidence in the course of a trial offers few, if any, advantages. If, by the date of a trial, it appears that, for some good reason, a child should not be required to give evidence by conventional means, we suggest as an alternative the special deposition procedure which we have outlined in the preceding paragraphs. We accordingly seek the views of consultees on the following propositions:

24. **Live closed circuit television should not be introduced into Scottish courts as a means of enabling a child to give evidence in the course of a trial.**

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[1] cf para 5.69 above.

[2] See Criminal Procedure (Scotland) Act 1975, s 136.

25. As an alternative the court should be entitled, at the commencement, or during the course, of a trial, to adjourn the trial to enable the child's evidence to be obtained using a video recorded deposition procedure. The grounds for taking that course, and the procedure itself, should be the same as for a pre-trial deposition (see Proposition 21 above).

General changes in law and practice

5.73 Thus far in this Part of the Discussion Paper we have first of all put forward various proposals for relatively minor changes in practice and procedure which will, we believe, improve the position of children who actually give evidence in court. We have also considered a number of techniques which may, in certain cases, remove the necessity for children to give formal evidence, or at least to give evidence in court in the course of a trial. We now turn to consider a number of other changes in law and practice of a more general nature. Some of those, if introduced, would affect the evidence of children by whatever means it was given. Others would be directed rather more at the general support of children who may have to give evidence in the course of criminal proceedings. We begin by considering the rules of evidence which relate to the admissibility of prior statements made by a person who actually gives evidence (as distinct from statements by a person who does not give evidence[1]).

Prior statements by a person who gives evidence

5.74 In Part 2 of this Discussion Paper[2] we briefly described existing Scots law in relation to hearsay statements. Where the

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[1] See para 5.34 above.

[2] Para 2.13 et seq.

maker of an earlier statement actually gives evidence the significant features of that law are, firstly, that a prior statement which is inconsistent with a witness's subsequent evidence may be given in evidence and, if proved, may be used adversely to affect the witness's credibility: and secondly, that a prior statement which is consistent with a witness's subsequent evidence may be used to support his credibility, but only in the case where that earlier statement was made de recenti, that is to say very shortly after the incident in question. In neither of these cases, however, can that earlier statement be used as evidence of the facts stated in it.

5.75 In our view the present law on this matter is contrary to commonsense, and requires a judge and especially a jury to engage in the almost impossible task of having regard to a piece of evidence for one purpose but of ignoring it for another. We proposed the abolition of this distinction in civil proceedings in our Report on Corroboration, Hearsay and Related Matters,[1] and recommended that henceforth, where a witness gives evidence, any prior statement made by him should be admissible not only in relation to credibility but also as evidence of any facts stated in it. Effect has indirectly been given to that recommendation in the Evidence (Scotland) Bill which is currently before Parliament. In relation to criminal proceedings we shall shortly be publishing a discussion paper in which we shall propose the abolition of the distinction in criminal proceedings also. We can see no reason why children should be treated any differently from other witnesses in relation to that proposal.

5.76 A major consequence of making such a change in the law would of course be that, if a child was unable to give evidence on

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[1] Scot Law Com No 100, 1986.

a particular matter (possibly because of imperfect recollection, or because of simply "drying up") but had made an earlier statement relating to that same matter, his formal evidence could be supplemented by that earlier statement. Equally, an earlier statement might contradict a child's subsequent evidence. We can see advantage in these possibilities, and we do not consider that they could be regarded as prejudicial to an accused person since he would be entitled to cross-examine the child regarding the earlier statement, and would also be able, if he wished, to cross-examine the witness who reported that earlier statement regarding the circumstances in which it was made. That would be so both where the child was giving evidence in court and also in cases where a child's evidence was being taken in the form of a pre-trial or in-trial deposition. If an independent interview of the child were to be used in place of formal evidence by him it would not, of course, be possible to cross-examine the child directly about a prior statement but, under our proposals, the accused or his lawyer would be entitled to ask the interviewer to question the child about it. In all cases, however, we consider that a prior statement by a child should be admissible only if, by one means or another, the statement is put to the child for comment. We accordingly propose:

26. **Where a child gives evidence, whether in court, or by any other means (including an independent interview), it should be competent to prove a prior statement made by him, and any statement so proved should, provided it has been put to the child, be admissible not only in so far as it supports or adversely affects his credibility as a witness but also as evidence of any fact stated in the statement.**

5.77 It is to be noted that, if the foregoing proposal were to find favour, it would mean, for example, that evidence could be led about statements made by a child not only in the course of his normal life (for example to a parent or a friend) but also in the course of what we have earlier referred to as diagnostic or therapeutic interviews. There are several points here that require consideration.

5.78 The first is that, as we have seen,[1] some therapeutic or diagnostic interviews involving children may proceed on the basis of a form of questioning that would not of itself be regarded as proper or acceptable in a court of law. It may be thought that statements made by a child in such circumstances ought not to be admissible in subsequent criminal proceedings. We can see some force in that view were the admission of such statements to be considered in the absence of the child himself giving evidence,[2] but we are not persuaded that there is the same force in cases where the child does give evidence. After all, as we have previously pointed out,[3] existing law would, we think, permit statements made in the course of diagnostic interviews to be used, where they were inconsistent with a child's subsequent evidence, for the purpose of attacking the child's credibility: and that would be so regardless of the manner in which such statements had been elicited. In these circumstances we tend to think that, as a general rule, the manner in which a statement has been obtained should not affect its subsequent admissibility, but of course that would not preclude a judge or a jury from taking account of the whole circumstances in determining what weight to attach to the earlier statement.

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[1] Para 4.44 et seq above.

[2] What we have referred to as "independent" interviews will, under our proposals, be admissible in the absence of the child himself giving evidence. However, our proposals in relation to such interviews should prevent the use of leading questions or other unacceptable questioning techniques: see para 5.35 et seq above.

[3] Para 4.49 above.

5.79 There is one possible exception to the foregoing generality, namely where an earlier statement has been obtained by means which are actually unlawful. Although this is unlikely to arise very often where children are concerned (for example statements elicited by torture, or overheard as a result of unlawful telephone tapping), we think that our general proposal in Proposition 26 above should be qualified to take account of this.

5.80 A rather different point arises in relation to prior statements made specifically for the purposes of criminal proceedings. It may be thought that they should be excluded as possibly being tainted in some way, but we are not persuaded that this is a valid distinction provided that the statement is truly one made by the child himself. That may not be the case where the statement is in the form of a precognition since in that case, it is generally thought, what is contained in the precognition may contain what the precognoscer hopes the person concerned will say in evidence rather than what the person actually said. We therefore conclude that a precognition should not be regarded as a statement for any of the above purposes.

5.81 To sum up, we accordingly propose:

> **27. Subject to Proposition 28 below it should not be an objection to the use of a prior statement for the purposes of Proposition 26 above that the statement was elicited by leading questions or by other forms of questioning that would not be permitted in a court of law.**

28. A prior statement should not be admissible for the purposes of Proposition 26 above where it was obtained by means which are unlawful.

29. For the purposes of Proposition 26 a statement should not include a precognition.

Privilege and confidentiality

5.82 We have noted above[1] that Scots law probably does not confer any legal privilege on communications passing between a patient and a doctor or other therapist, though we also noted that the present law was developed long before it could have been contemplated that a full video recording of an interview might subsequently be available for use in court. Given our proposal that prior statements by a child should be admissible for all purposes where the child subsequently, and by any means, gives evidence, the consequence of existing law is that evidence, including video recordings, of diagnostic interviews may subsequently be given in court without thereby breaking any privilege or obligation of confidentiality. As presently advised we are disposed to think that any essentially ethical problems associated with this should best be addressed by the professional bodies representing the doctors or other therapists who may be involved.

5.83 The special kind of interview, conducted by an independent interviewer, which we have proposed should be available in certain cases[2] is in a rather different position. It would be provided for by statute and would be an integral part of criminal proceedings. As such, questions of privilege and confidentiality in the ordinary

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[1] Para 4.50 et seq.

[2] See para 5.35 et seq above.

sense would not arise. Nonetheless, were that procedure to be introduced, we imagine that those responsible would wish to establish appropriate rules of procedure including, possibly, a requirement that the nature and purpose of the interview should be fully explained to the child's parent or guardian and, as appropriate, to the child himself.

A child advocate

5.84 The last of the American innovations which falls to be considered is the appointment of a person to protect, or possibly represent, the interests of a child who is to be a witness in criminal proceedings. Our view at present is that it is probably going too far to contemplate the appointment of a person who would actually be entitled to be heard in the course of those proceedings. There may, however, be more of a case for a person who would be charged with the task of assisting, and looking after the interests of, a child who is to be a witness.

5.85 Such a person could prepare a child for giving evidence by explaining court procedures and taking the child on a pre-trial visit to the court. He could accompany the child to court at the time of the trial; and, in appropriate cases, he could provide to the procurator fiscal information which might support an application to have the child's evidence taken by means of some special procedure. At present the task of preparing a child for giving evidence in court is sometimes undertaken by procurators fiscal themselves, but there could be advantage in having an independent person to undertake this function. As previously noted,[1] there are certain analogies between this kind of person and the "safeguarder" who may now be appointed for the purpose of proceedings before a children's hearing. Possibly the role of

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[1] Para 4.59 above.

safeguarders could be enlarged for this purpose. Bearing in mind that children who are witnesses in abuse trials may also be the subject of care proceedings before a children's hearing, an enlarged role for safeguarders could, we believe, provide a useful and helpful link between the two types of proceedings. On the other hand this role could possibly be assumed in due course by volunteers working within agencies such as victim support schemes.

5.86 At present we have no strong view for or against the creation of a new appointment to look after the interests of child witnesses. However, we seek the views of consultees:

30. Would there be advantage in providing for the appointment of a person to look after the interests of a child who is to be a witness in criminal proceedings?

31. If so, is it agreed that such a person should not be entitled to participate and be heard in the criminal proceedings themselves?

32. Could the role of "safeguarders" (as presently provided for under section 34A of the Social Work (Scotland) Act 1968) be expanded for the foregoing purpose?

Expert witnesses

5.87 We have seen[1] that in the United States, while it is generally not permissible for an expert witness to offer a view as to the truthfulness of a particular child, it is increasingly common for experts to give evidence of a more general kind against which a child's evidence or behaviour may then be judged. Plainly evidence of the former kind would not be permitted in Scotland;

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[1] Para 4.60 et seq above.

and we do not propose that there should be any change in that rule. It is not entirely clear to us, however, whether evidence of the latter kind would be permitted in Scotland, though we are unaware of any authority which would expressly prohibit it.

5.88 If it be the case that some people have, possibly wrong, preconceptions about the truthfulness of children generally or about the way in which children are likely to react to given circumstances, there may be something to be said for making it perfectly clear that general evidence on such matters is permissible. On the other hand it might be difficult to legislate with precision on such a matter, and it may be preferable to leave it to the courts to reach appropriate decisions on a case-by-case basis whenever such an issue arises. We accordingly seek views on the following proposition and question:

33. **There should be no new provision to enable witnesses, whether expert or otherwise, to give as evidence an opinion regarding the truthfulness of a particular child.**

34. **Should a suitably qualified expert witness be permitted to give evidence of a general kind regarding the way in which children of a given age are likely to behave or to react in given circumstances and, if so, is legislation required for that purpose?**

Types of case in which new procedures should be available

5.89 The provisions (applying to England and Wales only) in the current Criminal Justice Bill which authorise the giving of evidence by children by means of closed circuit television are limited to trials of certain offences (mainly various forms of

assault). While those are no doubt the kinds of case where such new procedures are most likely to be required, we can see no good reason why they should not be available in any criminal trial in which a child is to be a witness. After all, the trauma of giving evidence may be just as great where a child has witnessed his house being broken into as where the child has himself been the victim of an assault. We therefore propose:

35. **Any new techniques which may be introduced to facilitate the taking of a child's evidence in criminal proceedings should be available in any kind of criminal proceeding in which a child is to be a witness.**

Courts in which new procedures should be available

5.90 Many of our proposals, involving for example changes in the law of evidence, would clearly affect proceedings in all criminal courts. However, in relation to those proposals which involve some application of modern technology in the form of video recordings and television screens there may, we think, be good reason to limit them to the High Court and the sheriff court only: that is to say, not to make them available in the district court. In practice we doubt whether cases in which the use of such techniques would be required would be likely to be taken in the district court in the first place; and in those circumstances the cost of installing the necessary equipment in every district court could not be justified. We therefore propose:

36. **Any new techniques or procedures involving the use of video technology should be available only in the High Court and the sheriff court, and should not be available in the district court.**

Age of child

5.91 In relation to the proposals which we made earlier in this Part of the Discussion Paper for general improvements in court procedures we proposed[1] that, with only a few possible exceptions, they should apply to any child under the age of 16. In relation to more specialised techniques like closed circuit television there may be a case for making them available only to younger children, as is the case in many parts of the United States, and under the current Criminal Justice Bill provisions. However, we are not persuaded that this should be so. Any age limitation is bound to be rather artificial and arbitrary and, although the age of 16 can itself be criticised on that score, it is at least an age which our law widely recognises as the dividing point between childhood and adulthood. We therefore propose:

> **37. All of the special techniques for taking the evidence of children which are proposed in this Part of the Discussion Paper should, if accepted, apply to any child under the age of 16.**

Technical and other matters

5.92 Earlier in this Discussion Paper[2] we drew attention to certain technical problems which present themselves whenever, for example, television cameras are used either for live relay or for video recording purposes. Should the cameras be fixed or manually operated? Should pictures all be taken at the same focal length, or should close-ups be permitted? Should films be in colour or in monochrome? These are all matters regarding which, so far as we

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[1] Para 5.27: Propositions 15 and 16.

[2] Paras 4.24, 4.25.

are aware, there has been little, if any, research either in this country or in the United States.[1] We believe that, if television cameras and video recordings are to be used in any major way in the criminal courts, these are matters which should be considered as a matter of urgency so that standard procedures can be laid down for use in all cases and in all courts.

5.93 There are also issues concerning the ownership and control of any video recordings which may be made for use in court. Who is to "own" any such recordings, and who is to control the number and distribution of any copies that may be made? These are also, in our view, matters which must be considered and properly regulated. In our opinion such matters cannot simply be left to Rules of Court since those responsible for making Rules of Court would not be expected to have the technical expertise necessary for such a purpose. Instead, we think that this is something on which Parliament should legislate by secondary legislation, having first used the resources of appropriate Government departments to carry out the necessary evaluation.

5.94 There are also certain procedural matters which may require to be regulated. For example, where a video recording is being used in court should it be permissible for it to be played more than once? Should the jury be entitled to take the tape into the jury room in order to play it there? Such questions were considered some years ago in relation to audio recordings in the case of Hopes and Lavery v. HMA.[2] In that case Lord Justice General Clyde said:[3]

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[1] See Murray, passim.

[2] 1960 JC 104.

[3] At p 111.

> "It would never do for the trial to be prolonged by a long series of replayings of the tape, or of passages from it, either at the request of one of the parties, or of the jury, and it would be equally wrong for the jury to retire and replay the tape outwith the presence of the prosecutor or the accused, when they were considering their verdict."

At first sight this appears to restrict to one the number of times that a tape may be played in court, and to prohibit absolutely its playing in the jury room. However, the above comments were made in relation to an indistinct tape recording of a conversation where the question which was being addressed was whether a transcript of the tape, prepared after several replayings by a skilled stenographer, should be admissible in addition to the tape recording itself. That question should not arise in cases where a professionally produced video recording is prepared for use in court. In the context with which we are concerned we are disposed to think that it should not be permissible for a video recording to be viewed by the jury in the jury room since repeated viewing of the evidence of one witness could distort the importance of that evidence relative to the other evidence given at the trial. So far as replaying in court is concerned, however, our view at present is that this should be entirely a matter for the discretion of the presiding judge.

5.95 Another question which will arise, if video recordings are to be used in court, is whether the court shorthand writer should be required to note what is said in the course of the interview, deposition, or whatever. Our view is that he should not. The main purpose, as we understand it, of taking a shorthand note of questions and answers during the giving of evidence in a court of law is to provide a permanent record of what was said so that, in the event of a subsequent appeal or, occasionally, in the event of

a subsequent trial for perjury, there can be no doubt about what was actually said. In our opinion an electronic and visual record of what was said is just as good as, if not better than, a shorthand note.

5.96 A final matter which may require consideration is the use of anatomically correct dolls or other aids to the giving of evidence. We have seen[1] that the use of such objects may be open to question. Nonetheless, it seems to us that, if used with care, they may in fact make it possible for children to describe with some accuracy incidents which, through embarrassment or lack of appropriate vocabulary, they would otherwise be unable to describe. Under our proposals, therefore, it should be possible for children to use dolls and other devices whenever they are giving evidence, whether that be in court or by means of the other procedures considered earlier in this Discussion Paper. We are unaware of any authority which would in fact prohibit this, but we suspect nonetheless that some judges might be uneasy about permitting it in the absence of statutory or other authority.

5.97 In relation to all the foregoing matters we seek the views of consultees on the following propositions and question:

38. **Secondary legislation rather than Rules of Court should set out standard rules and procedures regarding the use of video technology in criminal proceedings.**

39. **Where a video recording is shown in court it should be permissible for it to be replayed, at the discretion of the presiding judge, as often as may be necessary; but it should not be permissible for a jury to take a video recording to the jury room in order to replay it there.**

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[1] Para 4.63 <u>et seq</u>.

40. Where a video recording is being played in court it should not be necessary for the court shorthand writer to take a note of what is said.

41.(a) The use of anatomically correct dolls or other devices as aids to the giving of evidence by children should be permitted whenever, and by whatever means, a child is giving evidence.

(b) If the foregoing Proposition is acceptable is it considered to be necessary to legislate expressly on this matter?

Changes in civil and other proceedings?

5.98 So far in this Discussion Paper we have been considering possible changes in practice and in the law of evidence solely in the context of criminal proceedings. It occurs to us, however, that there may be a variety of non-criminal proceedings - divorce cases and children's hearing referrals before a sheriff, for example - where it may be as traumatic for a child to be a witness as it is in criminal proceedings.

5.99 The Civil Evidence (Scotland) Bill, which is presently before Parliament, will in fact introduce into civil proceedings one of the proposals which we make in this Discussion Paper, namely that prior statements by a person who gives evidence should be admissible for all purposes. Indeed, that Bill goes much further than we have gone in this Discussion Paper, and will make all hearsay evidence admissible in future in civil proceedings. Nonetheless, many of our other proposals, including in particular those which involve the use of video technology, would find no

place in civil and other proceedings unless new legislation to that effect were to be introduced. We think that such procedures (possibly adapted in certain respects) could on occasions be useful in civil and other proceedings. We have not at present examined in detail how this might be done. We would, however, welcome the views of consultees on the following question:

42. **If techniques for giving evidence, involving the use of video technology, are to be made available in criminal proceedings, should similar techniques also be made available in civil proceedings and in court proceedings before a sheriff under the children's hearing system?**

PART 6 - POTENTIALLY VULNERABLE WITNESSES OTHER THAN CHILDREN

Should witnesses other than children be enabled to give evidence by special techniques?

6.1 In Part 1 of this Discussion Paper[1] we observed that we would give some consideration to the question whether any innovations in law or procedure which might be introduced for child witnesses could also be made available for other vulnerable witnesses such as the elderly, the mentally handicapped, or possibly adults of any age who had been the victims of certain sexual crimes. Certainly there seems at first sight to be no convincing reason why innovations which are designed to reduce the risk of trauma and to secure better evidence than might otherwise be available should be confined only to children. It is perfectly true, of course, that our law recognises children as a special, and in some respects privileged, class for a variety of purposes; but is there really any good reason why, for example, a child should be permitted to give evidence by closed circuit television or by means of a pre-trial deposition but those facilities should be denied to a frightened and frail old lady who has been the victim of an assault and robbery?

6.2 On grounds of sympathy and consideration for the vulnerable of any age it seems to us that there are quite compelling arguments in favour of extending appropriate innovations to certain witnesses other than children. There is, however, a practical difficulty. Children, as a class, are easily identified simply by reference to age. Beyond the age of childhood any classification of "eligible" witnesses becomes more difficult. Since, however, we assume that it would be unacceptable to make facilities such as a pre-trial deposition available to *any* witness,

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[1] Para 1.3 above.

an attempt must be made to find some basis for determining who is to be eligible. That task may be made easier if we first consider the particular innovations which are of relevance.

What techniques should be available for older witnesses?

6.3 Plainly some of the innovations which may be introduced in respect of children (for example obligatory removal of wigs and robes) would be inappropriate in the case of adult witnesses. Others (for example the provision of suitable microphones in all courts, and the general admissibility of prior statements made by a person who gives evidence) would be of general application and of general utility. It seems to us, therefore, that the innovations with which we are primarily concerned here are pre-recorded interviews conducted by an independent interviewer, pre-trial depositions, and closed circuit television. We do not think that the first of those would be appropriate in the case of an adult witness, except possibly where that witness is mentally handicapped. As presently advised, however, we tend to think that pre-trial depositions and closed circuit television could be appropriate in certain cases. Indeed, so far as closed circuit television is concerned we tend to think that it may have more to offer in the case of an adult witness since an adult is, we suspect, less likely to be troubled by the isolation associated with that technique than a child would be.[1] It may also be the case that an appointment modelled on the child advocate[2] could be helpful in the case of some adult witnesses, for example some of the elderly or the mentally handicapped. Assuming for the present that some, or all, of the foregoing innovations could with advantage be made available to certain adult witnesses, the question then is: what grounds or criteria should determine their use?

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[1] cf para 5.68 above.

[2] See para 5.84 *et seq* above.

Grounds and criteria

6.4 One possibility would be to determine initial eligibility simply by reference to age. Thus, for example, it could be provided that facilities such as closed circuit television could be made available to any witness over a certain age - possibly 70. The difficulty with that approach is that it would totally deny such facilities to a younger witness even when, by reasons of personality, mental handicap, or general health, that younger witness was much more likely to be adversely affected by appearing in court than a person of more mature years. Equally, many elderly witnesses are perfectly capable of giving evidence by conventional means without the help of special facilities.

6.5 An alternative approach would be to prescribe a more flexible test similar to that which we suggested for pre-trial depositions in the case of children.[1] Thus, the court might be entitled to authorise the taking of evidence by pre-trial deposition or by means of closed circuit television on cause shown, taking into account the age, and physical and mental health of the witness, the nature of the offence, the nature of the evidence which the witness is likely to be called to give, and the possible effect on the witness if required to give evidence in court.

6.6 For the present we have not examined in detail all of the approaches which could be contemplated were new techniques for giving evidence to be made available to certain adult witnesses since it seems unlikely that they would ever be introduced for adults if they were not also being made available for children. The main purpose of this Discussion Paper, accordingly, is to

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[1] Para 5.55 above.

examine the options in relation to children. Nonetheless, it would be helpful to know whether those consultees who favour the introduction of new techniques in respect of children would also be in favour of some, or all, of them being made available to certain adult witnesses. Comments are therefore invited on the following questions:

43. **If certain innovative techniques for giving evidence, such as pre-trial depositions or closed circuit television, were to be introduced in respect of children, would you be in favour of such techniques also being made available to certain adult witnesses?**

44. **If so, what should be the basis for their use? Would it be acceptable to have a flexible test taking into account matters such as the age of the witness, the nature of the offence, and the possible effect on the witness if required to give evidence in court by conventional means; or would a more restrictive test be necessary?**

PART 7 - SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS

General improvements in practice

1.(a) Consideration should be given to the issue of practice notes or directions relating to trials in which children are witnesses. Such practice notes or directions should provide that -

(i) judges, counsel and solicitors should be required to remove their wigs and robes when a child is giving evidence; and

(ii) children should be permitted to give their evidence sitting at a table in the well of the court; and in that event the judge as well as counsel and solicitors should sit with the child at that table.

(b) If the foregoing propositions are in general acceptable, should they be made mandatory in all cases where a child is a witness, or only in relation to children below a certain age, or only in relation to children who are the alleged victims of certain offences, say assaults and sexual offences?

2. Where it is known that a trial will involve a child as a witness the prosecutor should advise the clerk of court of that fact as long in advance of the trial as possible, and the clerk of court should then endeavour to allocate for the trial the smallest and least intimidating courtroom

compatible with the requirements of the trial and the other business of the court.

3. Prosecutors should be encouraged to expand the practice of taking child witnesses on a pre-trial tour of the courtroom and of explaining to them, in terms appropriate to their age, the functions of the judge, jury, defence lawyers, and other officials.

(Paragraph 5.8)

4. In the practice notes or directions referred to in Proposition 1 above it should be made clear, for the avoidance of doubt, that a judge should permit a child to have a relative or other support person seated alongside him while that child is giving evidence unless for some good reason the judge directs otherwise. The judge should, however, direct that relative or other person that he must not coach or assist the child in any way during the giving of his evidence.

(Paragraph 5.9)

5. As a matter of urgency effective sound amplification systems should be installed in all courtrooms which are not presently so equipped.

(Paragraph 5.11)

6. Accepting that it would not be practicable to have specially designed and equipped waiting rooms permanently

set aside for child witnesses in Scottish courts, would it be feasible instead for each court to be provided with a modest supply of furniture suitable for children, and of toys, books and games; for these, whenever possible, to be placed in a conventional witness room when a child is attending court as a witness; and for that witness room then to be closed to all other witnesses, apart from family members or others accompanying the child, for so long as it was occupied by that child?

(Paragraph 5.12)

7. In cases falling under sections 166 and 362 of the Criminal Procedure (Scotland) Act 1975 the presiding judge should be required, rather than merely permitted, to clear from the court all persons not having a direct involvement in the proceedings. He should also, however, have a discretion to permit members of the child's family to remain in court where their presence seems likely to offer comfort and support to the child. Such a discretion should also extend to persons such as approved researchers.

(Paragraph 5.14)

8. Sections 166 and 362 of the 1975 Act should be expanded so that they will apply in any case where a child is giving evidence in court.

(Paragraph 5.15)

9. Despite the exclusion of the general public from a court where a child is giving evidence, the press should continue to be entitled to be present at that time.

(Paragraph 5.16)

10. If amendments are in any event to be made to sections 166 and 362 of the 1975 Act the opportunity should be taken to make clear that representatives of the press entitled to remain in court while a child is giving evidence include representatives of television and radio services.

(Paragraph 5.17)

Corroboration

11. In cases of child abuse and other cases in which children are witnesses there should continue to be a general requirement of corroboration of essential facts which the prosecution requires to prove.

(Paragraph 5.20)

12. The rule of evidence, known as the Moorov rule, should not be widened by statute, nor should any attempt be made to give it statutory expression.

(Paragraph 5.22)

Identification of an accused

13. In any case where a child witness is required to identify a person who is alleged to have committed an offence, it should, so far as practicable, become standard procedure for that to be done by an out of court technique such as an identification parade involving the use of a one-way mirror, or identification from a collection of photographs. Where that is done it should no longer be necessary to ask the child in court to identify the person alleged to have committed the offence.

(Paragraph 5.24)

Competency of child witnesses

14. For the purpose of determining competency as a witness a child should be presumed to be a competent witness unless there is good reason to reach a different conclusion.

(Paragraph 5.25)

Meaning of "child"

15. Should the proposals made so far in this Discussion Paper, apart from those where we have identified possible exceptions, apply equally to all children under the age of 16?.

16. If not, to which proposals should a lower age limit apply, and what should that age limit be? If a lower age limit is to apply, should the court have a discretion to bring an older child within the practice or procedure in question?

(Paragraph 5.27)

Measures to remove the need for a child to give formal evidence

17. A system modelled on the Israeli "youth interrogator" system should not be introduced in Scotland.

18. Subject to the retention of any existing exceptions to the rule against hearsay, there should be no general exception to that rule so as to admit, in lieu of oral testimony, statements made by children prior to a trial taking place.

(Paragraph 5.34)

19.(a) Where an accused has been charged and a child is likely to be required to give evidence in a criminal trial the procurator fiscal should be entitled, at his discretion, to arrange for that child to be interviewed by an independent interviewer.

(b) For this purpose the interviewer may be from any background, whether professional or otherwise, but should be skilled and experienced in suitable interviewing techniques, and should be approved for the purpose by the Sheriff Principal for the court district concerned. The interviewer should also receive suitable instruction in the kind of question that is likely to be acceptable in court.

(c) The interview should be conducted in a suitable room having a one-way glass screen on one wall. The

accused and his lawyer, and the procurator fiscal, should be entitled to be behind this screen, out of sight of the child, but they should be able to communicate with the interviewer (using microphones and an ear receiver) so as to suggest desired lines of questioning to be put to the child.

(d) During the interview it should be possible, at the discretion of the interviewer, for the child to be accompanied by a parent or other adult.

(e) The whole interview should be video recorded.

(f) Where a video recorded interview has taken place, the video recording of the interview should be admissible in lieu of formal testimony by the child where none of the parties object.

(g) An accused and the prosecutor should be entitled, on cause shown, to ask the court to declare the video recording to be inadmissible as evidence. Where such an application is granted the court should be entitled to direct the use of any other lawful technique for securing the child's evidence.

(Paragraph 5.49)

20. As an alternative to the procedures outlined in Proposition 19 would it be acceptable to provide for a video recorded interview with a child along the lines suggested in that Proposition, but without the accused or the prosecutor

being present? In that event the recording of the interview would be admissible in lieu of more formal evidence by the child, but both the accused and the prosecutor would have an absolute right to require the child to give evidence in a more formal manner.

(Paragraph 5.50)

Measures which require the giving of formal evidence but which afford some protection to the child

21.(a) Provision should be made to enable the High Court or the sheriff court to authorise the taking of a pre-trial deposition from a child who is to be a witness in a criminal trial. Where that procedure is used it should not thereafter be necessary for the child to attend court as a witness.

(b) The court should be entitled to authorise the foregoing procedure on cause shown, taking into account matters such as the age and maturity of the child, the nature of the offence, the nature of the evidence which the child is likely to be called on to give, and the possible effect on the child if required to give evidence in court.

(c) Pre-trial deposition proceedings should be video recorded and the procedure should involve the formal examination and cross-examination of the child by counsel or solicitors for the prosecution and defence. The proceedings should be presided over by the trial judge (if known) or by a commissioner appointed by the court.

(d) The proceedings should be conducted in a room which is as agreeable and non-threatening to the child as possible.

(e) The accused should be entitled to be present while the deposition is being obtained, but should be out of sight of the child. For this purpose he should either be behind a one-way glass or should be able to watch the proceedings by means of closed circuit television.

(f) Formal identification of the accused by bringing him into the deposition room should not be permitted. Alternative methods of identification (such as an identification parade) should be used instead.

22. Apart from the independent interview mentioned earlier in this Discussion Paper, and possibly closed circuit television (see below), are there any other means whereby a child can be protected from a face-to-face confrontation with an accused who has chosen to conduct his own defence?

(Paragraph 5.59)

Screens and closed circuit television

23. Do you see any advantage in the use of screens as a means of shielding a child from an accused while the child is giving evidence in court?

(Paragraph 5.65)

24. Live closed circuit television should not be introduced into Scottish courts as a means of enabling a child to give evidence in the course of a trial.

25. As an alternative the court should be entitled, at the commencement, or during the course, of a trial, to adjourn the trial to enable the child's evidence to be obtained using a video recorded deposition procedure. The grounds for taking that course, and the procedure itself, should be the same as for a pre-trial deposition (see Proposition 21 above).

(Paragraph 5.72)

Prior statements by a person who gives evidence

26. Where a child gives evidence, whether in court, or by any other means (including an independent interview), it should be competent to prove a prior statement made by him, and any statement so proved should, provided it has been put to the child, be admissible not only in so far as it supports or adversely affects his credibility as a witness but also as evidence of any fact stated in the statement.

(Paragraph 5.76)

27. Subject to Proposition 28 below it should not be an objection to the use of a prior statement for the purposes of Proposition 26 above that the statement was elicited by leading questions or by other forms of questioning that would not be permitted in a court of law.

28. A prior statement should not be admissible for the purposes of Proposition 26 above where it was obtained by means which are unlawful.

29. For the purposes of Proposition 26 a statement should not include a precognition.

(Paragraph 5.81)

A child advocate

30. Would there be advantage in providing for the appointment of a person to look after the interests of a child who is to be a witness in criminal proceedings?

31. If so, is it agreed that such a person should not be entitled to participate and be heard in the criminal proceedings themselves?

32. Could the role of "safeguarders" (as presently provided for under section 34A of the Social Work (Scotland) Act 1968) be expanded for the foregoing purpose?

(Paragraph 5.86)

Expert witnesses

33. There should be no new provision to enable witnesses, whether expert or otherwise, to give as evidence an opinion regarding the truthfulness of a particular child.

34. Should a suitably qualified expert witness be permitted to give evidence of a general kind regarding the way in which children of a given age are likely to behave or to react in given circumstances and, if so, is legislation required for that purpose?

(Paragraph 5.88)

Types of case in which new procedures should be available

35. Any new techniques which may be introduced to facilitate the taking of a child's evidence in criminal proceedings should be available in any kind of criminal proceeding in which a child is to be a witness.

(Paragraph 5.89)

Courts in which new procedures should be available

36. Any new techniques or procedures involving the use of video technology should be available only in the High Court and the sheriff court, and should not be available in the district court.

(Paragraph 5.90)

Age of child

37. All of the special techniques for taking the evidence of children which are proposed in this Part of the Discussion Paper should, if accepted, apply to any child under the age of 16.

(Paragraph 5.91)

Technical and other matters

38. Secondary legislation rather than Rules of Court should set out standard rules and procedures regarding the use of video technology in criminal proceedings.

39. Where a video recording is shown in court it should be permissible for it to be replayed, at the discretion of the presiding judge, as often as may be necessary; but it should not be permissible for a jury to take a video recording to the jury room in order to replay it there.

40. Where a video recording is being played in court it should not be necessary for the court shorthand writer to take a note of what is said.

41.(a) The use of anatomically correct dolls or other devices as aids to the giving of evidence by children should be permitted whenever, and by whatever means, a child is giving evidence.

(b) If the foregoing Proposition is acceptable is it considered to be necessary to legislate expressly on this matter?

(Paragraph 5.97)

Changes in civil and other proceedings?

42. If techniques for giving evidence, involving the use of video technology, are to be made available in criminal proceedings, should similar techniques also be made available in civil proceedings and in court proceedings before a sheriff under the children's hearing system?

(Paragraph 5.99)

Should witnesses other than children be enabled to give evidence by special techniques?

43. If certain innovative techniques for giving evidence, such as pre-trial depositions or closed circuit television, were to be introduced in respect of children, would you be in favour of such techniques also being made available to certain adult witnesses?

44. If so, what should be the basis for their use? Would it be acceptable to have a flexible test taking into account matters such as the age of the witness, the nature of the offence, and the possible effect on the witness if required to give evidence in court by conventional means; or would a more restrictive test be necessary?

(Paragraph 6.6)

APPENDIX

This Appendix gives a brief description of the statutes in the United States which authorise the use of closed circuit television or pre-trial depositions. All of these provisions were introduced between 1983 and the middle of 1987.

The first part of the Appendix summarises those statutes which authorise closed circuit television under a one-way system. The second part of the Appendix summarises those statutes which authorise closed circuit television under a two-way system. Finally, the third part of the Appendix summarises those statutes which authorise the taking of a pre-trial deposition.

1. CLOSED CIRCUIT TELEVISION - ONE-WAY SYSTEMS

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Alabama	Any criminal trial	Age and maturity of child; nature of offence; possible effect on child.	Accused must be in room with child	16 or younger
Arizona	Any offence committed against, or witnessed by the child	None stated	Not stated	Under 15
Connecticut	Assault, sexual assault or abuse	None stated	Judge to be in room with child	12 or younger
Florida	Sexual offences	Likelihood of emotional or mental harm	Judge to be in room with child	16 or younger
Georgia	Assault and sexual offences	Likelihood of emotional or mental distress	Jury and others cleared from court: proceedings in court televised live to jury	14 or younger
Indiana	Victim or witness of sexual offence or child neglect	Sufficient that child is victim or witness of sexual offence or child neglect; otherwise must be likelihood of trauma	Not stated	Under 10

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Iowa	Any criminal trial	None stated	Not stated. Use of screen authorised as alternative to CCTV	Under 14
Kansas	Abuse or neglect	Not stated	Not stated	Under 13
Kentucky	Offence against the child	Not stated	Not stated	12 or younger
Louisiana	Physical or sexual abuse	When justice so requires	Not stated	Under 14
Maryland	Child abuse	Risk of serious emotional distress such that child cannot reasonably communicate	Not stated	18 or younger
Massachusetts	Assaults and sexual offences	Likelihood of psycho-logical or emotional trauma	Not stated	Under 15
Minnesota	Physical or sexual abuse	Presence of accused would psychologically traumatise the child so as to render the child unavailable to testify	Not stated	Under 10

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Mississippi	Sexual offences	Substantial likelihood that accused's presence would cause traumatic emotional or mental distress if compelled to testify in court	Not stated	Under 16
New Jersey	Sexual offences	Likelihood of emotional or mental distress if required to testify in court	Not stated	16 or younger
Oklahoma	Any offence against child	None stated	Not stated	12 or younger
Pennsylvania	Any criminal trial	Good cause shown	Not stated	14 or younger
Rhode Island	Sexual assault on child	Inability to testify without suffering unreasonable or unnecessary mental or emotional harm. Rebuttable presumption to that effect where child is 13 or younger	Not stated	17 or younger
Texas	Offences under Chap 21 Penal Code	None stated	Not stated	12 or younger

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Utah	Child abuse or sexual offences	Risk of serious emotional or mental strain, or risk that testimony will be inherently unreliable if required in presence of accused	Not Stated	Under 12
Vermont	Sexual offences	If court finds, when two-way CCTV already being used, that requiring child to hear and see the accused presents substantial risk of trauma and impaired ability to testify	Not stated	12 or younger

2. CLOSED CIRCUIT TELEVISION – TWO-WAY SYSTEMS

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
California	Sexual offences	Threats against child or family; threats of removal of child from home or family; use of firearm during crime; conduct on part of accused or counsel causing child to be unable to continue testimony in court	Not stated, but implicit that support person will be with child	10 or younger
Hawaii	Any criminal trial	None stated	Not stated	Not stated
New York	Any criminal trial	Likelihood of severe mental or emotional harm arising from one or more of a variety of stated causes, including: manner of commission of offence; child particularly young; accused occupied position of authority in relation to child; use of weapon; threats of violence if child were to report incident, etc	Not stated	12 or younger

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Ohio	Sexual offences	Child will refuse to testify, will be unable to communicate, or substantial likelihood of serious emotional trauma	Not stated	Under 11
Vermont	Sexual offences	Substantial risk of trauma and impaired ability to testify	Not stated	12 or younger

3. PRE-TRIAL DEPOSITIONS

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Alabama	Any criminal trial	Good cause shown, taking into account age and maturity, nature of offence, nature of testimony, and possible effect if required to testify in court. Deposition may be used in lieu of live evidence unless that will unfairly prejudice accused.	Not stated	Under 16
Alaska	Sexual assault or unlawful exploitation of a minor	None stated	Not stated	16 or younger
Arizona	Any criminal or civil proceedings	Good cause shown. If procedure used, child not required to testify in court	Not stated	15 or younger
Arkansas	Sexual offences	Good cause shown. If procedure used, child not required to testify in court	To be taken before judge in chambers. Child must not be able to hear or see accused.	Under 17

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
California	Assault or sexual offences	None stated. If, at time of trial, court finds that testifying would cause emotional trauma, videotape may be used in lieu	Not stated	15 or younger
Colorado	Sexual offences	Likelihood of unavailability at time of trial, based on recommendations from therapist and others. If, at time of trial, court finds that further testimony would cause emotional trauma, videotape may be used in lieu	Not stated	Under 15
Connecticut	Assault, sexual assault, or abuse	None stated. If court orders this procedure, child not required to give evidence in court	Child must not be able to see or hear accused	12 or younger
Delaware	Any criminal case or delinquency hearing	None stated. If court orders this procedure, child not required to give evidence in court	Court may exclude accused from room, but must permit him to see and hear the child	Under 12

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Florida	Sexual or child abuse	Likelihood of moderate emotional or mental harm. Videotape not admissible at trial if child testifies by use of CCTV	Court may require accused to be out of view of child by means of two-way mirror or other method	Under 16
Indiana	Sexual conduct with a minor, or child neglect	Where child under 10, or when psychiatrist has certified that giving evidence in court would be traumatic	Not stated	Any minor where second ground for use established
Iowa	Any criminal trial when child may describe sexual contact	Must be shown that recording would accord with State rules of evidence	Not stated	Under 14
Kansas	Any criminal trial	None stated. If procedure used, child may not be required to testify live at trial	Court must ensure that child cannot see or hear accused	Under 13
Kentucky	Any criminal trial	None stated. If procedure used, child may not be required to testify at trial	Court must ensure that child cannot see or hear accused	Under 12
Massachusetts	Any criminal trial	Likelihood of trauma. If procedure used, videotape is admissible in lieu of of live evidence	Child must be unable to see or hear accused	Under 15

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Minnesota	Where child is victim of abuse or sexual contact	None stated	Accused may see and hear testimony in person unless court finds that his presence would psychologically traumatise the child	Under 10
Mississippi	Sexual offences	Specific behavioural indicators and substantial likelihood of traumatic emotional or mental distress	If distress related to presence of accused, he can be placed behind two-way mirror so that he cannot be seen or heard	Under 16
Missouri	Sexual offences	Consideration of offence charged, and emotional or psychological trauma if required to testify in open court	Court may exclude accused from deposition if presence likely to cause emotional or psychological trauma	Under 17
Montana	Victim of sexual offences	Request of vitim and concurrence of prosecutor	Not stated	Adults and children alike

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Nevada	Any criminal offence	None stated. Procedure may be used in any case where child is to testify at a preliminary hearing or before a grand jury	Accused must be able to see and hear the deposition	Under 14
New Hampshire	Any criminal trial	Prosecutor, accused, or victim may request procedure, and court may allow it. Where witness under 13, deposition must be taken, and used in lieu of live evidence, unless court finds it would be in interests of justice to allow testimony in open court	Not stated	Any age, but special rule for under 13
New Mexico	Sexual offences with a minor	Good cause shown. If procedure used, video-tape must be used at trial in lieu of live evidence	Not stated	Under 16

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of Child
Ohio	Sexual offences	Finding that child will refuse to testify in open court, will be unable to communicate, or will suffer serious emotional trauma from giving evidence in presence of accused. If procedure used, child not required to give evidence in court	Court must provide television monitor in room where child gives deposition on which child can observe accused	Under 11
Oklahoma	Any criminal trial	None stated. If pro-credure used, child not required to give evidence in court	Court must ensure that child cannot see or hear accused	12 or younger
Pennsylvania	Any criminal trial	Good cause shown. If procedure used, child not required to give evidence in court. Rebuttable pre-sumption that child from 14 to 15 years of age would benefit from this procedure	Court must ensure that child cannot see or hear accused	Under 14

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Rhode Island	Sexual assault of child	Inability of child to testify in court without suffering unreasonable or unnecessary mental or emotional harm. Rebuttable presumption of such harm where child is 13 years of age or less. Deposition is in lieu of live testimony	Court must ensure that child cannot see or hear accused	17 or younger
South Carolina	Any criminal trial	Prosecutor or defence must notify court when a child victim or witness deserves special consideration. Video-taped deposition to be used when appropriate	Not stated	"Child"
South Dakota	Certain sexual offences	Deposition may be ordered on motion of prosecutor. If, at the trial, the court finds that live testimony would cause emotional trauma, that child unavailable, or that testimony would be substantially detri-mental to well-being of child, the videotaped deposition may be admitted in lieu	Not stated	15 or younger

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Tennesee	Child sexual abuse	None stated. Where procedure used, child not required to testify in court	Not stated	Under 13
Texas	Certain offences under Chap 21 Penal Code	Not stated. Where procedure used, child not required to testify in court	Court must ensure that child cannot see or hear accused	12 or younger
Utah	Child abuse or sexual offences	Good cause shown. Where procedure used, child not required to testify in court	Accused may be hidden from child's view if court determines that child will suffer serious emotional or mental strain, or that testimony would be inherently unreliable, if child required to give deposition in presence of accused	Under 12

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Vermont	Sexual assault, lascivious conduct, or. incest	None stated. Where procedure used, child not required to testify in court, unless otherwise ordered for good cause shown	Court may order that accused should be situated so that child cannot see or hear him if court finds there would otherwise be substantial risk of trauma which would substantially impair ability to testify	12 or younger
Wisconsin	Any criminal trial	None stated where child under age of 12. Where child between 12 and 16, court must find that interests of justice warrant the procedure. Factors are listed to determine interests of justice, including: age, level of development, nature of offence, custodial situation, relationship to accused, manifestations of post-traumatic stress disorder, etc. If procedure used, child may not be called as witness at trial	Not stated	Under 12, or between 12 and 16 where interests of justice warrant

State	Type of case	Grounds for use	Location of Accused, Judge, etc	Age of child
Wyoming	Incest or sexual assault	Where best interest of child would be so served, and potential physical or psychological harm to child would be likely if required to testify at trial, such as to render child incapable of testifying	Accused may be hidden from child's view where he is alleged to have inflicted or threatened physical harm on child, and where physical or psychological harm likely if there is face-to-face confrontation	Under 12

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