

Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions

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Abstract

The prosecution of charges of historical child sexual abuse routinely raises a range of complex legal and evidentiary issues in criminal law. There is often legal argument about the admissibility of evidence, lengthy legal directions to the jury and appeals following conviction. This is a constantly evolving area of the law and remains challenging for lawyers and other stakeholders in the criminal justice system. This article examines some issues that commonly arise for prosecutors in handling such cases, including the separation of trials, the use of expert evidence, context evidence, concoction evidence and complaint evidence. Consideration is also given to the impact of the criminal justice setting on victims. The article is presented from the practical perspective of a Crown Prosecutor who works in prosecuting such cases. Through this prosecutorial lens, some proposals for reform are canvassed.

Keywords: child sexual abuse – prosecution – trial – case management – evidence – admissibility – complaint – delay – tendency – concoction – context – cross-examination – directions

Introduction

Like every Crown Prosecutor in New South Wales (NSW), I have been involved in numerous prosecutions alleging historical child sexual abuse. These crimes are among the most serious prosecuted. The abuse of trust of a child by a sexual offender is unassailably heinous. Over the years, there have been a multitude of changes to the criminal law, many seeking to ameliorate the poor fit of our adversarial criminal justice system to deal with the

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complexities of a historical complaint, while at the same time preserving the fundamental rights of an accused.

It is well accepted that child sexual abuse is an underreported crime (Fitzgerald 2006:2). The sheer number of prosecutions that are dealt with indicates that it is not alarmist to refer to this type of offending conduct as an epidemic (Cowdery 2005:246), and a longstanding one at that. Academics and practitioners in Australia, England, Scotland and the United States (US) have devoted much energy and expertise to studies and evaluations of the criminal justice system to underpin reforms that are directed towards facilitating the prosecution of such cases in a fairer way.¹ For example, in the last 25 years there have been a range of reforms in Australia that allow the pre-recording of investigative interviews with children to be presented as their evidence-in-chief and to enable children to give evidence via closed-circuit television (CCTV), so that child witnesses do not have to be in the courtroom or see the accused person (Cashmore 2002). A range of legislative changes have also been made in an attempt to facilitate the admissibility of children's evidence and control the way children are questioned during the trial (Caruso 2012).

Child sexual assault matters continue, however, to be very difficult to prosecute. Nevertheless, a large number of cases are prosecuted every year. In 2012, more than 300 offenders were brought before the NSW Supreme and District Courts charged with sexual offences against children (NSW Bureau of Crime Statistics and Research (BOCSAR) 2013:89). It seems likely that there will be further increases in complaints and prosecutions with the current national Royal Commission into Institutional Responses to Child Sexual Abuse, and the NSW 'Special Commission of Inquiry into matters relating to the Police investigation of certain child sexual abuse allegations in the Catholic Diocese of Maitland-Newcastle', and the consequent heightened media reporting and public awareness surrounding this issue.

By and large, the criminal justice system deals with crimes that are immediately or soon discovered, investigated and ultimately prosecuted. Child sexual assault generally, and historical child sexual assault in particular, are categories of crime that are, arguably, a poor fit for the traditional rules, practices and the very culture of the adversarial criminal justice system. Rules of evidence and the fact-finding processes struggle to recognise and respond appropriately to some of the key dimensions of child sexual offences. These include delay in disclosure and reporting that often characterises this type of crime, the lack of physical or other supporting evidence, and the complex dynamics that often underpin relationships between a child victim and the alleged offender. Moreover, judges and jurors who are called to adjudicate these cases may lack the knowledge and experience to properly evaluate the evidence presented in the case (Shackel 2009a). Misunderstandings about the typical responses of victims of child sexual assault and the sequelae of such abuse may not be well understood by the fact-finders, but there is continuing resistance to the use of expert witnesses in such cases to help inform jurors and the court on such matters (Shackel 2009a).

That is not to say that justice cannot be achieved within the current system. It can be, and routinely is, achieved. But at what cost? Victims typically report a harrowing, lengthy and difficult process (Eastwood and Patton 2002; McWilliams et al 2014). Conviction rates are low (Fitzgerald, 2006; Flatman and Bagaric 1997/1998:5). Between 2006 and 2010 in NSW, an average of 59.5% of the persons charged were found guilty of at least one child sex

¹ See, for example, in Australia: ACT Office of Director of Public Prosecutions and Australian Federal Police 2005; Burrows and Powell 2013, 2014; Cashmore and Trimboli 2005, 2006; Cossins 2009, 2010; Eastwood and Patton 2002; Fitzgerald 2006; Middleton et al 2014; WA Community Development and Justice Standing Committee 2008; Wundersitz 2003.

offence (NSW BOCSAR 2012). By comparison, in 2010, 89% of all defendants appearing in the Local Court, 86% of those appearing in the Children's Court and 84% of those appearing in the higher criminal courts (the District and Supreme Courts) either pleaded guilty or were found guilty of at least one offence (NSW BOCSAR 2012; Fitzgerald 2006). It is noted that most child sexual assault hearings take place in the District Court. In my experience, pleas of guilty are far less common for child sexual assault crimes than for other types of offences. In addition, appeals are common and often successful (Hazlitt, Poletti and Donnelly 2004). This is because child sexual assault trials, particularly historical cases, are complex and difficult prosecutions that are a poor fit for traditional criminal law prosecutions.

The very nature of this type of crime means that the criminal justice system struggles to accommodate prosecutions that provide either a satisfactory environment for victims or adequate assistance to juries to properly evaluate the evidence and complainant credibility, and thereby render a fair verdict. Perhaps this is because lay people believe that it is easy for false allegations to be made by complainants (Cossins 2008; Gabora, Spanos and Joab 1993; Quas, Thompson and Clarke-Stewart 2005).

This article addresses some challenging aspects of historical child sexual abuse prosecutions and makes suggestions for reform. Many of these suggestions have been made before, are presently being considered by government or may simply be too difficult to achieve. Nevertheless, debate about how to improve the system is crucial and increasingly necessary.

The nature of the crime and the police investigation

When police are called to investigate a complaint of historical child sexual abuse, they are faced with an incredibly difficult and complex series of tasks. Despite being highly trained and experienced, the detectives who most often lead these investigations arguably have a harder job than their colleagues who are tasked with investigating more immediate and patent serious crimes, such as murder and robbery. Difficulties arise in the investigation of historical child sexual abuse cases for a number of reasons. There is no statute of limitations for serious historical crimes.² It is a defining characteristic of historical child sexual abuse that they come to light after many years.

Just as significantly, the centre of the investigation is the victim or the complainant.³ In my experience as a prosecutor, the time of complaint differs markedly between victims. The only common factor is that disclosure comes at a time when the complainant feels able or compelled to complain, such as when they have reached maturity or have children of their own that they feel the need to protect. Or a time may have come when it is safe to do so because the offender is no longer within the victim's immediate circle (Johnson 2004:465). Delayed disclosure of child sexual abuse is common. Studies have shown that two-thirds of child victims delay reporting and many do not complain until adulthood (London et al 2005; Somer and Szwarcberg 2001). In fact delay is 'the only response that can be said to be typical of sexually abused children' (Cossins 2008:154). The younger a child is at the start of the offending conduct, the less likely there is to be immediate disclosure (Cossins 2010:81). There is more likely to be immediate disclosure to police if the alleged offender is

² Nor should there be, given the complex reasons for delayed complaint.

³ Until such a time as a conviction is in fact recorded, the 'victim' is referred to as the 'complainant' or the person who has 'reported' or 'complained' about an alleged offence.

a stranger, rather than someone known to the complainant (London et al 2005; Paine and Hansen 2001; Smith et al 2000).

Victims of child sexual abuse who complain after a considerable amount of time are typically fragile and vulnerable. This may be a consequence of the offending conduct and the excruciating secrecy surrounding it. The disclosure itself can bring up many issues. The offender may still be in and around the family. For example, the offender may be the father of the victim, and this relationship may give rise to very ambivalent feelings (Goodman-Brown et al 2003:537). Complaining is hard and it is not uncommon for victims not to pursue the complaint. The investigative process is hard. The prosecution process is harder still.

A victim will, in all likelihood, have been groomed by an offender and coached in how to convincingly conceal the offending conduct (Craven, Brown and Gilchrist 2006; Johnson 2004:466). Children keep secrets extraordinarily well. Too young to understand the true nature of the crimes being committed against them, by the time they are able to articulate their abhorrence to it, victims can feel, or are in fact told by the offender, that it has gone on for too long and they are complicit (Goodman-Brown et al 2003:533–4). Victims may have been told that terrible things will happen if they do tell someone or are threatened with serious harm to themselves or their family if they fail to keep the offending secret (Craven, Brown and Gilchrist 2006:296; Goodman-Brown et al 2003:537). They may have ambivalent and highly confronting feelings about their own physical responses to the abuse (Craven, Brown and Gilchrist 2006:296). They may love and revere the offender. They may feel guilt about having recruited other children at the request of the offender. Offenders may also threaten to self-harm if a complaint is made. In my experience as a prosecutor, children very often feel that they are to blame for what has happened and are ashamed and embarrassed. Harrowingly, a child victim may have hinted or even disclosed offending to someone and not been believed (Ullman 2002:107). Worse still, they may have been believed and yet nothing was done at the time to protect them. Worst of all, they may have been offended against by the very person from whom they should expect protection and nurturing (Craven, Brown and Gilchrist 2006:293; Johnson 2004:466). Offending conduct may psychologically harm a child and may operate to inhibit disclosure (Craven, Brown and Gilchrist 2006:295). All of these circumstances result in what is known legally as ‘delayed complaint’.

The passing of time means that police and ultimately prosecutors are faced with an inevitable loss of evidence: memory, scientific and medical evidence, written records and living or competent witnesses. Generally speaking, with witnesses who can be located, recall is diminished. This is very significant. There is often no overt evidence of this type of offence occurring. There is usually no injury, no eyewitness, and no DNA evidence: no independent support (Johnson 2004:463–4; London et al 2005:194).

There have, however, been recent significant advances in police methodology. The use of telephone intercepts and listening devices, in particular the use of pretext calls, have produced highly probative evidence. The distress occasioned to the victims by their participation in this type of procedure can be enormous. The courage demonstrated by them doing so is remarkable.

While procedures are in place to record children and vulnerable witness statements, adult complainants of child sexual abuse are still taken through the process of recording a written narrative of the relevant events. Once the written material is compiled and the investigation completed, upon charge, the brief of evidence is given to the Office of the Director of Public Prosecutions (‘the DPP’).

The DPP does not investigate. Charges are finalised and contact is made with the victim and the process to trial begins in earnest. Finding the correct historical charge is perhaps one of the greatest challenges for the prosecution.

Delay in complaint

In prosecuting these cases, it is common to hear, during the defence closing address, a variation of the submission ‘if it really happened she would have run screaming from the room immediately’. As a prosecutor, my experience is that many abused children show no obvious outward signs of victimisation. Many also do not necessarily mean to disclose when they do (Shackel 2009b:385). The standard defence submission accords with what Shackel (2009:1) found in her research: that is, that adults, jurors included, often expect a child who has been sexually abused to react in a negative way towards an offender, to exhibit outward signs of distress and to take steps to avoid future contact. This misconception belies the ‘heterogeneity of consequences following sexual abuse’ (Shackel 2009a:S61). Furthermore, research about common beliefs and misconceptions regarding child sexual assault, and children’s memory, reliability, suggestibility and reactions, has revealed considerable uncertainty and variability among jurors, potential jurors and judicial officers about children’s capacities and motivations as complainants (Cashmore and Bussey 1996; Cashmore and Trimboli 2006; Cossins, Goodman-Delahunty and O’Brien 2009).

Cossins (2010:82) argued that ‘delay is a *typical*, rather than an aberrant feature of child sexual abuse’ (emphasis in original). She persuasively puts the case that this raises a real question about the legitimacy of both cross-examination regarding delayed complaint and many of the warnings and directions given during a criminal trial for such an offence. Cossins asks ‘[s]hould the trial process be implicated in silencing the voices of victims through the use of warnings, which are based on the outdated premise that delay is indicative of fabrication?’(2010:83). The answer is a resounding ‘no’. Cossins’ analysis of studies conducted over 20 years is consistent with my experience as a Crown Prosecutor. The fact that a child does not complain contemporaneously is not an indication that the offending did not occur. Immediate complaint is most unusual. Trial directions need to be radically reassessed in light of the findings of research on how children respond to sexual abuse and the various ways they come to disclose it.

An inordinate amount of time is devoted to the issue of delayed complaint in a criminal trial for historical child sexual abuse. Much of it is based on outdated notions about the predictable behaviour of victims in general, rather than children who have been sexually abused. As a matter of justice, the time has come to revisit judicial directions in child sexual abuse cases and the evidence that is permitted to be led in such cases. The focus should be on ensuring that the trier of fact is provided with as much information as possible to be able to evaluate properly the evidence before them. The current disconnect between the findings of empirical research in this field and the views that shape courtroom decision-making needs to be bridged. Research using virtual jurors in a simulated child sexual assault trial has shown that juror knowledge about children’s memory and typical responses to sexual abuse is increased by judicial directions (either before a child’s evidence or during the summing up) that explain counterintuitive behaviours such as delay in complaint and continued contact with and affection for the abuser (Goodman-Delahunty, Cossins and O’Brien 2011).

Specificity requirements

For there to be sufficient evidence for an offender to be charged on indictment, there needs to be a specific offence, a specific touching or sexual act that is remembered with enough particularity. At any one time in the history of the criminal law of NSW, the same offending sexual conduct against a child can constitute completely different criminal offences, depending on precisely when the offence was committed. There have been numerous wholesale reforms of the *Crimes Act 1900* (NSW) ('*Crimes Act*') over the years, which have altered and introduced offences and increased penalties. In particular, significant reforms were introduced by the *Crimes (Sexual Assault) Amendment Act 1981* (NSW), the *Crimes (Child Assault) Amendment Act 1985* (NSW), the *Criminal Legislation (Amendment) Act 1992* (NSW) (NSW) and the *Crimes Amendment (Aggravated Sexual Assault in Company) Act 2001* (NSW).

For a victim who was subjected to only one or few offences, recounting such events with the required specificity may be a less difficult task. In my experience as a prosecutor, victims of relatively isolated offences maintain a vivid, albeit distressing, recollection of the crimes. A victim may not remember what colour shorts she was wearing when, at eight years of age some 20 years ago her uncle put his finger in her vagina, but the victim remembers that event with certainty. Various research about the accuracy of maltreated children's memories confirm that children can remember traumatic and stressful events well (Goodman, Quas and Ogle 2010; Goodman et al 2001).

In contrast is the typical victim of long term offending — for example, the child who, at the hands of a corrupting paedophile, is offended against on a recurring and tragically monotonous basis. It is documented that autobiographical memory becomes more general and less particular over time and this can be particularly so for repeated events (Connolly, Price and Gordon 2009:114; Fivush 2002). If all that the now adult victim can say upon complaint about the experiences of the offending against them is, for example, that an offender anally penetrated them on many occasions, without being able to specify a particular event or timeframe, there cannot be a charge.

In an effort to isolate events, investigators focus on events. Such events may be the first offence in time or the first occasion when the offending escalated to another form of conduct, for example from touching to fellatio or intercourse. Events on or about particular occasions like Christmas, birthdays, holidays or other milestones can be triggers enabling recall of a particular act. Inevitably, experience shows that long-term victims will confuse the order of events and may conflate multiple events in a single recounting.

In 1998, s 66EA of the *Crimes Act* created the offence of persistent sexual abuse of a child. For that charge, it is not necessary to specify or to prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred. It is necessary to 'specify with reasonable particularity the period during which the offence ... occurred' and 'describe the nature of the separate offences alleged to have been committed by the accused during that period'. Limitations of recall are reflected in the less onerous requirements of that section, which does not require the same degree of specificity. It is, however, a complex charge and is rarely prosecuted. It requires the Director of Public Prosecutions' sanction. It is not retrospective and applies only to persistent abuse after 1998. Many alleged offences now being dealt with by the courts pre-date this legislation.

Each criminal offence comprises multiple legal elements that need to be proved. In relation to any sexual intercourse charge, for example, penetration to any degree of the genitalia (or the vagina, prior to May 1992) needs to be proved. Can a child say if penetration in fact occurred? This is a regular issue at trial. The distress of being touched, with the consequent pain and discomfort, sometimes makes this a difficult question for a victim to answer many years later. Does it really matter if a five-year-old girl was penetrated or not during sexual touching? It certainly matters on sentence, where proving penetration can make the difference between a significant custodial penalty or potentially a gaol term at all.

In addition, some charges have changed character in a very significant way. The multitude of changes in legislation defining child sexual abuse offences were enacted for positive reasons, to reflect changing community attitudes to these types of crimes, expanding definitions of sexual offending, increasing penalties and the like. For example, an offence involving fellatio would amount to 'indecent assault' before 1981, rather than 'sexual intercourse', when it became defined as such (*Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 cl 4).

The need for specificity of dates is also important. There is a real difficulty in charging if a complainant describes particular conduct, but cannot say with relative precision when it occurred (see *JDK v The Queen*). It may be the case that the offence occurred around a time when the conduct constituted a completely different offence, with different elements, or had a different maximum penalty. How does the prosecutor charge? Often, in cases with multiple offences, these difficult-to-place offences are simply omitted from the indictment in favour of other events that do not have the same attendant difficulties. Occasionally, separate and alternative charges dealing with the same alleged sexual abuse are placed on the indictment. These are alternative offences that comprise the same offending conduct, but refer to dates when the offending occurred, both before and after legislative change. This can mean, for example, that before a certain date, an act of fellatio is categorised as indecent assault, and afterwards as sexual intercourse. The indictment would have both charges included with different date ranges. The jury is then asked to determine when the offending occurred. Proving dates can then become a focus of the trial, rather than certainty about the offending conduct. Why must this be so?

A regular step in a prosecution for historical child sexual abuse charges is an application by the Crown to amend the indictment. Typically, a historical offence is charged 'between dates'. That means that the complainant is unable to nominate the precise date upon which an offence occurred, so the Crown expresses two dates between which the offence is alleged to have occurred. It is rare that a victim can say 'on my 12th birthday' an offence happened. It is much more likely to be something along the lines of 'when I was in 4th class and Mrs Dyers was my teacher [an offence] happened'. Depending on the charge, the date or date range asserted can be something that must itself be proved beyond reasonable doubt. Such a charge is known as a charge where 'time is of the essence'. Such charges generally contain the age of the victim as an element of the offence. For other charges, the dates are merely a particular and need not be proved beyond reasonable doubt.

During a trial, it is not uncommon for there to be refinement of the dates of offending or even a significant change in the evidence about when the offending occurred. The Crown cannot then simply amend the dates specified in the indictment without the Court's leave or the accused's consent (*Criminal Procedure Act 1986* (NSW) ss 20–21). An application to do so must be made and it is rare that the accused consents. Many applications are refused, leading to a directed verdict of acquittal on that particular count. A typical example might be that a complainant has remembered an offence as happening when they were 14 years old

and living at Starling Street in a house with a pool. Late in the trial, the accused produces records showing that the pool was built at Starling Street when the victim was in fact 15 years old (then a different offence, given the change in the victim's age). Clearly, the complainant was mistaken and the offence actually occurred a year later. The defence is usually 'I didn't do it' and not 'I did it in 1986, not 1985'. Notwithstanding this, if satisfied that an offence fell outside the range of dates specified in the indictment, time is of the essence for that offence, and leave to amend the indictment is refused, then the trial judge will direct a verdict of not guilty. Is this fair and just? An offender typically encourages, if not in reality forces, a child not to complain (Craven, Brown and Gilchrist 2006:295). Time passes and the child, now an adult, cannot remember if the accused had sexual intercourse with them at age 14 or 15. Why should the offender be able to escape punishment even though a jury may have been satisfied beyond reasonable doubt that the offending conduct did occur?

One of the most radical suggestions I raise for consideration in this article is this: abandon the legislative history of child sexual abuse offending. Simply make it a punishable offence to have sexually offended against a child (Forster 2009).⁴

Case management

There is another critical issue that is important, and it is a practical and administrative one. This concerns the typical delays between the commencement of proceedings and reaching the trial date, and in particular, the start of the complainant's substantive evidence. The average time for a trial before a jury to commence from report to police varies, but can extend to two years or longer. For example, in NSW, the proportion of sexual offence cases (against a child victim) in which criminal proceedings commenced within 180 days of reporting dropped from 61% in 2007 to 33% in 2010 (NSW BOCSAR 2012).

NSW District Court Practice Note 6 (2007) stipulates that such trials:

should wherever possible be listed for trial within four months of the date of committal for trial but in no case later than six months from committal. The longer period of six months is only to make allowance for country areas where the court sits on a circuit basis.

The Practice Note goes on to say that:

In cases involving charges of sexual assault, complainants who are required to give evidence are often anxious about the trial process, the need to confront the accused, give evidence and be cross-examined. The level of that anxiety naturally increases as the trial approaches and can be expected to reach its highest level on the day of trial. ... During the course of sexual assault trials, it is desirable to provide some certainty to complainants as to when they will give evidence and where possible the giving of evidence should be arranged accordingly.

As a Crown Prosecutor, I routinely witness the incredible distress and anxiety experienced by complainants in the lead-up to giving evidence at trial. Even if the trial is not adjourned, there is often further excruciating delay while legal argument takes place. Over the years, numerous Commissions and reports have recommended strict time standards and special listing arrangements for child sexual abuse matters. However, experience shows that there is little scope and too few resources for trial judges to deal with preliminary matters

⁴ Forster (2009:835, 844) argues, for example, that the three-tier approach in common law countries in relation to the seriousness of sexual offences is 'unjustifiable' in treating 'one case more seriously than another on the basis of age either in terms of likely impact or culpability'.

prior to a trial commencing. This is so for metropolitan and country centres in NSW. Often, the result of legal argument is further delay, while interlocutory appeals are considered and pursued. This delay in proceeding directly to a complainant's evidence is a real issue that needs to be addressed. The early pre-recording of a complainant's entire evidence would accomplish much. There are longstanding concerns about such a process if the accused is not represented. A fair trial for the accused dictates that they be given the opportunity to test the evidence. Competent counsel cross-examines the witness and exposes deficiencies and inconsistencies in the evidence for the assistance of the jury; this is a necessary component of an adversarial system. Counsel is often not briefed at the early stages of the criminal justice process and there are arguments made that a fair trial can only be achieved when counsel appears. Procedures — such as those in Western Australia, where the accused is represented and the evidence, including cross-examination, is recorded close to the time of the complaint — reportedly achieves a fair trial and speedier justice for the victim. Traditional briefing arrangements whereby counsel are briefed close to a trial date may need to be revisited to allow for the accused to be appropriately represented at an early hearing to record the evidence.

It should also be mandatory that applications for trial judges to rule on interlocutory matters be made and determined before a trial date. There should be a presumption against allowing legal argument to take place at the time allocated for trial.

Cross-examination

Victims can be cross-examined for a long time; three or four days is not uncommon. There is the need to facilitate the proper testing of evidence, but experience shows that while this can be achieved quickly and with focus, it is rarely quick or focussed. Despite judges in NSW having the power to put a stop to harassing, repetitive and other oppressive forms of questioning (*Evidence Act 1995* (NSW) ('*Evidence Act*') s 41),⁵ as a prosecutor my experience is that victims are still unnecessarily subjected to lengthy questioning about peripheral issues, such as the colour of a particular piece of clothing. At present, if matters are deemed 'relevant', a very broad test, cross-examination can seem endless and have little point apart from confusing the witness and undermining their credibility (Cossins 2009; Henderson 2002). Further, Cashmore and Trimboli (2006) found that judges are reluctant to intervene in the absence of objections from counsel.

If legal argument on some of the most complex matters litigated in this country, such as special leave applications in the High Court, are able to be limited to 20 minutes, perhaps there could be reasonable time limits placed on the cross-examination of the complainant?⁶ Trial judges could assess an appropriate amount of time needed given the issues in the case being tried and the capacity of the particular witness. Complainants would then know more precisely how long they would be in the witness room. Concrete time limits would also demand that the defence prioritise questions and focus on the most pertinent issues. For example, there can be very lengthy questioning about events surrounding an occasion of

⁵ Questions that must be disallowed are those that the court is of the opinion are misleading or confusing, unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or has no basis other than a stereotype (for example, a stereotype based on the witness' sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

⁶ The Crown Prosecution Service (UK) 'Guidelines on Prosecuting Cases of Child Sexual Abuse', for example, include ground rules hearings where the defence agrees to the length of time for cross-examination. These are mandatory for intermediary cases (see CPS Guidelines:[89]–[95]).

offending, who was at a party the night before, who was wearing what clothes and what the weather was like. While some of these matters might have very limited relevance in enabling the jury's capacity to assess the complainant's recall and reliability, such lines of cross-examination often focus on areas that in fact add little evidence of any real weight, but are time consuming, frustrating and greatly prolong the complainant's time in court. The ability to return to areas and topics numerous times in the hope of rendering inconsistent versions should also be limited.

Complaint evidence

Evidence of complaint, that is, the report of the offending conduct, can be admissible pursuant to s 66 of the *Evidence Act* as evidence that the accused, in fact, sexually assaulted the complainant. This evidence is an exception to the hearsay rule. It is admissible if it is 'fresh in the memory' of the complainant. Following the enactment of the *Evidence Act*, the High Court held that 'fresh' meant hours and days and not weeks and months (*Graham v The Queen* at 608 [4]). Historical complaints were not then admissible unless relevant to restore a complainant's credibility pursuant to s 108(3). In 2007, there was a significant amendment to the *Evidence Act* and the definition of 'fresh in the memory' was extended, by the insertion of s 66(2A), to allow the court, in determining if something is fresh in the memory, to consider, among other things, the nature of the event concerned, the age of the witness and the period of time between the occurrence of the asserted fact and the making of the representation. In theory, this was a great leap forward. In practice, it has not had a significant effect.

The absence of or delay in making complaint is a matter that the jury may take into account in assessing the credibility of the complainant. As outlined earlier, lengthy delays in disclosure and non-disclosure are common. The assumption often relied upon by the defence is that the absence of complaint or delay in making complaint is 'inconsistent with the conduct of a truthful person who has been sexually assaulted' and, accordingly, the jury should not believe the complainant (Shackel 2009b:381). In such a case, the trial judge is required to direct the jury that this 'is a matter which you may take into account in assessing' the complainant's credibility. Jurors are also directed that:

the delay in making a complaint about the alleged conduct of the accused [*or the absence of such complaint*] does not necessarily indicate that the allegation that the offence was committed is false. There may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about such an assault. (Judicial Commission of NSW 2012:[2-620])

Section 165B(2) of the *Evidence Act* stipulates that

If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.

Factors that may be regarded as establishing 'significant forensic disadvantage' include the fact that 'any potential witnesses have died or are not able to be located', or that 'potential evidence has been lost or is otherwise unavailable' (*Evidence Act* s 165B(7)). Significant forensic disadvantage is not regarded as established by the mere existence of a delay.

This 2007 amendment to the NSW and other Uniform *Evidence Acts* was intended to ameliorate concerns about mandatory directions concerning delay. In theory, and in practice, it can achieve the desired result, and often does. There are, however, still instances where a trial judge will point out to the jury that an accused's position in defending very old allegations is untenable, implying that the trial is deeply unfair and that the jury could never be convinced beyond reasonable doubt. Much depends on the attitude of the presiding judge. In my experience, some still regard trials relating to offences that date back 20 years to be 'problematic'. The vast majority of judges do not hold such views. However, those who do can undo what could be a viable prosecution. Victims who have taken many years to get up the courage to complain, may have their hopes of justice dashed by the exclusion of evidence, separation of trials and directions that are unfairly favourable to an accused.

Context evidence

Evidence of criminal conduct that is not charged is often led by the prosecution to place the crimes charged into their true context. If the conduct is sexual in nature, before leading this evidence the Crown must first seek leave pursuant to one of the most confusing and complex legislative schemes there is. It is legislation that is designed to protect a complainant.

Section 293 of the *Criminal Procedure Act* relates to the admissibility of evidence relating to sexual experience or reputation, or lack thereof, and is what is referred to in the US as a 'rape shield law'. It prohibits questions about other sexual conduct by the complainant unless certain rigorous exemptions are met and leave is granted. It is a strictly applied test and applies equally to the prosecution in relation to any uncharged sexual acts relied upon. This can create an unnecessarily complex task and hinders successful prosecution. The prosecution should not be subject to the same strictures that prevent an accused cross-examining a complainant regarding prior sexual conduct. This is because some uncharged sexual experience, for example grooming by an offender in another state, can be highly relevant to the issues at trial and should be admissible without the prosecution needing to seek leave to lead the evidence.

For context evidence to be admissible, the judge must critically evaluate what issue(s) in the trial justify the reception of context evidence. In a historical child sexual abuse case, the issues could include:

- Why did the complainant not rebuff the accused?
- Why was the complainant compliant?
- Why was there no complaint or surprise on the part of the complainant?

Context evidence may be admissible if the act constituting the charge appears to be 'astonishing, and almost unbelievable, if the jury [is] not made aware of the existing sexual relationship between the adult accused and the child complainant' (*R v Beserick* at 515) or by 'removing implausibility that might otherwise be attributed to the complainant's account of the assaults charged if [the] assaults were thought to be isolated incidents' (*R v Leonard* at 556 [49], emphasis in original).

Historical child sexual abuse cases typically present complex factual scenarios. An overly clinical approach to background evidence where a sanitised version is presented to ensure that the accused is not unfairly prejudiced lends an air of unreality and does a great

disservice to the prosecution. Grooming behaviour — the way the offender creates the opportunity for abuse and manipulates the child and others to ensure compliance and secrecy — should be understood to be an important and necessary part of the true narrative (Craven, Brown and Gilchrist 2006; Cossins 2006). There is often argument about the admissibility and scope of context evidence. Evidence is routinely excluded because it is unfairly prejudicial.

As McHugh J said in *Papakosmas v The Queen* (at 325 [91]): ‘Evidence is not unfairly prejudicial merely because it makes it more likely that the defendant will be convicted’. Unfairly prejudicial evidence is not evidence that advances the Crown case or weakens the defence case, but is evidence that is dangerous to the defence case in some way (*R v Suteski* (2002) at 199 [116]). There must be a risk that the evidence will provide some irrational, emotional or illogical response or a risk of the evidence being given more weight than it truly deserves. Where the only prejudicial effect of the evidence is to prove that it was the accused that committed the offence, it will not be excluded for that reason. An approach allowing the jury to hear all of the evidence is to be preferred if justice is to be achieved.

Separation of trials: Concoction and tendency evidence⁷

Predators who prey sexually on children often do not offend against a single child (John Jay College 2011:9). They are serial offenders with multiple victims. A complaint by one victim can lead police to find other victims of the same offender. Media reports can encourage other victims to come forward. Victims sometimes come forward together. This results in proceedings where there are multiple victims of the one offender (see, eg, John Jay College 2011:9, 75). Many prosecutions for historical child sexual abuse involve cases with multiple complainants. Children have typically been groomed and offended against by a person they trust (Craven, Brown and Gilchrist 2006:293). For example, the accused may be a priest, teacher, scoutmaster, soccer coach, a family friend or a relative.

A jury should hear all of the allegations together. An accused usually resists this. So begins a series of applications to exclude evidence and to separate the counts on the indictment into separate trials. These applications are as predictable as they are common. The law is complex and difficult. Reasonable minds do differ on proper outcomes. There is a vast array of precedent and authorities that hold that various and sometimes diametrically opposed positions are correct. Results vary widely and can be dependent on the particular judicial officer presiding.

Separating trials and excluding evidence can have dire consequences for achieving true justice. Victims are told to come to court and tell the truth. The jury is told to observe a witness very carefully, particularly a victim, whom they are told to ‘scrutinise with great care’. Judges routinely tell a jury that how a witness communicates may be just as important as what is said; their demeanour is crucial. The truth may be that while in the company of three other victims, a particular victim was assaulted by an accused. Those other victims are also proposed complainants in the same trial. The Crown files charges for all three victims on the same indictment. The accused argues that because the victims have discussed what happened to them at the hands of the offender, their evidence is contaminated or ‘concocted’

⁷ In 2012, the Standing Council on Law and Justice (SCLJ) requested consideration of issues regarding the operation of the Uniform *Evidence Act* ss 97, 98 and 101 (tendency and coincidence provisions) and this is presently being undertaken (now by the Law, Crime and Community Safety Council (LCCSC) into which the SCLJ was subsumed in December 2013).

and there should therefore be separate trials. That is, one trial for each victim and the jury would remain unaware of the existence of anything but a single, isolated, complainant. Unpersuaded by the Crown's arguments against severance, the trial judge separates the trials. The victim is then told that during their evidence they may not mention the presence of the other two victims when describing the alleged offences.

The already nervous victim enters the witness box and is asked about a particular offence. Worried about the consequences of inadvertently blurting out something they must not, the victim hesitates and appears vague and unsure (Cashmore and Trimboli 2005).⁸ The full story has been kept from the jury and it is inevitable that the victim will be unfairly and harshly judged because of their demeanour. Similarly, certain events that commonsense might dictate the details of which would never be forgotten, might seem inexplicably lacking in detail if the complainant is limited to particular events in a vacuum because of a ruling separating counts in an indictment.

Tendency evidence

The most common reason for the separation of trials for multiple complainant matters is where the accused is asserted to have a tendency to act in a particular way and this evidence is found to be inadmissible. Tendency evidence is '[e]vidence of the character, reputation or conduct of a person or a tendency that a person has or had ... [which proves] ... that a person has or had a tendency to act in a particular way, or to have a particular state of mind' (*Evidence Act* s 97). The evidence must have significant probative value. It must be evidence that is meaningful in the context of the issues in the trial. The probative value of the evidence must also substantially outweigh any prejudicial effect it may have on the defence of the accused.

One aspect of a judge's assessment of the probative value of the evidence is whether or not there has been the real possibility of concoction; that is, complainants having contact with each other and contaminating or fabricating evidence against the accused. If there has been, the probative value of the evidence is weakened; separate trials are more likely and any tendency evidence likely to be excluded. Presently, this argument requires an examination of the facts of the case and the circumstances of the witnesses, the relationship of witnesses to each other, opportunity and possible motive for concoction.

The onus is on the Crown to exclude the reasonable possibility of concoction on the part of the proposed witnesses. This means that victims are often called to give evidence twice; once during legal argument where they are asked about contact with other victims in the absence of the jury, then again at trial, perhaps quite some time later, when they must give evidence about the offences.

An argument that concoction or contamination has occurred should be a matter argued before and considered by a jury with a presumption for joint trials. This would reduce the number of applications for separate trials that are made and it would create a more realistic picture of what the accused is alleged to have done. A just outcome is more likely in those circumstances.

⁸ A 16-year-old complainant cited by Cashmore and Trimboli (2005:51) commented on the difficulty she had in giving evidence in one of several separated trials after an earlier trial had been aborted because one of the witnesses had mentioned another of the accused in an offending incident that involved several defendants and several complainants:

Did you have a chance to say what you wanted to say about what happened?

No, I had been told that I could not mention any other cases but some questions that they asked, you couldn't answer without mentioning the other people because that's how it worked, that's how it happened. So I was thinking, "Am I going to look like I am lying because I am hesitating?" but I didn't know how to answer.

It is remarkable that convictions are achieved at all considering the vacuum in which juries routinely receive select and sanitised evidence. The victim is severely disadvantaged and confused as to why they are not entitled to say exactly what happened and to put everything in its proper context.

Lack of expert evidence

Another very significant reform was achieved in 2009 when s 79 of the *Evidence Act* was amended to allow expert evidence about ‘the development and behaviour of children who have been victims of sexual offences, or offences similar to sexual offences’ (s 79(2)).⁹ This section allows the prosecution to call evidence explaining what are known as ‘counterintuitive behaviours’. In my experience as a Crown Prosecutor, family photos are routinely produced by defence counsel showing a victim standing next to the alleged offender smiling, or tendering a Father’s Day card that says ‘I love you Daddy, you’re the best Daddy in the world’, or producing video footage showing a smiling happy child, and tendering a school report saying the complainant was clever and well adjusted. These defence strategies are designed to be the foundation of a submission to the jury along the lines that the complainant ‘could not have been offended against as alleged, otherwise they would not be smiling, writing a card, doing well at school’ and the like (Shackel 2009a). But such behaviours on the part of sexually abused children are not in fact counterintuitive (Shackel 2009a). If children who were offended against were easy to identify because of overt behaviour, then detecting and prosecuting these sorts of crimes would be easy. In the prosecution of child sexual assault cases it would be of great assistance to have the complexities of the underlying dynamics of the abuse situation, which often makes a child victim feel precluded from complaining, explained to a jury by an expert.

The underutilisation of s 79(2) is disappointing. It can be challenging to find experts in this field. Even then, it is difficult to have the evidence admitted because the evidence focuses on generalities rather than on the particular complainant/s. Some complainants can themselves powerfully and accurately articulate the complex reasons for certain behaviour and perhaps this diminishes the need for expert evidence. There is also a common concern that if the Crown calls an expert to explain counterintuitive behaviours, then defence will respond with an expert of their own to give contrary evidence and the trial will become a battle of experts rather than focussing on the complainant and whether the Crown has proved the elements of the offences beyond reasonable doubt. Hopefully this worthy reform will be adopted so as to assist juries to understand the true nature of this type of offending and the effect that it can have on the development and well-being of the children offended against.

Trial directions

The NSW Law Reform Commission Report (2012) on jury directions stated that:

There is growing awareness that jury directions are not always working well in guiding jurors in their task. There are concerns that jury directions are becoming too complex and uncertain to meet their intended purposes, and that they rely on outmoded communication methods that may confuse rather than assist the jury. (Executive Summary: xi [0.3])

⁹ See also: *Evidence Act 1995* (Cth) s 79; *Evidence Act 2001* (Tas) s 79; *Evidence Act 2008* (Vic) s 79.

Trial directions are directed towards ensuring that the Crown has discharged its burden of proof and has proven elements of the offences beyond a reasonable doubt. In child sexual assault trials, the credibility of the complainant is central. It is their reliability and accuracy that must be carefully considered by the jury. A trial judge is required to direct the jury with a bewildering array of directions that appear impenetrable (eg *Longman v The Queen* warning, *Crofts v The Queen* warning and *R v Murray* direction). Many of the directions given are to safeguard the rights of the accused.

There are simply too many directions in Australia; they are confusing and, in combination, may amount to an invitation to acquit. While we have moved from the traditional *Longman* direction that invoked the words ‘dangerous to convict’, the effect of the directions can amount to the same result and are a long way from a simple, practical regime. A simpler approach must be adopted with fewer and less confusing directions that are balanced and appropriate. Those directions should better reflect the understanding that many years of research have garnered in relation to the complex issues that arise in child sexual assault cases.

It is legitimate to protect the rights of an accused. However, maybe the pendulum has swung so far towards protecting the accused that the prosecution and victims and ultimately the community are sometimes deprived of a fair trial?

Conclusion

When a victim of historical child sexual abuse comes forward, their bravery and courage are incredible. They have overcome a myriad of overwhelming obstacles in their path. At present, the criminal justice system presents as a process replete with multiple further trauma (Eastwood and Patton 2002). The experience of alleging such a crime should be one that is managed swiftly, with respect and dignity for all concerned.

From a common sense point of view, a specialist court for child sexual assault cases would seem to address many of the challenges that commonly arise in the prosecution of such cases. While a pilot scheme ran in 2003 for child sexual assault matters with limited success (Cashmore and Trimboli 2005), there is still scope for the establishment of a specialised jurisdiction with a consistent and reworked approach.

It is generally impermissible at law to ask the question ‘why would the victim lie?’ This is because it reverses the onus of proof, which lies with the prosecution. Yet, in the absence of any motive on the part of the victim to do so, and after they have been put through the wringer of the criminal justice system, it is a question worth considering in this broader context. In any instance, the answer may be that the victim has told the painful, embarrassing and humiliating truth. Upon entering the criminal justice system, for victims who have had the courage to finally seek the protection they did not receive as a child, the criminal justice system should not present a further ordeal.

Some of the suggestions made in this article may seem radical or challenging. Perhaps some readers will even consider that some of the proposals might be unfair to an accused. Yet, they are the result of reflections from a practical prosecutorial perspective about issues that consistently arise in practice. It is accepted that at no stage in the criminal justice process should unfairness be visited on any individual. In shaping processes that enable fair and effective prosecution of child sexual assault cases, the rights of the accused do not need to be unfairly sacrificed. These rights are not, and should not be, mutually exclusive from the rights of victims and the community at large in achieving a fair trial.

It is necessary to look at wholesale change for prosecutions of historical child sexual abuse. It is time to consider embracing what may appear to be radical ideas and, at the very least, move forward with outstanding reforms. We know we can do better. We must do better.

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