

The Winston Churchill Memorial Trust of Australia

Report by:

Colleen Winterburn

2001 Churchill Fellow

**To study the use of video techniques in the taking of evidence
in judicial proceedings**

Index

1.0	Introduction	3
	1.1 The Project	3
	1.2 Acknowledgements	3
2.0	Executive Summary	5
	2.1 Personal Details	5
	2.2 Significant Events	5
	2.3 Key Issues	5
3.0	Program	6
	3.1 Background	7
	3.2 The Process	7
	3.3 Witness Support Programs	7
	3.4 Crown Prosecution Services and Child Protection Practices (UK)	8
	3.4.1 Chelmsford	8
	3.4.2 Essex	9
	3.4.3 Hertfordshire	10
	3.5 Kirkcaldy (Scotland)	10
4.0	Republic of Ireland	12
5.0	Conclusions	12
6.0	Recommendations	14
7.0	References	15

1.0 Introduction

Electronic recording of children's evidence has been introduced into practice in New South Wales under the *Evidence (Children) Act 1997*. Historically the developmental needs of children have not been taken into account as a matter of practice within the Criminal Justice System. A study examining the impact of the Criminal Justice system on female child complainants who had been victims of sexual abuse found that defence counsel [involved in the study] support the adversarial nature of cross-examination and

*'would consider it cowardly not to go for the jugular when cross-examining a child..., that if in the process of destroying the evidence it is necessary to destroy the child – then so be it.'*¹

Further comments from defence barristers highlighted their lack of knowledge about child development and an insistence that since a child has the same IQ as an adult then they can be treated as an adult. The study also revealed a significant lack of understanding of the dynamics of sexual abuse, poor attitudes and behaviour within the judiciary and further trauma for victims within the criminal justice system.

1.1 The Project

This project provided an opportunity to examine how the legal systems across some counties within the United Kingdom have refined their practices and/or processes in the last 10 years to accommodate the needs of children within the Criminal Justice System. It was also an opportunity to discover what policies and procedures the Republic of Ireland may be developing around the videotaping of children's evidence, as this process is due for introduction later in 2001.

1.2 Acknowledgements

The Winston Churchill Memorial Trust of Australia provided the unique opportunity to undertake this study. It is also important to acknowledge those people who generously donated time and enthusiasm in order to bring together individuals and/or organisations who could provide information and input into the study. These people significantly contributed to identifying and coordinating specific Agency visits and key personnel as well as providing transport to and from a range of locations. They are:

¹ Eastwood, C., Patton, W. & Stacey H., 1998. "Child Abuse & the Criminal Justice System" in *Trends & Issues in Crime and Criminal Justice*, No.99, Australian Institute of Criminology

- Detective Sergeant Keith Oddy, Harold Hill (Essex) Child Protection Unit
- Detective Inspector Keith Tilley, Child Protection Unit, Stevenage (Hertfordshire)
- Detective Constable Fiona Curzon, Hertford (Hertfordshire Constabulary)
- Detective Sergeant John Callaghan Child Protection Unit Fife, Scotland
- Dr. Helen Buckley, University of Dublin, Trinity College
- Gerard Hughes, Assistant Principal Policy Officer, Department of Children & Health, Dublin

2.0 Executive Summary

2.1 Personal Details

Name: Colleen Winterburn **Occupation:** Project Manager

Address: 31/1 Dudley Street, Randwick NSW 2031

Telephone: (02) 9398 3928 (H) (02) 9692 7111 (W)

2.2 Significant events

Meetings with key personnel in the Harold Hill (Essex) and Stevenage (Hertfordshire) Child Protection Units in England highlighted the importance of fully assessing the safety, welfare and well being of the child prior to any videotaped interview being conducted. Only then is the child assessed for readiness and capacity to participate in a videotaped investigative interview.

It was acknowledged that children and young people face particular challenges in the Criminal Justice System due to the lack of understanding around the developmental needs of children and the lack of knowledge of the dynamics of child abuse by both members of the judiciary and juries.

An interview with Maurice Aston, a barrister for the Prosecution in the United Kingdom, reinforced these views. Aston firmly believes that anyone in the legal profession (lawyers and judges) dealing with child protection cases should have training in the developmental and other needs of children.

2.3 Key Issues

- There is a distinct lack of training for those in the legal profession around child protection, child development and developmental disability which leads to children and young people being seriously disadvantaged within the Criminal Justice System.
- There needs to be further consideration given to recording all the child's evidence at pre-trial hearings, and to providing 'communicators' to explain questions to children as well as providing clarification of children's answers to the court.²

The intention is to forward this report to the Australian Law Reform Commission, tertiary institutions offering legal studies, and the NSW Attorney General. It is important that lawyers participating in child abuse matters receive compulsory education in Child Development and Child Protection. There is a need for serious consideration of a system of compulsory Child Development and Child Protection education for Magistrates and Judges before they are able to hear Child Abuse matters. There will also be the opportunity to discuss the outcomes of the study at inter-departmental forums.

² Pigot Report (1989), *Report of the Advisory Group on Video-Recorded Evidence*, Chairman: Judge Thomas Pigot, London: HMSO.

3.0 Program

In attempting to capture a view of the broad spectrum of services involved with children and young people in the area of evidentiary interviews, a number of agencies were visited in various counties in England, as well as services in Fife, Scotland. The following details identify the services and people who provided extensive information during this process.

- Margaret Pryce, Project Manager, and Janet Moore, Co-ordinator, National Society for the Prevention of Cruelty to Children Witness Support Project, Tilburry (Essex)
- Mr Alan Moore, Manager, Crown Prosecution Service, Chelmsford (Essex)
- Detective Sergeant Keith Oddy, Child Protection Unit, Harold Hill (Essex)
- Mr Frank Flynn, Social Worker, Social Services, Harold Hill (Essex)
- Ms Judy Allen, Senior Social Worker, Child & Family Services (Essex)
- Ms Frances Sharp, Manager, Witness Support Program, Chelmsford Crown Court (Essex)
- Detective Constable Fiona Curzon, Hertford (Hertfordshire Constabulary)
- Panel of Representatives of St. Albans Crown Court Witness Preparation Program (Hertfordshire)
- Detective Inspector Keith Tilley, Child Protection Unit, Stevenage (Hertfordshire)
- Maurice Aston, Barrister for the Prosecution, St. Albans Crown Court (Hertfordshire)
- Detective Sergeant John Callaghan, Detective Constable Edith Potter, Mr Brian Stevenson, Kirkcaldy Child Protection Unit, Fife (Scotland)
- Mr Alex Miller, Reporter, (used uniquely in Scottish Child Protection System), Dunfermline (Scotland)
- Ms Lesley Stevenson, Head Social Worker, Child & Family Team. Kirkcaldy (Scotland)
- Detective Constable Graeme McCallum, Community Safety Representative, Fife Constabulary (Scotland)
- Ms Alison Michie, Procurator Fiscal Depute, Kirkcaldy (Scotland)
- Mr Patrick Flynn, Forensic Police Surgeon, Kirkcaldy (Scotland)
- Mr Gerald Hughes, Assistance Principal Policy Officer, Department of Children & Health, Dublin (Ireland)
- Dr. Helen Buckley, Co-ordinator, Post Graduate Diploma in Child Protection and Welfare, University of Dublin, Trinity College (Ireland)
- Judge Frank O'Donnell (Chair of Videotaping Committee), Ms Sheila O'Neill (Secretary of Videotaping Committee), Mr Frank Lyons, Principal Officer, Court Service, Dublin (Ireland)
- Mr Keiran McGrath, Senior Social Worker, St. Clare's Unit, The Children's Hospital, Dublin (Ireland)
- Mr Keiran Smythe, Assistant Principal Policy Officer (Child Care Act), Department of Children & Health, Dublin (Ireland)

- Detective Sergeant Gerry Deagan (Domestic Violence and Sexual Assault Investigations Unit), Dublin (Ireland)

3.1 Background

Historically, concerns have been raised around how investigative interviews with children have been conducted. Issues identified included the interviewer's questioning style and the child's suggestibility, as well as the difficulties in balancing the demands of the legal system with the needs of the child. The Royal Commission into the New South Wales Police Service expanded its terms of reference in 1996 to include examination of systems which had contributed to the failure to protect children from abuse. Subsequently the NSW Department of Community Services and the NSW Police brought staff together to form Joint Investigation Teams. One of the key outcomes of the joint interview process is to minimise the number of interviews to which children are subjected.

Prior to the Police Royal Commission, the electronic recording of children's evidence had been under consideration and formed the basis of pilot schemes in New South Wales since the early 1990s. The *Evidence (Children) Act 1997* was assented to in November 1997 and enacted in part on August 1 1999.

Researching and writing the curriculum for training both Department of Community Services and NSW Police personnel in audio/videotaping of children's evidence highlighted the duress that children are subjected to in the 'adult world' of the criminal legal system. Very little consideration is given to the psychological well being of the child, trauma that may have been suffered, or the use of language that is in keeping with the developmental age of the child. The United Kingdom has had over 10 years experience around the process of videotaping children's evidentiary interviews, and at the time of the study, the Republic of Ireland was at the stage of finalising policy and guidelines around videotaping evidentiary interviews.

3.2 The Process

In undertaking a study in the United Kingdom to look at the accommodation of children's needs within the criminal justice system it was important to gather as wide a range of information as possible across different counties and services.

3.3 Witness Support Programs

Throughout the research process it became evident that practices varied across counties. Whilst the legislation is the same, policies and procedures differ. For example in Essex, the National Society for the Prevention of Cruelty to Children has received funding to set up the Essex Young Witness Project. The service is structured to be provided primarily by volunteers, and since its launch in 1997 has received over 750 referrals. This project differs from the Witness Support

Programs housed within the Crown Courts in that there is intense preparation and ongoing support with the young witness in his/her home environment, as well as support being offered during the time the young witness is at court.

A meeting with the Manager of the Chelmsford Crown Court Witness Support Program identified that this service focuses on preparing witnesses around the procedure of going to court rather than the court process. There was acknowledgement of the need to balance preparation with ‘over’ preparing children to the point where they appear to be coping so well that the impact of abuse is not recognised or understood. The issue of Closed Circuit Television (CCTV) versus ‘live’ court appearances by children was raised. There was a view that frequently there was a non-guilty verdict when CCTV was used, although there is no data available to verify this view. According to the Manager, the Judge turns the camera off if a child cries, thereby removing the opportunity for the jury to witness the emotional impact of the process on the child. Rather, it would appear that CCTV seems to neutralize the impact for the victim. There was a belief that the jury tends to build a rapport with the defendant’s family, yet never get to see the devastation of the child’s family unless they are giving evidence. However, this belief is based on qualitative data within the Chelmsford Crown Court rather than on statistical analysis.

Generally, the type of training most Crown Court Witness Preparation Programs provide for staff (usually volunteers) is comparative. Usually the training is conducted over a three month period and includes:

- Attending a Child Protection Unit to see where the children are interviewed
- Eight days face-to-face training in a classroom situation
- Two days shadowing another experienced volunteer

Further discussion with the Manager highlighted the view that juries need to have a knowledge and understanding of specific issues, particularly in the area of child protection. There is a strong belief that juries, not only in Chelmsford but also throughout the United Kingdom, are operating in ignorance when it comes to child protection issues. There is a lack of awareness of the difficulties children face within the constraints of language competence when dealing with legal questions and jargon.

3.4 Crown Prosecution Services and Child Protection Practices (UK)

3.4.1 Chelmsford

In Chelmsford, the Crown Prosecution Service is a combined service of Police and Crown Prosecution staff. This service is the roll out of new procedures in the United Kingdom, with staff from both services taking joint responsibility for a

case. The joint responsibility that Police and Crown Prosecution staff have for the case is considered to streamline the process of getting the brief to court.

According to the Manager of this service, there is a low conviction rate when evidence is given via video link. Whilst the use of the video link is good for young witnesses, again the assertion was made that live evidence is more compelling, although this is based on anecdotal evidence rather than analysis of data. In the United Kingdom there does not appear to be a system in place which consistently records verdicts and details as to whether evidence was given 'live' or via CCTV link. However, discussions with other Crown Prosecution Services, including Witness Support Programs seemed to reinforce the view that there is a lower conviction rate when CCTV is used.

Discussions revealed the general view that defence tactics usually do not include badgering the young witness to a point where the child cries. However, there are strong tendencies to find material from Social Services, school files or any other possible area that will discredit the child and portray the child as a 'liar'. The desired outcome of such an approach is to get the case dismissed at the Plea and Directions hearing which occurs before the matter proceeds to trial. From the prosecution perspective, there is also a strong 'push' to have the Prosecution view the video, not just read the transcript, prior to any court appearance.

3.4.2 Essex

In Essex, depending on the judge, when a child protection matter is being heard the day will be broken into 40 minute 'chunks', in recognition of the attention span of the age of the child. Child abuse trials commence on Monday, with the preliminaries happening on that day, so that the child does not have to be in court until Tuesday. The aim is to get cases to trial four weeks after the Plea and Directions hearing, with Judges now having the responsibility of being case managers and setting the timetables.

Discussion with representatives of Child and Family Services (Social Services) with in the county of Essex highlighted strong communication between Police and Social Services prior to conducting any investigative interview with a child. There is shared communication between Government Departments such as Health and Education. In addition, Social Services take responsibility for researching as much information as possible on the child. This information is shared at a strategy meeting, formally documented and an agreed plan signed off by the parties at the meeting. Prior to any investigative interview there is a joint home visit by Police and Social Services. When questioned about how Agency practices have changed over the years, there was agreement that the welfare of the child is paramount, driving better planning and assessment, as well as improved training and communications. Investigative interviews are conducted according to the Memorandum of Good Practice, and there is always an assumption of the need to adhere to the rules of evidence during an investigative interview.

3.4.3 Hertfordshire

At Hertfordshire, the Prosecuting Barrister generally views the video before going to court, rather than simply relying on the transcript. An interview with Maurice Aston, a barrister (Prosecution) who was formerly a Detective Inspector with the (Hong Kong) Police raised several pertinent points including:

- In Hertfordshire there is not a lot of intervention from judges or prosecutors on behalf of children
- Overtly incorrect conduct is stopped very quickly by the judge
- There is a significant issue around language construction and use of language by the legal profession – there is little to no conforming to children’s needs, nor is there any appreciation of children’s needs
- Technical language is frequently used and double-barrelled questions are posed
- There is a need for Judges to have a basic understanding of developmental issues of children
- The legal profession, (lawyers and judges) dealing with child protection cases should have training in the developmental and other needs of children
- There is a belief that the jury begins to form relationships with the defendant and supporters of the defendant, whilst no such relationship is established with the victim. The jury and the rest of the court do not see the emotional trauma of the child, as only the head and shoulders are seen on the television monitor (CCTV). If the child becomes distressed, again it is the practice that the television monitor is turned off, thereby preventing the court witnessing the impact of the process on the child.

3.5 Kirkcaldy (Scotland)

Processes in Kirkcaldy (Scotland) vary significantly from those in Britain. The Kirkcaldy Child Protection Unit is the only Unit in Scotland where Social Services and Police share the same office, and as such does not conduct video interviews with children. Scotland has a unique Child Protection system in that children rarely attend court. Instead the Children’s Hearing System has been established and is made up of lay members approved and appointed by the Secretary of State to decide how children should be dealt with. The decision to refer a child to a Hearing is taken by a Reporter, an official employed by the Scottish Children’s Reporter Administration.

Within the Child Protection Unit, there is a very low percentage of interviews that proceed to criminal court. The primary foci is assessing the evidence and assessing the child’s capacity to be a witness before proceeding to criminal court. In discussions with the Procurator Fiscal (Prosecutor) it was acknowledged that in criminal court it is less likely that the developmental needs of children are attended to and dealt with in an age appropriate manner. There is a procedure in

place whereby Fiscal Prosecution Officers will take further statements from witnesses in the more serious cases. There are also Defence Precognition Officers, amounting to any person being able to interview the victim. They are allowed to use leading questions and despite the fact that a child does not have to agree to participate in the interview, if the child refuses, proceedings are held up as Defence claim they are not ready. Where possible, the practice of the Procurator Fiscal is to offer the Procurator Fiscal Precognition to the Defence rather than Defence conducting a further precognition interview.

It was also stated that whilst the European Convention of Human Rights refers to the rights of the accused and victims, the accused is more favoured in the court process, and that often victims rights and procedural fairness for victims is overlooked in the process. Judges are also mindful of appeals and may not necessarily intervene to challenge the language used or the questioning style when children are in the witness box.

Discussions with Police representatives within the Child Protection Unit highlighted that the welfare of the child is paramount. When a referral is made to the unit, a strategy meeting is held with both Police and Social Services present. There may be a number of agencies/personnel contacted after the initial referral in order to obtain as much information as possible to assist in the assessment of the child. Information is pooled and a decision made whether to proceed. A decision is made on how, when and if the child will be interviewed. However an interview will be conducted if the child expresses their wish for this to occur. Medicals are rarely conducted, nor is forensic photography a common practice. There is reluctance on the part of paediatricians and medical practitioners to become involved in the investigation and prosecution processes. The policy states that two (2) doctors must examine a child, one of whom must be a paediatrician and one who must be a Police Forensic Surgeon. Logistically this creates significant challenges in terms of resources, due to the general unwillingness among medical practitioners to become involved.

There is no joint training as such between Police and Social Service Staff who work in the Child Protection Unit. Each Agency takes responsibility for providing any training deemed necessary to carry out the work. Training for Police includes:

- Cognitive Interviewing Techniques
- Child Development
- Psychology
- Communication Skills with Children
- Body Language
- Signs and Symptoms of Abuse
- Interview Structure

Social Services staff are only employed if they are a qualified Social Worker. This title can be conferred through a certificate, diploma or degree course. Nevertheless, all Child and Family Social Workers in Kirkcaldy are expected to do post graduate Child Protection Studies through Dundee University. Despite this, Investigative Interviewing is not taught to Child and Family Social Workers as a matter of routine.

4.0 Republic of Ireland

The Republic of Southern Ireland is currently at the stage of reviewing draft policy and formulating procedures for the videotaping of children's interviews. Whilst the Republic of Ireland has a population of 3.6 million, most of the population (about 2 million) is on the Eastern Seaboard so most resources tend to be concentrated in this area. A meeting with Gerard Hughes (Principal Policy Officer), Department of Children and Health, provided the opportunity to overview the *Child Care Act 1991* and discuss the history and philosophy underpinning the Act.

At a meeting attended by Judge Frank Donnell (Chair of the Videotaping Committee), Sheila O'Neill (Secretary) and Frank Lyons (Court Service) an invitation was extended to provide extensive details on the curriculum, policy and procedures surrounding videotaping of children's evidence within the state of New South Wales. At the time of visiting, the issue of developing a specific curriculum for the training was still under discussion. However, there was strong acknowledgement that the principles contained within the United Kingdom's Memorandum of Good Practice would underpin the evidentiary interviewing of children in the Republic of Ireland. This was further reinforced at a meeting around 'best practice' with Kieran Smythe, Assistant Principal Policy Officer (Child Care Act), Department of Children and Health.

5.0 Conclusions

Several key issues emerged throughout the study, some of which are very similar to current issues within the Australian Criminal Justice Systems.

1. Discussions throughout both the UK and Republic of Ireland strongly suggest that there is an inherent prejudice in the legal system which reflects the presumption that the evidence of children is unreliable, particularly in cases involving alleged sexual offences. Such prejudices influence their legal systems yet such presumptions do not stand up to scientific scrutiny.³

³ Spencer, J & Flin, R. (1993) *The Evidence of Children – the Law and Psychology*, 2nd edn, London: Blackstone Press.

2. There is a distinct lack of training for those in the legal profession around child protection, child development and developmental disability which leads to children and young people being seriously disadvantaged within the criminal justice system.
3. In general, the criminal justice system does not address the developmental needs, cognitive and language capacity of children and young people as standard practice. Rather, this appears to be arbitrary and left to the discretion of individual judges.
4. In recognition of the trauma often suffered by child victims Witness Support Programs are evident in every Crown Court throughout England. However such programs generally support the child through the procedure rather than being able to offer support around the process.
5. In the interest of best practice, interviews comply with the conduct specifications in the UK Memorandum of Good Practice, adhering to the rules of evidence at all times.

In relation to the view which is held by many defence barristers that children can largely be treated as adults based on their IQ, it would seem very pertinent for those involved in the judiciary to consider the following:

“Children are no less reliable as witnesses than adults and, in many respects, are more reliable informants because of their less developed ability to lie or deceive.”³

This report will form the basis of presentations and will be distributed to the Australian Law Reform Commission, tertiary institutions offering legal studies, and the NSW Attorney General. It is important that lawyers participating in child abuse matters receive compulsory education in Child Development and Child Protection. There is a need for serious consideration of a system of compulsory Child Development and Child Protection education for Magistrates and Judges before they are able to hear Child Abuse matters. There will also be the opportunity to discuss the outcomes of the study at inter-departmental forums.

³ Cerezo, M.A, McGrath, K., & Lamers, F. (2000) Child Abuse: Perpetrators and Victims. Identifying the legal obstacles that decrease system effectiveness of victim and perpetrator rehabilitation. *Final Report*, Valencia, Spain.

6.0 Recommendations

- 1.1 All tertiary bodies offering legal studies include specific modules in Child Protection, Child Development and Developmental Disability within the curriculum
- 1.2 Specialist Magistrates and Judges be appointed to and remain with both Children's Courts and Criminal Courts
- 1.3 Such appointments not be made until specific training in Child Protection, Child Development and Developmental Disability has been undertaken
- 1.4 Current lawyers and barristers seeking to represent clients in child protection matters undertake training in Child Protection, Child Development and Developmental Disability
- 1.5 The Principles of Procedural Fairness be adopted for all parties within the court process
- 1.6 Consideration be given to mandatory independent assessment of the child/young person victim prior to appearing in court to determine developmental, language and cognitive capacity
- 1.7 Given the delay from the time a charge is brought about until a trial commences for child abuse matters, further consideration be given to introducing the Western Australian regime of pre-trial hearings, as recommended by the New South Wales Royal Commission⁴
- 1.8 A 'communicator' be appointed to assist children and young people in understanding questions posed within the court and to assist the court in understanding the responses of children and young people

⁴ Davis, G., Hoyano, L., Keenan, C., Maitland, L. & Morgan, R. (1999). *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions*, Report for the Home Office, Department of Law, University of Bristol, UK.

7.0 References

1. Eastwood, C., Patton, W. & Stacey H., 1998. "Child Abuse & the Criminal Justice System" in *Trends & Issues in Crime and Criminal Justice*, No.99, Australian Institute of Criminology
2. Pigot Report (1989), *Report of the Advisory Group on Video-Recorded Evidence*, Chairman: Judge Thomas Pigot, London: HMSO.
3. Cerezo, M.A, McGrath, K., & Lamers, F. (2000) Child Abuse: Perpetrators and Victims. Identifying the legal obstacles that decrease system effectiveness of victim and perpetrator rehabilitation. *Final Report*, Valencia, Spain.
4. Davis, G., Hoyano, L., Keenan, C., Maitland, L. & Morgan, R. (1999). *An Assessment of the Admissibility and Sufficiency of Evidence in Child Abuse Prosecutions*, Report for the Home Office, Department of Law, University of Bristol, UK.