1. The Commission for Children and Young People

1.01. The Commission for Children and Young People was established by the Commission for Children and Young People Act 1998. The Act lays down three statutory principles which govern the work of the Commission:

(a) the safety, welfare and wellbeing of children are the paramount considerations

(b) the views of children are to be given serious consideration and taken into account

(c) a co-operative relationship between children and their families and community is important to the safety, welfare and well-being of children: s10.

1.02 Children are defined in the Act as all people under the age of 18 years and the terms ‘child’ and ‘children’ will be used in this submission to refer to children and young people under the age of 18.

1.03 It is one of the principal functions of the Commission to make recommendations to government and non-government agencies on legislation, policies and practices and services affecting children: s11(d).

2. This submission

2.01 The Commission thanks the Legal and Constitutional Legislation Committee for its invitation to the Commission to make a submission on its inquiry into the Measures to Combat Serious and Organised Crime Bill 2001 (the Bill).

2.02 The section of the Bill which is most relevant to children is Schedule 3 which provides special protections for children in criminal proceedings for sexual offences by adding a new Part 1AD to Crimes Act 1914 and this submission is limited to those provisions of the Bill.

2.03 The Commission commends the government for introducing legislation to give special protection for children giving evidence in criminal proceedings. The disadvantages suffered by child victims and child witnesses in giving evidence in the criminal courts are well documented and legislation now exists in most States of Australia to remove or mitigate some of these disadvantages.
2.04 The proposed amendments included in the Bill have been carefully drafted and, in some aspects, give greater protection to children than equivalent State and Territory legislation.

2.05 This submission suggests ways in which the protections could be extended so as to provide even greater benefits to children and more effectively redress the disadvantages they encounter when giving evidence as victims or witnesses in court proceedings.

3. Comments on provisions in Schedule 3 of the Bill

proceedings to which the special protections will apply – criminal proceedings

3.01 The Commission is pleased that the protections provided by Schedule 3 extend to offences in relation to child sex tourism, sexual slavery and assaults of U.N. personnel. But, apart from U.N. personnel, the protections apply only to ‘sexual offences’ (to be designated by Regulation). While some of the provisions (eg 15Y-15YD) are specific to proceedings for sexual offences most are not. It is the view of the Commission that children require equivalent protections in other criminal proceedings in which they are required to give evidence as witnesses. In particular, they require protection in cases of assault and other forms of violence whether they are the victim of violence or a witness to violence.

3.02 The Evidence (Children) Act 1997 (NSW) contains special protections for child witnesses which are quite similar to those in the Bill, but the NSW protections are not restricted to proceedings for sexual offences. Some of the protections apply to all court proceedings (Parts 3 & 5, ss4, 6) while others apply to personal assault offences (including both physical and sexual assaults) and stalking, intimidation and proceedings relating to apprehended violence orders (Part 4, s17).

3.03 Recommendation 1: That the Bill be amended to broaden the range of criminal offences in respect of which child witnesses are given special protection to include all criminal offences or, at least, all offences involving interpersonal violence.

proceedings to which the special protections will apply – civil proceedings

3.04 The Bill does not give special protections to child witnesses in civil proceedings. The Evidence (Children) Act 1997 (NSW) contains special protections for child witnesses who give evidence in civil proceedings and the Queensland Law Reform Commission Report 55 The Receipt of Evidence by Queensland Courts: The Evidence of Children proposes that the protections it recommends apply in civil, as well as criminal, proceedings (see its Recommendation 2.4).

3.05 A child may bring civil proceedings against an abuser or be a witness in such proceedings. Whether the abuse is sexual or physical, the situation may be similar to that in a criminal trial with the child witness being intimidated by unnecessarily aggressive cross-examination, facing cross-examination by an unrepresented abuser or being unnerved by having to give evidence in a court setting.

3.06 Recommendation 2: That the Bill be amended to include amendments to the Evidence Act 1955 (Cwth) to extend the protections included in the Bill to child witnesses in civil proceedings.
age range of children covered by special protections

3.07 The Commission is pleased to note that the protections provided by the Bill apply to all children under the age of 18 years. In this respect the proposed legislation will accord with the principle in Art 3 of the United Nations Convention on the Rights of the Child that requires that the child’s welfare shall be a primary consideration. Equivalent legislation in New South Wales applies only to children below the age of 16.

cross-examination

3.08 The Commission supports giving the Court a specific statutory power to disallow cross-examination which may distress or confuse the child and accordingly may unfairly cast doubt on the creditworthiness of the child witness and discount the value of the evidence. The term ‘appropriate’ lacks precision and the Commission prefers the wording recommended by the Queensland Law Reform Commission Report 55 *The Receipt of Evidence by Queensland Courts: The Evidence of Children:*

‘(1) The court may disallow a question put in cross-examination to a witness under the age of 18 years, or inform the witness that it need not be answered, if the question is:
(a) misleading or confusing
(b) phrased in inappropriate language
(c) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

(2) Without limiting the matters that the court may take into account for the purposes of subsection (1) it is to take into account:
(a) any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding, and
(b) any mental, intellectual or physical disability to which the witness is or appears to be subject.’

3.09 Recommendation 3: That c15YE of the Bill be amended by replacing the present wording with the more comprehensive wording recommended by the Queensland Law Reform Commission.

cross-examination by unrepresented defendants

3.10 The Commission supports the provisions in cc15YF – 15Y of the Bill but suggests that, in deciding whether leave should be given to an unrepresented defendant to cross-examine a child witness (who is not a victim), the Court should take into account the ‘wishes of the child’ as well as ‘the trauma that could be caused to the child witness’. It will be difficult for the Court to make a judgment about the likelihood of trauma to the child without first finding out the child’s views.
A 17 year old witness may feel quite confident in answering questions from a defendant and his/her evidence may have more impact if the questions are asked directly rather than through an intermediary.

3.11 Recommendation 4: That the words ‘the wishes of the child and’ be inserted after the words ‘have regard to’ in c15YG(3) of the Bill.
giving evidence by closed circuit television

3.12 The Commission supports the provisions in Divisions 4 and 5 of Schedule 3, subject only to a reservation about the exception in c15YI(1)(c). If the protection does not apply where the Court lacks the technical facilities there is no incentive to either install the necessary facilities or, where practicable, to transfer the case to the nearest court where the facilities are available.

3.13 Recommendation 5: That the words ‘and that it is impracticable to transfer the hearing to another court where such facilities are available’ be inserted after ‘television’ in c15YI(1)(c). Alternatively a sunset clause might be added to c15YI(1)(c) so that technical equipment will have to be installed in all courts or portable equipment will have to be available before the sunset date.

adults accompanying child witnesses

3.14 The provisions in c15YO are commendable in allowing a chosen adult (and, with leave of the court, a second chosen adult) to accompany the child while giving evidence. The word ‘accompany’ could give rise to problems of interpretation and consideration might be given to the parallel recommendations of the Queensland Law Reform Commission which proposed that the support person be ‘permitted to be within a reasonable physical proximity of the child (Recommendation 5.3(g)).

3.15 Recommendation 5A: That a new subclause (6) be inserted after c15YO(5) to the effect that any person accompanying the child is to be permitted to be within reasonable physical proximity of the child while the child is giving evidence.

warnings about children’s evidence

3.16 The Commission fully supports the intent of c15YQ which prevents judges from giving warnings to juries that children’s evidence is unreliable or that their evidence should be given lesser weight because the child has an accompanying person or gives evidence by closed circuit television, or is cut off from visual contact with the defendant by a screen or other device.

3.17 Consideration might be given to adopting the approach taken in s25 Evidence (Children) Act 1997 (NSW) which further requires the judge to inform the jury that the use of video or a screen and/or the presence of an accompanying adult are standard procedures where children give evidence (see particularly s25(3)(a) & s25(4)(a)).

3.18 Recommendation 6: That consideration be given to amending c15YQ by placing a positive duty on the judge to inform the jury that the protections provided for child witnesses are standard procedures.

Prohibition on publication of identifying information about a child victim or witness

3.19 Clause 15YR(4) sets out the matters which the court must take into account before giving special leave to publish identifying information about a child witness or victim. It is
suggested that the views of the child should be considered as well as any possible trauma and damage to reputation likely to be suffered by the child. Article 12 of the U.N. Convention on the Rights of the Child states that children have the right to express their views freely in matters which affect them and that their views must be taken into account when decisions are made.

3.20 Recommendation 7: That a new subclause ‘(a) the wishes of the child’ be inserted in c15YR(4) of the Bill so that the views of the child are considered by the Court before it gives special leave to publish identifying information about a child witness or victim.

4. Other protections for children that might be included in the Bill

4.01 Other recommendations in the Queensland Law Reform Commission Report 55 are worthy of inclusion in the Bill:

(a) requiring that a separate waiting area be provided for child witnesses: \textit{R2.1}

The benefits of protecting child victims and witnesses from meeting the alleged abuser face to face while giving evidence will be greatly diminished if the child has to wait in the same waiting room as the alleged abuser until called to give evidence. There is a need for special waiting areas for children where they can have access to toys, books, comics, videos and refreshments to help them pass the time until called to give evidence. It would be possible to devise interactive programs assisting children to become familiar with the layout and procedures of the court.

(b) giving the court power to direct that robes and gown not be worn by counsel in court while a child’s evidence is given: \textit{RR2.5, 5.3}.

The wearing of wigs and gowns by the Judge and the lawyers creates a situation which is outside the experience of most younger children and may heighten the discomfort and anxiety of child victims and witnesses.

(c) in cases of persistent sexual abuse the charge need only specify a period during which the abuse occurred and the nature of the offence or offences allegedly committed during this period: \textit{RR19.1 & 2}.

4.02 The need to particularise dates and specific incidents of abuse creates special problems where children are the victims of abuse as they find it hard to relate a particular abusive incident to a specified date. They are more likely to place the abusive incident within a personal or family context rather than be able to relate it to a precise day and month.

4.03 Recommendation 8: That the recommendations 2.1, 25, 5.3(a) and 19.1 & 2 of the Queensland Law Reform Commission Report 55, \textit{The Receipt of Evidence by Queensland Courts: The Evidence of Children} be adopted and changes made to the Bill accordingly.