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**PERSPECTIVES FROM THE COMMISSIONER
ON ALTERNATIVE MODELS FOR
PROSECUTING OFFENDERS**

Gillian Calvert

**Commissioner, The Commission for Children and Young
People**

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Introduction

Thank you for giving me this opportunity to share my perspective, as a Children's Commissioner, on how we can work together to improve the criminal justice system for kids who are sexually assaulted.

Children and young people take an enormously difficult step when they disclose sexual assault.

Yet we are told that from their experiences in the criminal justice system that the system lacks appropriate levels of sensitivity and compassion.

"It's a waste of time and it hurts a lot" is how one 16 year old from NSW described how she felt the criminal justice system responded to her disclosure of assault.

Sadly, this view¹ encapsulates the common experiences of many children and young people who have had the courage to speak up.

Many of us here today share a strong commitment to improving how the legal system responds to allegations of child sexual assault.

We don't want child sexual assault prosecutions to be a "waste of time" and to "hurt a lot" for the children and young people involved.

Dr Cossins and Richard Refshauge have just outlined the important work of the National Child Sexual Assault Reform Committee.

The Committee is examining some of the barriers to successful child sexual assault prosecutions and identifying alternative models.

As a representative on that Committee, I believe this is an important step towards reform of the legal system so that it becomes more effective for children and young people. As a Children's Commissioner, I would also like to convey three important messages that I hope will help frame your thinking as we work to improve the legal system's response to child sexual assault.

Message 1

Child sexual assault is a complex social problem for the legal system to grapple with.

Before we can effectively consider the relative merits of a 'justice response' or alternative prosecutorial models, we need to be clear about what we want the legal system to achieve for kids.

In my view, the legal system has a strong role to play in reducing the incidence of child sexual assault in the community through the principles of deterrence, punishment and rehabilitation.

By identifying child sexual assault as a serious issue and by prosecuting offenders, the legal system makes a significant contribution to helping keep the community safe for children and young people. However, this should not be the sole aim of any legal response to child sexual assault.

Dr Christine Eastwood and Professor Wendy Patton, “The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System”, Queensland University of Technology, 2002, p.44.

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It is also vital that children and young people are given a voice in the legal process.

As Dr Judy Cashmore has argued, this is more than merely enabling children and young people to give evidence.

It is about changing the way that adults regard what children have to say and how they say it.

As children and young people don't express themselves in the same ways as adults, we risk not hearing them.

If we – as adults - are to give them the full opportunity to adequately express themselves we need to change our approach.

For instance, we need to think about our how we test their competency to give evidence and our attitudes to the reliability of their evidence.

We could also look at our use of language and legal terms that often alienate and confuse kids who are already vulnerable and in a stressful situation.

There is much to be gained by supporting change in the legal system processes in ways that will engage children and young people without compromising the rights of the accused.

Message 2

How we pursue these objectives brings us to my second message and the need to base any reform on good evidence.

While the legal system has been designed with adults in mind, the last two decades – especially in NSW - has seen significant efforts to better accommodate children and young people.

For example, there are now alternative means by which kids can give evidence, such as closed circuit TV, to help minimise the stress of formal court processes.

Rules have also been abolished that previously required judges to give warnings in relation to the uncorroborated evidence of children.

Collaborative investigation approaches across government agencies are also being used in child sexual assault matters.

This is important for kids because it promotes important relationship building and continuity of interaction with adults in the process.

A cross agency approach is also good for the legal system as it encourages greater integration with organisations responsible for children's safety, welfare and well-being.

However, I would stress that before further changes are made within the legal system, it is vital that we look at building the evidence around what works and what doesn't work.

The gathering of solid evidence is a challenge confronting the current criminal justice system.

While there are many evaluations of the system, often they are based on what adults believe kids would benefit from, rather than what kids themselves would like to see changed within the system.

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From the Commission's experience, being guided by the views of children and young people can lead to a more accurate assessment of the impact of proposed reforms.

I commend the conference organisers for featuring studies that have taken this child-centred focus, particularly the research by Dr Eastwood and Professor Patton that attempts to draw on a sizeable sample of the views of children and young people.

However, there is still a need to produce research on what kids think about alternative prosecutorial models that are operating, or under trial, in Australia and elsewhere.

The need for such information is becoming increasingly pressing, if discussion about further reform is to be underpinned by evidential rigour.

The National Child Sexual Assault Reform Committee is attempting to remedy this information deficit by examining overseas models that could be adapted for the Australian context.

Message 3

In searching for the solution to our challenge today, there have been a range of proposals put forward including dealing with child sexual assault through civil, rather than the criminal, law.

I don't fully support this position as I believe it can reduce the serious nature of what is a criminal action (and should be treated as such) and not one which will result in better outcomes for kids.

It would also place the onus on the complainant and their families to launch any action which we know is a costly and difficult process.

In addition, the criminal justice system has already demonstrated that it can accommodate alternative responses to child sexual assault.

There are civil remedies available to victims of child sexual assault in NSW, including a claim for compensation through the Victims Compensation Tribunal.

There is the NSW Pre-Trial Diversion scheme, established under NSW law. This scheme is an alternative sentencing option available to a person who is charged with a sexual assault offence committed on their child or the child or their spouse or de facto partner.

The scheme focuses on the rehabilitation of offenders who have pleaded guilty and the family unit, and avoids the ordeal of a trial for the child concerned.

As well, a number of preventative measures, like the NSW Working with Children Check, aim to reduce the potential for child sexual assault in the community.

In discussing alternative models, there is also some support for greater specialisation in court processes and structures, including a proposed Child Sexual Assault Court in NSW.

However, we should keep in mind that this may not be the definitive answer to the problems of the current criminal justice system.

Whilst a specialised court may take account of the unique aspects of child sexual assault prosecutions, loading the current prosecutorial system with experts isn't necessarily helpful to children and young people.

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I would suggest that points of improvements that would be helpful – that are also cost effective and able to be quickly implemented - could include:

- Giving child sexual assault cases a priority in the court system.
- Allowing all of a child's evidence, including cross examination, to be given by alternative means such as closed circuit television.

- Establishing a child witness service that is separate from the prosecutorial process and focused on minimising the stress for kids of court interaction.

There is no clear answer to the profoundly difficult question of how the legal system can best respond to child sexual assault.

In any legal system, children are going to be vulnerable within the prosecution process due to their developing capacities.

Where we locate our response to child sexual assault within the structure of the legal system is *less* important than improving the way that professionals within the systems understand kids and their experiences as sexual assault complainants.

If we want the system to work for children and young people – if we are serious about real justice – what is needed is not just a technological or structural ‘fix’.

What is needed is a *cultural* shift to improve the way that we, as adults and professionals, respond to children and young people in the legal system, regardless of how that legal system is structured.

This cultural shift can begin now.

It does not require legal reform or institutional restructuring.

I offer a parting example.

NSW evidence law empowers a judge to disallow cross-examination that is intimidating, harassing or repetitive.

Yet, studies tell us that judicial officers rarely intervene to enforce such rules, even where it does not impact on the proper testing of evidence.

The question is why this is so and what understandings of children we need to promote to challenge such reluctance.

As Eastwood and Patton write, “reforms... have not given children the belief, respect, protection or justice they deserve and... are entitled. We need a paradigm shift. Somehow, we have lost sight of the fact that what the child wants most of all is to be listened to – and to be believed”.²

Until we begin to direct our attention to cultural change, it will be difficult to restore the faith of children and young people in the importance of disclosing assault.

We can start that process today.

²Dr Christine Eastwood and Professor Wendy Patton, “The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice

System”, Queensland University of Technology, 2002, p.34.