
Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us

Anne Cossins

School of Law, University of New South Wales, Sydney, New South Wales, Australia

This article summarizes the extensive research literature on laypeople's and jurors' beliefs about children's memory, suggestibility and responses to child sexual abuse. In particular, it discusses the extent and types of misconceptions held by laypeople/jurors, as well as the effects of age, education and gender on those misconceptions. The results from an analysis of mock jury studies where different types of expert testimony were presented are then considered in order to understand the types of expert testimony that would be admissible in courts in Australia, with a particular focus on the *Uniform Evidence Act*. As a result of this analysis, particular reform options are discussed and recommended in order to counter juror misconceptions in child sexual abuse trials.

Key words: children's memory, expert testimony, juror misconceptions.

This article investigates a key question that has been posed both in the research literature and a number of recent law reform reports: are expert witnesses needed in child sexual assault cases to inform jurors about children's memory, suggestibility, and reactions to abuse, or "do jurors already know what...experts could tell them"? (Quas, Thompson, & Clarke-Stewart, 2005). The context in which child sexual abuse occurs is relevant to answering this question because that context typically involves (Cossins, 2000): (a) an offender who is known or related to the child; (b) grooming by the offender over time to engage a child's trust and test her/his reactions to non-sexual and sexual touching; (c) a relationship of dependence, control, or power between the child and the offender; (d) no eyewitnesses to the actual sexual contact; (e) delayed complaint; and (f) no scientific

evidence such as the presence of semen or medical evidence of penetration. For example Johnson (2004) reported that "as many as 96% of children assessed for suspected sexual abuse will have normal genital and anal examinations".

This context means that the focus of the trial is on the credibility of the Crown's chief witness, which will include an assessment of the child complainant's responses to the abuse and her/his relationship with the accused. Yet it cannot be assumed that the average juror, let alone the average lawyer or judge, "has a good understanding of all the insights that decades of psychological research have yielded" about the effects of child sexual abuse (Ceci & Friedman, 2000). This means that jurors, making decisions about guilt and innocence, will be required to make assessments of credibility "that go beyond

Correspondence: Dr Anne Cossins, School of Law, University of New South Wales, Sydney, NSW 2052, Australia.
Email: a.cossins@unsw.edu.au

the layperson's commonsense knowledge" (Quas et al., 2005).

Because of the complexity of the context in which child sexual abuse occurs, there may be a number of reasons why expert opinion about the behaviour and mental development of children would be relevant in a child sexual assault trial. Contrary to some past judicial views that the behaviour of sexually abused children is within the common knowledge of lay people (see the discussion below about common law cases on expert opinion evidence in child sexual assault trials), the psychological literature is replete with studies that have posed, then attempted to answer, questions associated with children, sexual abuse and memory, such as the (a) cognitive development of different age groups of children; (b) suggestibility of children; (c) reliability of children's memory; (d) behaviour of sexually abused children; and (e) patterns of disclosure and reasons for delayed complaint.

Despite decades of research there is no consensus in the literature that there is a particular set of typical reactions or behaviours that sexually abused children will always display. Blackwell (2005) has noted there is such a high degree of variability of children's responses to abuse that:

there is in fact no symptom, sign, behaviour or constellation of such that can be said to be absolutely indicative or diagnostic of sexual abuse having taken place (Blackwell, 2005; Johnson, 2004).

London, Bruck, Ceci, and Shuman (2005) have also observed that "the accuracy of diagnosis of child sexual abuse is often difficult because definitive medical or physical evidence is lacking or inconclusive in the vast majority of cases . . . and because there are no gold standard psychological symptoms specific to sexual abuse (Kendall-Tackett, Williams, & Finkelhor, 1993; Poole & Lindsay, 1998; Wood & Wright, 1995)". Despite the long-standing belief that sexually abused children display the child sexual abuse accommodation syndrome (CSAAS) (Summit, 1983), that is, they delay, deny then recant their disclosures, the only response that can be said to be typical of sexually abused children and for which there is substantial evidence, is delayed complaint or failure to complain (London et al., 2005). In a recent review of the literature to ascertain the scientific basis of the CSAAS, London et al. (2005) concluded that there was little evidence for the syndrome because "the data clearly

demonstrate that most children who are interviewed about sexual abuse do disclose and do not later recant" (2005). Only a minority of children were found to fit the behavioral pattern of the CSAAS by recanting their reports of abuse.

According to Blackwell (2005), "the closest we may get to [a] 'diagnosis' of sexual abuse may be the presence of post-traumatic stress disorder" (PTSD), but a number of different traumatic events can lead to PTSD in children (Kendall-Tackett et al., 1993). While there is no child sexual abuse syndrome that can be identified, there is an extensive body of knowledge about the various behavioural and psychological effects of sexual abuse (Browne & Finkelhor, 1986; Bagley & Thurston, 1996; Johnson, 2004; Ligezinska et al., 1996; Myerson, Long, Miranda, & Marx, 2002; Paolucci, Genuis, & Violato, 2001), although some children will display no behavioural or psychological symptoms at all (Blackwell, 2005).

Because of the degree of variability in the way children react to sexual abuse, a particular defence strategy is to argue that, if the child complainant exhibits no distressed behaviours, then she or he was not abused. For example, Blackwell (2005) has observed:

I have seen defence counsel use "disordered" child behaviour to suggest that the child is "bad", "not reliable" and "not credible". Similarly I have seen defence counsel suggest that because there is no evidence offered of disturbed, distressed or traumatized behaviour, the complainant child could not have experienced the events they have described.

In contrast, in a submission to the Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission (ALRC, NSWLRC and VLRC) (2005), the NSW Public Defenders' Office raised the issue about what is a normal response of a person who has been sexually abused:

[t]here is a tendency of [expert] witnesses to treat every conceivable response of the complainant as being a 'normal' response of a victim of sexual assault. Thus immediate complaint is a 'normal' response, but so it not making a complaint for 20 years (ALRC, NSWLRC and VLRC, 2005).

These views highlight the fact that the adversarial system does not adequately deal with

the issues surrounding children's responses to sexual abuse, nor does it have the capacity to acknowledge that trauma and its effects will be a function of context and circumstance. Instead, a child's reaction to sexual abuse is presently subject to lawyers' and laypeople's misconceptions about how a "real" victim of sexual abuse would or would not behave. For that reason, this article presents (a) a summary of the research literature on laypeople's and jurors' beliefs about not only children's responses to child sexual abuse but also the effects of age, gender and education on those beliefs; (b) the results from mock jury studies where different types of expert testimony were given; and (c) an analysis of the reform options that have been discussed over the last 10 years to address the problem of juror bias and misconceptions.

Based on this analysis and the workability of these reform options, this paper makes a number of reform recommendations that have not yet been considered in the Australian context.

Case Law on Expert Opinion Evidence

In Australia there are very few cases that have examined the admissibility of expert opinion evidence about the effects of sexual abuse on children (Freckelton & Selby, 2005). The general approach under the common law opinion rule has been to exclude such evidence on the grounds that the behaviour of child sexual abuse victims is within the common knowledge or ordinary experience of the jury (*C v R*, 1993; *F v R*, 1995; *Ingles v R*, unreported; *R v Venning*, 1997; *S v The Queen*, 2001).

In *C v R* (1993), for example, the trial judge had admitted the evidence of a child psychiatrist to explain why the complainant had delayed her complaint and to re-establish her credibility. On appeal, King CJ concluded that such expert evidence was not admissible in South Australian courts because the behaviour of sexual abuse victims was not considered to be a fit subject for expert opinion:

[i]n the end this becomes a question whether the subject matter of the proposed evidence is so special and so outside ordinary experience that the knowledge of experts should be made available to courts and juries....[It can be expected that] jurors would have much experience of the behaviour and reactions of children

in the family situation. Most would not, of course, have encountered child sexual abuse. That of itself is not sufficient reason for the admission of expert evidence....I am far from convinced...[that the insights of child psychology] are necessary in order to enable a jury to reach a just decision.

Blackwell (2005) has observed that judges, lawyers and other professionals may "normalize" their own professionally acquired knowledge of child sexual abuse and therefore consider it 'common knowledge' that the average juror will possess. But jurors are not necessarily representative of the general population so the idea that laypeople possess a common ordinary experience about the behaviour of children does not appear to be a valid assumption. In a New Zealand Court of Appeal case, *R v Aymes* (2004), Glazebrook J posed the opposite view:

[n]ot all jurors will have had children. Some may have had children but who are no longer in the relevant age group. Even jurors with young children may not know what is and what is not normal sexual behaviour for that age group (or may not want to say in case their child is considered abnormal).

Indeed, some of the responses of children to sexual abuse are counterintuitive from a layperson's perspective, such as delay in complaint, secrecy, protecting the offender and maintaining an emotional bond with the offender. Rather than the jury relying on its commonsense or collective experience, it is arguable that expert testimony about the behaviours of sexually abused children is necessary "to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance" (New Zealand Law Commission, 1999), especially where the behaviour in question appears to a jury to be inconsistent with sexual abuse.

Laypeople's and Jurors' Beliefs About Children's Responses to Sexual Abuse: Summary of the Research Literature

In order to evaluate whether there is a need to reform of the laws of evidence in relation to expert testimony about the behaviour of children, generally, and sexually abused children, specifically, it is important to identify what laypeople

and jurors believe they know about children and the extent and types of misconceptions held by jurors. Table 1 lists the misconceptions that have been found to exist in a number of studies based on a comparison of juror/layperson knowledge with the findings in the research literature.

Overall, the studies listed in Table 1 show that there are a number of key beliefs held by jurors and laypeople that have been consistently reported in the research literature over the last 10–15 years: (a) that children are easily manipulated into giving false reports of sexual

Table 1

Misconceptions of laypeople and jurors about children's responses to sexual abuse and suggestibility as witnesses

BELIEFS	% WHO AGREED	STUDY
1. Children are easily manipulated into giving false reports of sexual abuse.	>50 53	Quas et al. (2005) Kovera & Borgida (1997)
2. Child sexual abuse will result in physical damage and physical evidence.	>50 >50	Morison & Greene (1992) Kovera & Borgida (1997)
3. A typical victim would resist, cry out for help or escape the offender.	>33	Morison & Greene (1992)
4. If a child returns to, or spends time with the accused, that is evidence no abuse occurred.		Blackwell (2005)
5. Delay in complaint is evidence of lying.		Blackwell (2005)
6. Delay in complaint is uncommon.	9	Quas et al. (2005) Calvert & Munsie-Benson (1999)
7. Children cannot remember events well enough to be reliable witnesses in court.	31	Morison & Greene (1992) Quas et al. (2005)
8. Repeatedly asking children general, open-ended questions (e.g. what happened?) leads them to make false claims of sexual abuse.	46	Quas et al. (2005)
9. Repeatedly asking children specific questions (e.g., did he touch your private parts?) often leads them to make false claims of sexual abuse.	58	Quas et al. (2005)
10. Most sexually abused children exhibit bizarre sexualized behaviour.	41	Quas et al. (2005)
11. A physical examination by a doctor will almost always show whether a child has been sexually abused.	57	Quas et al. (2005) Kovera & Borgida (1997)
12. When a child discloses more details over time, this indicates that the report is false.	25	Quas et al. (2005)
13. Children sometimes make up false claims of sexual abuse for revenge.	33	Quas et al. (2005)
14. Inconsistencies in a child's report is evidence of lying.	29	Quas et al. (2005) Morison & Greene (1992)
15. Children who retract their reports have fabricated.	21	Quas et al. (2005) Morison & Greene (1992)
16. A psychologist can tell whether a child's description of an event has been influenced by another adult.	68	Quas et al. (2005)
17. Abuse claims made by 4- or 8-year-olds are false.	Most believed some claims of sexual abuse were false. ^a	Quas et al. (2005)
17a. Abuse claims often prove to be false.	> 33	Morison & Greene (1992)
18. Belief in the "CSI phenomenon" means some jurors expect scientific forensic evidence in child sexual abuse cases.		Blackwell (2005)

Notes. Percentages are quoted where they are provided by the study in question
^aSpecifically, 49% of jurors/laypeople believed that 10–30% of sexual abuse claims were false, while 28% of jurors and laypeople believed that 35–> 50% of claims were false (Quas et al., 2005)

abuse; (b) that retraction and inconsistencies are evidence of lying; (c) that abuse claims often prove to be false; and (d) that child sexual abuse can be detected by a medical examination.

The study reported by Quas et al. (2005) showed that jurors and lay people had some beliefs that were both compatible and incompatible with scientific consensus. For example, it was found that a majority (66%) believed that children can remember events well enough to be reliable witnesses in court and that children can distinguish between truth and lies (70%). But either significant minorities or a majority held a number of erroneous beliefs about children's memory and responses to abuse. Although, as discussed above, there is no single behavioural response, psychological symptom or medical sign that is diagnostic of sexual abuse (and some children may display no symptoms at all), 41% of jurors/laypeople in the study by Quas et al. (2005) considered that sexually abused children will display bizarre sexualized behaviour and 57% believed that a medical examination will reveal evidence of sexual abuse.

Quas et al. (2005) concluded that jurors/laypeople's "knowledge of specific research findings was quite limited" both in relation to children's suggestibility and responses to sexual abuse. Not only do jurors/laypeople possess both accurate and inaccurate knowledge about children, there is a high degree of variability in knowledge so that:

[a] critical and much needed role for experts is to reduce this variability and correct the misperceptions of a majority (or a large minority) of jurors. ... [A]s long as a sizable minority of jurors hold incorrect beliefs, expert testimony is important in juror education. ... Of importance, ... experts need to go beyond simply stating that children can be misled to make false claims of abuse and explain the conditions under which children are more (and less) likely to err (Quas et al., 2005).

The one feature that was consistent in a review by Ceci, Crossman, Scullin, Gilstrap, and Huffman (2002) was that preschoolers (under the age of 5 years) were more suggestible than children over the age of 5 years, indicating that not all children "are equally vulnerable to suggestive influence" (Ceci et al., 2002). Yet because of competency issues, cases involving pre-schoolers

are the ones least likely to be prosecuted in Australian courts, which means that studies on the suggestibility of preschoolers cannot be used to conclude that older children are similarly affected because there are marked cognitive differences between children aged under 5 years and children aged over 5 years.

Although some studies have demonstrated that some children can be misled into reporting false events, this research has been conducted in relation to observed rather than experienced events. Children who participate in an event, particularly where the event is personally significant, provide the most complete details compared to those who observed the same event (Murachver, Pipe, Gordon, Owens, & Fivush, 1996). Gobbo, Mega, and Pipe (2002) reported that actual participation in an event (which is the case when a child is sexually abused) increases not only the ability of a child to recall that event, but also their resistance to suggestions. Goodman, Rudy, Bottoms, and Aman (1990) found that by the age of 4 years, most children "are surprisingly resistant to abuse suggestions" and that it was difficult to make children give false reports of abuse (see also Saywitz, Goodman, Nicholas, & Moan, 1991; Schwartz-Kenney & Goodman, 1999) so that "highly suggestive interrogation practices are necessary to elicit such false reports" (Quas et al., 2005). In fact, London et al. (2005) found, after a review of 17 studies, that "when children who have been abused are questioned in formal settings, they will usually tell, obviating the need for suggestive questioning techniques" (London et al., 2005). Even where children did agree with misinformation in the study by Gobbo et al. (2002), the accuracy of their responses decreased after 1 week and 1 month so that the influence of misinformation decreased with time.

While research has consistently shown that free recall or open-ended questions "do not create false reports in children", in the jury study by Quas et al. (2005) 46% of jurors/laypeople believed that they can. This would mean that jurors "may need assistance from experts regarding not only what constitutes a suggestive interview, but also ... what does not" (Quas et al., 2005).

There is also evidence to show that certain individuals may be more prone to holding erroneous beliefs about children's reports of sexual abuse and that particular compositions of juries,

based on gender, age and education levels, may require educative expert opinion evidence. As shown in Table 2, there is greater scepticism of children’s claims of abuse according to increasing age, low levels of education and gender, so that:

when juries are male dominated, expert witnesses may be particularly useful in terms of overcoming males’ increased tendency to be unduly sceptical of children’s claims. Expert witnesses may also benefit less educated jurors in terms of providing them with additional knowledge about both children’s memory...and susceptibility to false suggestions (Quas et al., 2005).

The consistent finding across the studies listed in Table 2 is that jury verdicts can vary as a function of the composition of juries. Because male jurors are less likely to believe a child complainant, more likely to hold misconceptions about child sexual abuse and less likely to convict a defendant in a child sexual assault trial, it can be expected that acquittals and hung juries will be more likely when a jury is dominated by men.

Presence of Experts in Mock Jury Trials

Preliminary results from a New Zealand jury study by Blackwell (2005) show that “jurors exhibit a considerable lack of knowledge in many of the areas related to child sexual abuse” and most “expressed a desire for expert psychological evidence to assist them”, including developmental information about children. This finding accords with those from an Australian study in which mock jurors, who had not been exposed to expert testimony in simulated child sexual assault trials, indicated that they would have found such psychological expert testimony helpful (Crowley, O’Callaghan, & Ball, 1994).

In a jury study conducted in the United States by Gabora et al. (1993), mock jurors more often voted guilty in relation to simulated child sexual abuse trials when “a specific expert testified on behalf of the prosecution (60%) than when a general expert (45%) or no expert testified (35%)” (Gabora et al., 1993). The specific expert, who was identified to mock jurors “as a clinical psychologist who specialized in the field of child sexual assault”,

Table 2
Effects of age, education and gender on jurors’ and laypersons’ beliefs

CHARACTERISTIC	EFFECT	STUDY
Increasing age	Greater scepticism of children’s reports Fewer guilty verdicts	Goodman et al. (1998)
Gender	Women show greater accuracy about children’s responses to sexual abuse than men.	Quas et al. (2005) Morrison & Greene (1992)
	Male jurors believed misconceptions about child sexual abuse more strongly than female jurors.	Gabora, Spanos, & Joab (1993)
	Men more sceptical than women about children’s claims of sexual abuse.	Quas, Bottoms, Haegerich, & Nysse-Carris (2002) Bottoms & Goodman (1994)
	Men rate children as less believable, credible and competent.	Quas et al. (2005) Quas et al. (2002) Bottoms & Goodman (1994) Crowley et al. (1994)
	Men give higher estimates of false reports by children than women.	Quas et al. (2005)
	Female jurors rated complainants as more credible; male jurors rated the male defendant as more credible.	Gabora et al. (1993)
	Female jurors voted to convict the defendant significantly more often than male jurors. ^a	Crowley et al. (1994) Gabora et al. (1993)
Higher education levels	More accurate knowledge on the part of jurors/ laypeople.	Quas et al. (2005)

Note. ^aThe proportions of jurors voting guilty was remarkably similar in these two studies: 45.8% of male jurors voted guilty compared to 73.6% of female jurors in the study by Crowley et al. (1994), while 47% of male jurors voted guilty compared to 79% of female jurors in the study by Gabora et al. (1993)

made specific reference to the research literature on the effects of child sexual abuse, related the significance of the literature to the case at hand, and gave an opinion, based on a clinical examination of the complainant, that the child had been sexually abused (Gabora et al., 1993). The general expert, in contrast, merely testified about the relevant research literature but gave no opinions about the case at hand. As Gabora et al. (1993) observe, "[t]hese results are consistent with reports that expert testimony is most effective when it is presented so that the relevance of the research information is clearly linked to the specific case".

The study also reported that when a specific expert gave evidence in the simulated trials, the defendant was perceived as less credible than when either a general expert or no expert was seen (Gabora et al., 1993). Similarly, Crowley et al. (1994) reported that mock jurors who heard general expert testimony from a psychologist about children's memory and resistance to suggestion rated the complainant child more highly on these variables. Such testimony was also found to be related to increased guilty verdicts and to the degree of certainty that jurors' had about their verdicts (Crowley et al., 1994).

Gabora et al. (1993) reported that when mock jurors viewed trials in which no expert gave evidence, they were "more accepting of child sexual abuse misconceptions" than jurors who viewed trials in which either a specific or general expert gave evidence. Such misconceptions, together with attitudes towards women, were found to affect the credibility ratings of the complainant and the defendant (Gabora et al., 1993). This became evident when different juries viewed trials with differently aged complainants, with jurors rating complainant credibility more highly at a younger age (13 years) than at an older age (17 years). Gabora et al. (1993) surmised that:

girls approaching puberty or in their teenage years tend to be perceived by jurors more like adult rape victims and less like children.... Consequently, common misconceptions about rape (e.g., women are responsible for their own rape) are likely to become increasingly salient for jurors as the age of the female... complainant increases beyond puberty.... [S]uch misconceptions, coupled with the belief that the knowledge to fabricate such allegations increases with age, are likely to be associated with

decreases in the credibility attributed to complainants and decreases in guilty votes.

General Versus Specific Expert Opinion Evidence

The above discussion shows that the psychological literature provides important information that goes beyond laypeople's and jurors' commonsense notions about children's suggestibility and responses to sexual abuse (Quas et al., 2005). The research summarized in Tables 1,2 strongly suggests that expert opinion evidence on a range of matters to do with children ought to be routinely admitted in child sexual assault trials because of the number and type of misconceptions that are held by lay people about children and sexual abuse. It is worth noting at this point that the common law has always reasoned that the admission of criminal propensity evidence about a defendant is highly prejudicial because it can be expected that such evidence will influence a jury's decision-making. So too it cannot be discounted that erroneous or prejudicial views about children and their responses to sexual abuse will influence how a jury assesses the complainant's evidence in a sexual assault trial. Therefore, there is a clear public interest in admitting expert evidence to correct jurors' misconceptions and lack of knowledge about child sexual abuse and developmental issues, as well as to counter the over-reliance of the adversarial trial on the credibility of the complainant in a child sexual assault trial.

There are two types of expert testimony that could be admitted to assist juries. The first is "knowledge derived from scientific research that gives an appropriate context for understanding specific evidence in a given case" (Freckelton, 1997; Quas et al., 2005). This is referred to as social framework testimony by Quas et al. (2005) but is better known as educative or general expert testimony. It is distinguishable from expert testimony that is based on an examination of, or interview with, the child complainant, which is known as diagnostic or specific expert testimony.

With educative expert testimony the expert simply gives evidence about the "findings and conclusions from the scientific literature that are relevant to the jury's evaluation of the child's statements, without expressing an opinion about

the child's credibility" (Quas et al., 2005). For example, in the United States, "expert testimony is often introduced to counteract prevailing misconceptions" in child sexual abuse cases (Gabora et al., 1993), with the study by Gabora et al. (1993) showing that jurors became less accepting of misconceptions when they viewed the evidence of an expert witness; the admission of educative or diagnostic expert testimony was equally effective in overcoming misconceptions about child sexual abuse, although, as discussed above, jurors who heard diagnostic expert evidence returned a guilty verdict more often than those who heard educative expert testimony (Gabora et al., 1993).

In terms of reform questions, should the adversarial trial allow the admission of diagnostic or educative expert evidence, or both? Blackwell (2005) has noted that some experts "have taken a 'hired gun' approach" to the literature and have selectively chosen research or have misinterpreted the research to illustrate a particular point. The adversarial system is not suited to correcting these problems given the lack of expertise and unfamiliarity of cross-examining counsel with the literature, nor will defence counsel necessarily have an interest in correcting such misinterpretations. Because of the possibility of competing experts who might operate as hired guns, the purpose of expert testimony ought to be educative rather than diagnostic "to correct any erroneous beliefs that jurors may have" (Blackwell, 2005).

Another problem associated with introducing evidence from an expert witness who gives a diagnostic opinion that the complainant has been sexually abused is the fact that such evidence is likely to be highly prejudicial to the defendant. In other words, it can be argued that the opinion is likely to have a disproportionate effect on the jury's decision-making because it usurps the role of the jury. This means there would be a good argument for excluding it in the interests of justice. Even though the ultimate issue rule has been abolished in those jurisdictions in Australia that have adopted the *Uniform Evidence Act* (s80a), a trial judge can still exclude evidence if "its probative value is substantially outweighed by the danger that the evidence might... be unfairly prejudicial to a party" (s135) or "if its probative value is outweighed by the danger of unfair prejudice to the defendant" (s137), by, perhaps,

having too great an influence on the jury's decision-making.

While the credibility of the complainant is a question that must ultimately be decided by the jury, experts who give general or educative expert testimony do not usurp the jury's function in relation to deciding witness credibility because the expert does not directly refer to any psychological/behavioural characteristics of the complainant nor give an opinion about whether the complainant has been sexually abused. By merely providing a summary of the relevant research about, for example, children's abilities to give an accurate account of events and to distinguish fact from fantasy, their resistance to suggestion and the behavioural/psychological responses of sexually abused children, it is then for the jury to decide to use that information when assessing the credibility of the complainant. Because it is less likely that educative expert evidence will be excluded under ss135 or 137, it is this type of expert testimony that is likely to survive a challenge under the Uniform Evidence Act and is less likely to be prejudicial to the accused. However it is clearly to the defendant's advantage for such evidence not to be admitted because this situation allows the defence to exploit all the misconceptions associated with delay in complaint, behavioural disturbances and counterintuitive behaviour (Blackwell, 2005).

Because it is likely that defence counsel will seek to have expert opinion evidence about the behaviour of sexually abused children declared inadmissible or excluded on the grounds that it is prejudicial or within the common knowledge of the jury, it would, therefore, be necessary to enact a particular provision that specifically allows for the admission of educative expert evidence in child sexual assault trials (e.g., *Evidence Act 2001(Tas)*, s79A; *Evidence Act 1958(Vic)*, s37E; Freckelton & Selby, 1993).

Recommendations from Government Reports and Law Reform Commissions

There has been a consistent view from key reports around Australia that legislative reform is required to allow the admissibility of expert opinion evidence on the behavioural patterns of sexually abused children and children generally. Ten years ago, the ALRC and Human Rights and

Equal Opportunity Commission (HREOC) (1997) recommended that, in order “to overcome the problem of potential misconceptions about children”:

[t]he rules of evidence should clearly indicate that expert evidence on such issues as patterns of children’s disclosures in abuse cases or the effects of child abuse on children’s behaviour or demeanour in or out of court, is admissible to explain why general assumptions about the behaviour of a child witness or a certain line of cross-examination might not reflect adversely on a particular child witness’ credibility.

The ALRC and HREOC (1997) also recommended that all States and Territories should enact similar legislation, and ensure that the common knowledge and ultimate issue rules are abolished at the same time, as they have been under s80 of the Uniform Evidence Act.

Similarly, the Royal Commission into the New South Police Service (1997) considered that expert evidence should be admitted in sexual assault trials in order to place “perplexing” behaviour in context, such as delayed complaint and the complainant’s continued association with the defendant. In the Commission’s view the purpose of admitting such evidence “would be to establish a neutral playing ground, in which misconceptions held by jurors arising out of their ignorance concerning the behaviour of children generally, might be removed”.

More recently the NSW Legislative Council Standing Committee on Law and Justice (2002) was “of the opinion that providing a jury with the necessary knowledge to accurately assess the credibility of the complainant’s allegation is vital to a just outcome of the trial” because “the erroneous views of many jurors could be impacting on their ability to assess the credibility of the [child] complainant and determine the guilt or innocence of the accused”. The Committee did not believe such evidence would “create an unfair disadvantage for the accused” because such a reform “would merely create a level playing field, in which misconceptions held by the jury were countered by specialist knowledge”. As a result, the Committee recommended that the NSW Evidence Act be amended by including a provision similar to s79A of the Tasmanian Evidence Act.

After a review of the need for expert opinion evidence in trials with child witnesses, the ALRC,

NSWLRC and VLRC (2005) also concluded that evidence:

on child development and behaviour (including the effects of sexual abuse on the development and behaviour of children) can in certain cases be important evidence in assisting the tribunal of fact to assess other evidence or to prevent inappropriate reasoning processes based on misconceived notions about children and their behaviour.

The ALRC, NSWLRC and VLRC (2005) observed that because courts appear reluctant to admit expert opinion evidence under s79, that provision should be amended to make it clear that expert evidence about child development and behaviour generally, and about the behaviour of sexually abused children is admissible. Given that a bill for amending the Uniform Evidence Act has been passed, will the recommended changes to s79 be sufficient to remove juror misconceptions? Before considering the ALRC, NSWLRC and VLRC’s specific recommendations, some background on the problems associated with the admission of expert opinion evidence under the Uniform Evidence Act is required.

Admissibility of Expert Opinion Evidence Under the Evidence Act

Like the common law, restrictions under the Uniform Evidence Act make it difficult for expert opinion evidence to be admitted in child sexual assault trials, although the Tasmanian Evidence Act has a different approach to the admissibility of such evidence. Under the NSW Evidence Act, the opinion rule, s76, states:

(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

In relation to expert opinion evidence, the relevant exception to the opinion rule is s79:

If a person has specialized knowledge based on the person’s training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

The current basis for the admissibility of expert opinion evidence under the Evidence Act is that the evidence must be relevant to a fact in issue under s55, the witness must have specialized

knowledge based on his/her training, study or experience, and the opinion expressed by the witness must be based wholly or substantially on that knowledge. In theory, therefore, s79 would allow an expert to give their opinion about a child complainant's behaviour or reliability, if the opinion was relevant and met the criteria set out above. In practice, such evidence is rarely admitted.

As an example, it is useful to consider whether or not the prosecution would be able to lead diagnostic expert testimony from an expert who has interviewed the child complainant and formed the conclusion that the child has been sexually abused. At the outset it is difficult to know whether a court would consider the evidence to be relevant to a fact in issue in the trial under s55 or merely relevant to the complainant's credibility, although the test under s55 is a low threshold test (*Papakosmas v R*, 1999). If the evidence was held only to be relevant to credibility, it would be inadmissible under the credibility rule, as discussed below.

Assuming that the diagnostic expert opinion was considered to be relevant to a fact in issue, one of the difficulties with admitting such evidence is satisfying the requirements of "specialized knowledge" under s79, as well as showing that the opinion is wholly or substantially based on that knowledge (*Ocean Marine Insurance Association (Europe) OV v Jetopay Pty Ltd*, 2000). (Where identity is not in issue, a diagnosis of sexual abuse by a qualified expert that a complainant was sexually abused would be relevant to whether the defendant committed the sexual conduct complained of because it affects [increases] the probability of the existence of that fact in issue; s55, Uniform Evidence Act.)

The requirements in *Ocean Marine Insurance Association* have been strictly interpreted by both the New South Wales Court of Criminal Appeal and the High Court and are particularly pertinent in the area of children's behaviour, cognitive development and memory. In *Makita (Australia) Pty Ltd v Sprowles* (2001), Heydon JA set out a number of strict criteria for expert opinion evidence to be admissible. In particular, Heydon JA emphasized that courts will closely examine whether or not the opinion "is based wholly or substantially on the expert's specialized knowledge" or whether the opinion is merely "a combination of speculation, inference, personal and second-hand views...[involving] a process of reasoning which [goes] well beyond the field of

expertise" (*Makita (Australia) Pty Ltd v Sprowles*, 2001, per Heydon JA; quoting Gleeson CJ in *HG v R*, 1999).

The High Court had previously considered s79 in some detail in *HG v R* (1999), a child sexual assault case in which the appellant appealed against the trial judge's refusal to allow opinion evidence to be led from a psychologist. The expert opinion of the psychologist was that the complainant had not been sexually abused by the appellant (who was the de facto husband of the complainant's mother) but by the complainant's father when she was 3 years old. The psychologist was of the opinion that "trauma always results in 'a clear behaviour change'" and because the complainant's mother had stated "there was no deterioration in [the complainant's] behaviour in the period during which the sexual assaults by the appellant allegedly took place, the psychologist concluded that the complainant had not been sexually assaulted at that time" (*HG v R*, 1999) but at an earlier age when the child had displayed various behavioural changes.

Although the High Court ultimately held that the psychologist's evidence was inadmissible under the NSW rape shield provision (Formerly s409B, *Crimes Act* 1900, now enacted under s293, *Criminal Procedure Act* 1986 (NSW)), the case raises a number of issues to do with the purpose for which opinion evidence about the behaviour of sexually abused children is admitted. For example, Gleeson CJ considered that:

[i]f all that [the psychologist] had said was that, based on his study, training and experience, he considered that the behaviour of the complainant during 1992 and 1993, as recounted to him by others, appeared to be inconsistent with her having been sexually abused during that time, ... then that might have been one thing. It would have required identification of the facts he was assuming to be true, so that they could be measured against the evidence; and it would have required or invited demonstration or examination of the scientific basis of the conclusion (*HG v R*, 1999).

But the appellant had not wanted the psychologist to limit his evidence in that way; rather he had wanted to adduce the psychologist's expert opinion that the complainant had been abused in 1987 by her father when, for a short time, she was in his custody. Gleeson CJ was of

the view that that particular opinion did not meet the criteria set out in s79 so that it was inadmissible as opinion evidence:

[t]hat opinion was not shown to have been based, either wholly or substantially, on [his] specialized knowledge as a psychologist. On the contrary, ... it was based on a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of a psychologist. ... He does not appear to have considered or investigated the possibility of abuse by some third party. He appears to have inferred, for no apparent reason, that the words "stop it daddy", attributed to the complainant by her mother, referred to sexual as distinct from some other form of abuse (*HG v R*, 1999).

Similarly, Hayne J considered that the expert opinion evidence that the complainant had been sexually assaulted by her father at the age of 3 years could not have been based on the psychologist's specialized knowledge:

for [the psychologist] to say that a child who has been sexually assaulted will ... exhibit certain behavioural changes is an opinion that might be linked to [his] training ... or his study of published literature in the field, or his experience in examining young victims of sexual abuse (or some combination of these factors). By contrast, ... to say that the complainant in this case had been assaulted by her natural father as opposed to some third party is an opinion that, on its face, appears not to be based at all on any specialized knowledge ... [but rather] only on his reasoning from his earlier ... conclusion that the child was assaulted at a particular time (when she was in the custody of her natural father) to the conclusion that the father was the most likely perpetrator (*HG v R*, 1999).

The facts in *HG v R* (1999) were unusual in the sense that it was the defence case that the complainant had been sexually abused but by someone other than the defendant. Based on the views of Gleeson CJ and Hayne J, it is possible to conclude that educative expert opinion evidence about the behavioural changes exhibited by children who have been sexually abused would be admissible under s79. (Gaudron, with whom Gummow agreed, held that such expert opinion would have been admissible both at common law and under the Evidence Act; *HG v R*, 1999). But it can be

inferred that expert opinion evidence that seeks to do more than that and is diagnostic in nature will be closely examined by the courts and may be held to infringe the terms of s79, particularly where psychology as a discipline has not been able to identify a definitive list of symptoms or behaviours that are diagnostic of sexual abuse.

As discussed above, because of the likely prejudicial effect of diagnostic expert testimony and the possibility that it may be inadmissible under s79 of the Uniform Evidence Act, the admission of expert opinion evidence in child sexual assault trials ought to be confined to that which is educative in nature. The next issue is to consider the legislative models that would allow for the admission of this type of expert testimony.

Legislative Models for the Admission of Expert Opinion Evidence About Children's Behaviour

Since the enactment of the Uniform Evidence Act in Tasmania in 2001, expert opinion evidence about children's behaviour has been admissible under s79A, with educative expert evidence being admissible under both s79A(a) and (b):

Specialized knowledge of child behaviour

A person who has specialized knowledge of child behaviour based on the person's training, study or experience (including specialized knowledge of the impact of sexual abuse on children and their behaviour during and following the abuse) may, where relevant, give evidence in proceedings against a person charged with a sexual offence against a child who, at the time of the alleged offence, had not attained the age of 17 years, in relation to one or more of the following matters: (a) child development and behaviour generally; (b) child development and behaviour if the child has had a sexual offence, or any offence similar in nature to a sexual offence, committed against him or her.

However the Tasmanian Director of Public Prosecutions (DPP) has said that s79A is rarely used because of the lack of experts available in Tasmania who would meet the strict requirement of having 'specialized knowledge of child behaviour' (Tasmanian DPP, personal communication, 14 June 2006). There is also the problem, highlighted by the ALRC, NSWLRC and VLRC (2005) and discussed below that expert opinion evidence would be inadmissible under the credibility rule if

the evidence were admitted for a credibility purpose (ALRC and HREOC, 1997), an issue that the Tasmanian Supreme Court failed to address in *Bellemore v Tasmania* (2006) TASSC III.

In Queensland, under s9C(2) of the *Evidence Act* 1977 (Qld), expert opinion evidence is admissible in relation to the assessment of a particular witness' competency, including a child under 12 years. But expert evidence is not admissible under this provision on general matters associated with children's memory, cognitive abilities or behaviour. It is clear from the wording of s9C(2) that the evidence admitted under this section would be expert evidence based on an expert's interview with the child witness.

9C Expert evidence about witness's ability to give evidence

(2) Expert evidence is admissible in the proceeding about the person's or child's level of intelligence, including the person's or child's powers of perception, memory and expression, or another matter relevant to the person's or child's competence to give evidence, competence to give evidence on oath, or ability to give reliable evidence.

Because this provision is limited to the issue of competency, it does not represent a model for the admission of expert opinion evidence about children's behaviour generally or the behaviour of sexually abused children.

Reference has often been made to s23G of the *Evidence Act* 1908 (NZ) as a model for the admission of expert opinion evidence in child sexual assault trials. This provision was intended to allow for the admission of such evidence by child psychologists or child psychiatrists, including evidence about the behaviour of sexually abused children. Specifically, evidence from registered psychologists and psychiatrists could be led in relation to (a) the intellectual attainment, mental capability and emotional maturity of the complainant; (b) the general development level of children of the same age group as the complainant; and (c) whether any evidence relating to the complainant's behaviour is consistent, or inconsistent with the behaviour of sexually abused children of the same age group as the complainant.

According to Blackwell (2005), s23G was rarely used in New Zealand because such evidence had been considered to usurp the role of the jury by amounting to evidence on the ultimate issue.

(Although the ultimate issue rule has been abolished under the Uniform Evidence Act, until recently it still stood in New Zealand.) Problems also emerged in relation to the stringency with which New Zealand courts interpreted the degree of specialization necessary for the psychiatrist or psychologist — that is, not only that they must have practised in the field of child psychiatry or child psychology but they must have had experience in “the professional treatment of sexually abused children” (s23G1).

The prevailing view about s23G is that it “has not been successful . . . , [with] most counsel being concerned at the prospect of the leading of such evidence resulting in a mistrial or retrial” (Blackwell, 2005). Section 23G has now been repealed in its entirety with no replacement provision for the admission of expert evidence specifically in child sexual assault cases (The *Evidence Act* 2005 (NZ)). Instead, a general provision, s22 of the *Evidence Act* 1908 (NZ), has been enacted to deal with the admissibility of expert opinion evidence, generally speaking, as follows.

1. An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
2. An opinion by an expert is not inadmissible simply because it is about –
 - (a) an ultimate issue to be determined in a proceeding; or
 - (b) a matter of common knowledge.
3. If an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied upon only if that fact is or will be proved or judicially noticed in the proceeding.

The wording of this provision, “if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding”, evokes reminders of the views expressed in common law jurisdictions that such evidence should be admitted only if the opinion would be outside the common experience of the jury. As such, s22 is a model that may not result in a major change in increasing the extent to which

expert opinion evidence would be admissible in child sexual assault trials.

In its review of the Uniform Evidence Act, the ALRC, NSWLRC and VLRC (2005) highlighted the main problem with admitting expert opinion evidence about the development and behaviour of children: that is, if it is tendered for a credibility purpose, the credibility rule and exceptions to the credibility rule are obstacles to its admission because of the following.

1. Evidence cannot be led in chief to bolster the credibility of any party's witness, including a child complainant. Therefore, the prosecution cannot lead expert testimony if the evidence is considered to be relevant only to the complainant's credibility, rather than a fact in issue.
2. Evidence can be led under s108 to re-establish a witness' credibility but that evidence is limited to evidence of a prior consistent statement made by the witness in question.
3. s106 concerns the admission of evidence that challenges, rather than bolsters, the credibility of a witness. Admission of evidence under s106 requires a witness' denial in cross-examination and is, therefore, a provision that would be most likely to be utilized by the defence, not the prosecution. In addition, evidence must fall within one of the five categories under s106 for it to be admissible.

As a result of these inherent limitations in the Uniform Evidence Act, the ALRC, NSWLRC and VLRC (2005) recommended an amendment to s79 by inserting a new sub-section (2). This amendment appears to be limited to the admission of educative expert opinion evidence, depending on how subsection (2)(b) would be interpreted:

1. If a person has specialized knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.
2. To avoid doubt, subsection (1) applies to evidence of a person who has specialized knowledge of child development and child behaviour (including specialized knowledge of the effect of sexual abuse on children and of their behaviour during and following the

abuse), being evidence in relation to either or both of the following: (a) the development and behaviour of children generally; (b) the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

In order to deal with the problem that has not been addressed in the Tasmanian Evidence Act — that expert opinion evidence would be inadmissible because of the credibility rule — the ALRC, NSWLRC and VLRC (2005) also recommended the enactment of a new exception to the credibility rule:

108AA Exception: Evidence of persons with specialized knowledge, etc.

1. If a person has specialized knowledge based on the person's training, study or experience, the credibility rule does not apply to evidence given by the person, being evidence of an opinion of that person that: (a) is wholly or substantially based on that knowledge; and (b) could substantially affect the assessment of the credibility of a witness; and (c) is adduced with the court's leave.
2. To avoid doubt, subsection (1) applies to evidence of a person who has specialized knowledge of child development and child behaviour (including specialized knowledge of the effect of sexual abuse on children and of their behaviour during and following the abuse), being evidence in relation to either or both of the following: (a) the development and behaviour of children generally; (b) the development and behaviour of children who have been the victims of sexual offences, or offences similar to sexual offences.

While the ALRC, NSWLRC and VLRC's recommendations may appear to provide the solution to the admissibility of expert evidence in child sexual assault trials, provisions that allow for the admission of such evidence are a gateway only, rather than a complete answer to the problem of correcting juror misconceptions. First, the gateway represented by ss79(2) and 108AA is a narrow one because the expert opinion evidence has to *substantially* affect the credibility of the complainant in a child sexual assault trial. The word "substantial", which is not defined in the Uniform Evidence Act, also appears under s103.

Case law indicates that “substantial” represents a relatively high bar to surmount, in that “the proof value” of the evidence in relation to witness credibility needs to be strong (*R v Lockyer*, 1996, per Hunt CJ at CL; see also *R v Martin*, 2000; *R v RPS*, unreported). Thus, the word “substantially” in the above recommendation imposes a significant limitation on the admissibility of expert evidence admitted solely for its credibility purpose.

Second, the expert opinion evidence can be adduced only with the leave of the court, which means the court will need to refer to the matters listed in s192 before leave will be given. It can be expected that defence counsel will argue that expert opinion evidence about child development and behaviour should not be admitted because it will unduly lengthen the hearing (s192,2a) and would be unfair to the defendant (s192,2b). This means that the admissibility of such evidence will be dependent on individual trial judges’ decisions under s192. Third, there is also the trend that “[r]ather than using expert witnesses, counsel tend to give evidence from the bar to juries during their closing addresses” about the significance of certain behaviours or lack of behaviours (Blackwell, 2005: 8). This so-called “evidence” is given without any reference to the literature, and the above recommendations would have no effect on closing addresses.

This analysis shows that the type of law reform measures recommended by the ALRC, NSWLRC and VLRC are unlikely to be sufficient to address the issue of jury misconception in each and every child sexual assault trial. The public interest (including the interests of child complainants and their families) in the appropriate conduct of child sexual assault trials, means that it is not enough that law reform measure merely allow for the admission of expert opinion evidence. Such measures will need to produce practical outcomes in the way trials are conducted to ensure that juror misconceptions are not left unchallenged as a matter of luck or chance, depending upon the individual decisions of prosecutors to adduce evidence from expert witnesses or the availability of appropriately qualified expert witnesses in different jurisdictions.

Because it is not possible to survey potential jurors about their beliefs and misconceptions at the time of empanelling, there is a need for educative expert opinion evidence to be given during the course of all child sexual assault trials in

order to ensure that jurors do not undertake an assessment of the evidence of the complainant’s credibility through prejudicial eyes.

At the same time, there is a danger associated with admitting expert opinion evidence about the effects of sexual abuse on child development and behaviour. This danger is illustrated by defence counsel’s attempts in *HG v R* to admit expert opinion evidence that the lack of behavioural changes in the complainant at the time when she alleged she had been sexually abused indicated that she had not been abused. The ALRC, NSWLRC and VLRC (2005) warned of the “danger in admitting this category of evidence” because it might invite the jury to do exactly what the defence in *HG v R* hoped: to reason that, because children exhibit certain behavioural responses as a result of sexual abuse and because the complainant displayed none of these responses, the complainant was not sexually abused. The ALRC, NSWLRC and VLRC (2005) considered that the dangers of expert opinion evidence being misused can be addressed by excluding the evidence, which does not seem to be a particularly satisfactory solution, or by judicial comments or directions.

While the latter would be the preferable approach, the ALRC, NSWLRC and VLRC did not specify what type of judicial comments would be required. Nonetheless, s21(3) of the *Evidence Act 1908* (NZ) provides an example of the type of instructions that judges are required to give when a witness is a child under the age of 6 years:

3. ... if, in a proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect: (a) even very young children can accurately remember and report things that have happened to them in the past, but, because of development differences, children may not report their memories in the same manner or to the same extent as an adult would; (b) this does not mean that a child witness is any more or less reliable than an adult witness; (c) one difference is that very young children typically say very little without some help to focus on the events in

question; (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than older children or adults; (e) thus the reliability of the evidence of very young children depends crucially on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish open questions aimed at obtaining information from leading questions that put words into their mouths.

Alternative Recommendations for Correcting Juror Misconceptions

Because the prosecution may choose not to lead evidence from an expert witness about children's responses to sexual abuse and their reliability as witnesses, or because a trial judge may refuse to give leave for such evidence to be admitted, this paper recommends a series of provisions be enacted in all States and Territories in the form of mandatory judicial directions in child sexual assault trials to correct juror misconceptions and any information given about children's behaviour during the closing addresses of counsel.

The first two recommendations are modelled on s21(3) of the NZ Evidence Act. The first is drafted to apply to the evidence of child complainants between the ages of 5 and 16 years, while the second applies to when the complainant is under 5 years of age, which is the age that accords with the research literature on suggestibility studies discussed above. These two recommendations summarize the findings in the psychological literature about children's memory, their reliability as witnesses, their resistance to suggestions of abuse and the importance of examining the way a child is questioned when deciding how much weight to give their evidence.

Directions Concerning Children's Abilities as Witnesses

1. This section applies to proceedings in respect of a prescribed sexual offence.
2. In a proceeding in which there is a jury and the complainant is under the age of 16 years but over the age of 5 years, the judge must give the jury the following instructions: (a) even very young children can accurately

remember and report things that have happened to them in the past, but, because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would; (b) this does not mean that a child witness is any more or less reliable than an adult witness; (c) sometimes children give incomplete or inconsistent accounts of events that have happened to them but there is no research to show that inconsistencies and incompleteness mean a child is fabricating; (d) research has shown that children over the age of 5 years are highly resistant to abuse suggestions and it is difficult to make children give false reports of abuse; (e) when deciding how much weight to give to a child's evidence, it is important for you to consider the way in which he or she was questioned and to distinguish between open-ended questions aimed at obtaining information, from leading questions that might put words into their mouths.

Directions Concerning Very Young Children's Abilities as Witnesses

1. This section applies to proceedings in respect of a prescribed sexual offence.
2. In a proceeding in which there is a jury and the complainant is under the age of 5 years, the judge must give the jury the following instructions: (a) even very young children can accurately remember and report things that have happened to them in the past, but, because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would; (b) although children under the age of 5 years typically report less detail than older children or adults, the information they recall is just as accurate; (c) this does not mean that a child witness is any more or less reliable than an adult witness; (d) sometimes children give incomplete or inconsistent accounts of events that have happened to them but there is no research to show that inconsistencies and incompleteness mean a child is fabricating; (e) depending on how they are questioned, children under the age of 5 years can be more open to suggestion than older children, although research has

shown they have difficulty remembering the suggestions put to them after a short period of time; (f) the reliability of the evidence of very young children depends on the way they are questioned. It is important, when deciding how much weight to give their evidence, to distinguish between open-ended questions aimed at obtaining information, from leading questions that might put words into their mouths.

The third recommendation summarizes the findings from the psychological literature about children's responses to sexual abuse, in particular the fact that the lack, or presence of certain symptoms or behaviours cannot be used to determine whether a child has been sexually abused.

Directions Concerning Children's Responses to Sexual Abuse

1. This section applies to proceedings in respect of a prescribed sexual offence.
2. In a proceeding in which there is a jury and the complainant is under the age of 16 years, the judge must give the jury the following directions: (a) there is no one set of symptoms or behaviours that all sexually abused children display; depending upon the individual child and their circumstances, some children may exhibit a number of symptoms whereas some children may exhibit none at all; (b) only infrequently does sexual abuse result in physical symptoms and physical evidence that can be detected by a medical examination; (c) very often victims of sexual abuse do not cry out for help, resist or escape from the offender; (d) some children may exhibit particular behaviours as a result of being sexually abused that are counter-intuitive and may not appear to make sense to the adult layperson; (e) the behaviours that have been reported in the scientific literature include: delay in complaint for months or years; disturbed sleep patterns and/or nightmares; bedwetting; disturbed behavioural patterns; learning difficulties, fearfulness and general emotional upset; retraction of the complaint; sexualized behaviour; and ongoing contact and/or affection for the alleged offender; (f) it is important to

remember that, on their own, none of these behaviours is diagnostic of sexual abuse having occurred.

Conclusion

Although Australian common law considers that, generally speaking, the responses of children to sexual abuse are within the ordinary experience of jurors, this article began by identifying the extent and type of misconceptions that have been reported in the psychological literature over the last 10–15 years. In particular, the studies listed in Table 1 show that either a substantial minority or a majority of jurors and laypeople hold beliefs that are incongruent with research findings about children's responses to sexual abuse, memory and suggestibility. The key misconceptions held by jurors and laypeople that have been consistently reported in the research literature for the last 10–15 years include that: (a) children are easily manipulated into giving false reports of sexual abuse; (b) retraction and inconsistencies are evidence of lying; (c) abuse claims often prove to be false; and (d) child sexual abuse can be detected by a medical examination.

The research literature also shows that jury decision-making is influenced by gender, age and education (Table 2), with male jurors being less likely to believe a child complainant, more likely to hold misconceptions about child sexual abuse and less likely to convict a defendant in a child sexual assault trial. As such, it can be expected that acquittals and hung juries will be more likely when juries in child sexual assault trials are dominated by men, particularly older men with low education.

For these reasons it has been suggested that educative expert evidence is required to correct the extent and types of male juror misconceptions. In fact, in the mock jury studies discussed in this article, jurors' decisions were found to be affected by whether they were presented with expert evidence in the mock trials, with such evidence affecting jurors' assessments of both the defendant's and complainant's credibility and their verdicts.

Overall, the studies discussed in this article show that it is important for the law to integrate the decades of research about children, their memories, their suggestibility and their responses to child sexual abuse in order to create a level or

neutral playing ground, in which misconceptions and misinformation held by jurors are countered by specialist knowledge.

This article then considered the appropriate reform options that would achieve this goal, with reform focusing on the Uniform Evidence Act rather than the common law because the common law opinion rule has excluded expert opinion evidence in child sexual assault trials on the grounds that the behaviour of sexually abused children is within the common knowledge of the jury, despite evidence to the contrary.

The consensus from a number of law reports over the last 10 years, including the most recent report by the ALRC, NSWLRC and VLRC (2005), is that legislative reform is required to allow for the admissibility of expert opinion evidence on the behavioural patterns of sexually abused children and children generally. Nonetheless, this article demonstrated that educative as opposed to diagnostic expert opinion evidence would be more likely to survive challenges to its admission under the Uniform Evidence Act and would be less likely to be prejudicial to the defendant. After considering the specific recommendations made by the ALRC, NSWLRC and VLRC (2005), it was concluded that they represent a relatively narrow admissibility gateway for the admission of educative expert opinion evidence and would not necessarily ensure that such evidence would be admissible in each and every child sexual assault trial. For that reason this article has made three recommendations, in the form of mandatory judicial directions, which would require trial judges to provide educative information to jurors. Importantly, the content of these recommendations represents a summary of the research literature on children's memory and suggestibility and the impact of sexual abuse on children's behaviour. Because they are judicial directions rather than evidentiary provisions either permitting or excluding evidence, they would be able to be enacted in both common law and Uniform Evidence Act jurisdictions.

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