Personal perspectives ...

Child sexual abuse and the legal system

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Adapted from an invited address presented to the First World Scientific Congress on Sexual Health, 19 April 2007

When Australia signed the UN Convention on the Rights of the Child in 1990, federal and state governments agreed, under Article 19, to create appropriate legislation and all necessary social and educational measures to protect children from all forms of abuse and exploitation *and* provide treatment and social support for victims and their carers. Seventeen years later, Australian child advocates are wondering where those services are, especially for those outside state capital cities. More importantly, where is the justice system that protects children and caters for victims of sexual abuse?

Australia, in common with other former British colonies, inherited the Westminster adversarial system, described by Mallon and White (1995, p. 50, cited in McGrath 2005) as:

> ... a competitive argument between two sides, each presenting the best case for its own side. It isn't designed to objectively discover the absolute truth of the matter being tried. The parties are engaged in a struggle ... not a mutual search for truth. The competitive nature of the process is, in part, an explanation for its reputation as an awesome place for the inexperienced witness under cross-examination.

Judges were described by Britain's Lord Justice Clerk-Thomson as behaving:

> ... like referees at boxing contests: they see that the rules are kept and count the points (Thomson v Glasgow Corporation, 1961 SLT 237)

The role of the court is limited to (a) whether an offence has been committed by the accused, and (b) the provision of a suitable punishment. Both parties are viewed as equal which is preposterous given that children can never be equal to adults, least of all, barristers ... with or without their wigs.

The Council for Legal Education (1991) states that the aims of cross examination are to advance your own case and to undermine your opponent's (*Council for Legal Education* 1991, p. 237, cited in McGrath 2005).

Defence lawyers are not under oath. They can reverse the roles of the parties involved, repeat the lies their clients told them, and accuse children of seducing the adult sex offenders, regardless of the lack of evidence. For example, a judge described two paedophiles as naïve victims while the real victim was labelled as the bad seducer simply because he was truanting from school at the time of the offences. The jury didn't know that the men had previous convictions when they found them 'not guilty'.

Offenders can be presented as respected professionals who would never risk their careers for sex with young children when their lawyers know that they face other charges. Furthermore, judges decide what evidence is admissible and can reject vital information. In her PhD research described in the book, *Court Licensed Abuse*, Ballarat University post doctoral fellow Caroline Taylor (2004) tells of a judge refusing to admit DNA evidence because he didn't like this scientific stuff. The defence then seized the opportunity to claim that the mother concocted the sex abuse allegations to spite her former partner and the jury, not aware of any DNA evidence, found him 'not guilty'.

How do you think that would affect the child victim?

Lawyers often ask complicated, repetitive questions using double negatives and legal jargon either deliberately or as a stratagem to trick or confuse children and present them as unreliable witnesses. About three years ago, several state governments proclaimed that they were making courts more child-friendly by banning bullying, yelling and asking questions that are developmentally inappropriate. Child advocates were unimpressed; after all, judges have always been able to stop inappropriate questioning and, as Taylor (2004) showed, in Victoria, some contributed to it. And how can they be expected to know what is developmentally appropriate for a young or disabled child when their expertise is restricted to law? Furthermore, the rules of evidence leave a great deal of discretion to the individual judge. It is an even greater concern when you remember that, in recent times, four South Australian magistrates have been accused, charged or convicted of sex offences against children, and former Magistrate Peter Liddy is serving a 25 year prison sentence for sexually abusing boys.

Child support agencies are in no doubt that the adversarial justice system protects paedophiles and causes further psychological harm to child victims. For many years, the South Australian Attorney-General's Office has revealed that only 1-1.8% of reported child sex offenders have been convicted and punished. Other states provide similar statistics. It is anticipated that the proportion will increase in

2007 because of the number of guilty pleas in historical cases that are now being heard consequent to the removal of statutes of limitations. Victims who are now adults are more formidable witnesses than children.

Other Commonwealth countries using the Westminster system report identical concerns. Child sex abuse cases have been identified as one of the biggest problems contributing to the secondary trauma of victims in South Africa, especially through the process of cross-examination and re-examination. South African reformists have recommended the adoption of the French inquisitorial approach but their politicians, influenced by the legal fraternity, have rejected change (ISPCAN South Africa, personal communication, 22 March 2007).

As long ago as 1986, the Child Sex Abuse Task Forces established by the Minister of Health (SA) and his counterpart in New South Wales drew attention to the inadequacy of the adversarial justice system for cases involving young witnesses. Nearly a decade later (1994) the National Association for Prevention of Child Abuse and Neglect (NAPCAN) sponsored a conference entitled, 'Is there justice for children?'. During this conference, 150 professionals from different disciplines and agencies met to examine each aspect of the judicial process and identified areas where major changes were needed to facilitate improved justice for children. As a result, a working party consisting of professionals from health, welfare, law, police prosecutions and therapy was established to explore alternative systems, especially in relation to victims under the age of seven.

After meeting for several months, in August 1995 the Committee submitted a report to the Attorney-General (South Australia) with the recommendations that

- the government should initiate an enquiry
- an inquisitorial system should be adopted for child sex abuse cases
- all professionals employed in that court should have training in child development and child abuse
- all of the evidence should be investigated
- children's well being and the treatment of offenders should be a priority (Sloan 2005).

It was suggested that staff should be rotated because of the distress that these cases can cause.

The report was ignored by the Attorney-General of the day. When challenged by the author, his officers responded: 'We are not the problem; it's the Liberals in State Parliament who don't want change'.

Liberal politicians replied that, 'He's surrounded by lawyers who don't think like normal parents. They like the system as it is because it's easy to get their clients off'.

Getting the best result for their clients is not their only duty, however. They also have a duty to the court and to the underlying purpose of a justice system, to do justice. A criminal process that silences an especially vulnerable witness and results in the facts not being fully placed before a judge and jury for a proper decision is not 'just'.

Even if offenders are convicted, there is a strong chance that they will win an appeal on a technicality that has nothing to do with their crimes. In 2001, NSW Director of Public Prosecutions Nicholas Cowdrey said that when convictions were overturned on appeal, it was usually because the judge failed to give adequate directions to the jury in its role of evaluating the facts in the legal framework. In R v RAT (2000), a man was acquitted of offences against his step-daughter because the judge didn't warn the jury that if they didn't find him guilty on one count, they couldn't convict on other counts without independent evidence.

In 2002, it was reported that High Court Justice Michael Kirby warned that it was becoming harder to convict because of a ruling that juries must be warned that a child's evidence is less credible if offences were not reported soon after offences were committed. In R v G, a married couple was convicted of seven counts of sexual assault on two sisters aged 12 and 14. Police were informed six years later. Because the judge didn't warn the jury about the need for corroboration or an explanation, the convictions were quashed. No new trials were ordered.

The law or the judges that interpret and apply it (or both) are clearly out of touch given research findings that children seldom realise that sexual abuse is wrong and reportable and male victims are only likely to make reports when they are adults, realise that they were not to blame and are confident in their sexuality and relationships.

In South Australia, magistrates and judges have recently complained publicly that the process from reporting to the day of the trial now takes up to four years. It has long been known that the longer the delay, the greater the advantage to the offender and the greater the disadvantage to the child who will be asked about minute details that have little relevance to the crime. Taylor (2004), for example, reported that, years later, a child was asked repeatedly how many buttons were on her pyjamas and whether, when she went to the toilet prior to being raped, she used the short flush or the long flush. In another case, the child was asked repetitively how many inches of penis were inserted inside her despite the fact that the offender was on top of her and she could not see and Australian children use metric measurement, not inches.

Delays are especially damaging to Aboriginal victims. Elders say that, lacking police protection, offenders and their mates bash victims and their parents and destroy their homes until charges are withdrawn. I asked police in two states why

these cases can't be fast tracked and the response was simply that there aren't enough judicial resources.

France and Holland use a different, inquisitorial model.

> The court takes the initiative in gathering information, builds up a file ... by questioning all those it thinks may have useful information to offer and then applies its reasoning powers to the material it has collected in order to determine where truth lies (Spencer & Flin 1993, p. 75, cited in McGrath 2005).

In Holland, children's evidence is based on video interviews with police specialists. Children don't attend the court. Three judges hear cases without juries and take an active role in seeking information. It is also possible to appoint specially trained judges, on a 'part-time' basis, as appeal judges in the Dutch High Court (van Montfoort, cited in McGrath 1998). These have to be highly qualified professionals with expertise in child development or social work as well as law. The appointments recognise that the key knowledge required in adjudicating is not legal knowledge but a professional knowledge of children (McGrath 2005) and the dynamics of their abuse by powerful people. Interestingly, this was the system in London's juvenile courts half a century ago. The three magistrates were experts in child development and were assisted by a legal officer.

Because few offenders are convicted, when a parent finds that a child has been sexually abused by the other parent, the protective parent is caught in a dilemma. If that parent does nothing, the state can remove the child as being in need of care and protection. All that the protective parent can do to protect the child is turn to the Family Court of Australia to seek an order either to stop contact or to have supervised contact with the abusive parent. Unfortunately, the Family Court has a poor history of protecting children. It was created for divorce, not for making decisions on child abuse cases that now constitute a large portion of its workload.

For several years, incestuous parents – mostly fathers but, more recently, drug-addict mothers with their boyfriends – have gained custody of their victims by accusing protective parents of suffering from a fictitious mental illness referred to as Parental Alienation Syndrome. The theory is that the protective parents brainwashed their children into believing that they'd been abused when they hadn't; the protector is accused of emotionally damaging the child who is then handed over to the abuser. The protective parent is then restricted to occasional, supervised contact. These children may be denied counselling and the protective parent can be banned from reporting signs of further abuse ... thus denying children their basic right to be protected from exploitation. In essence the children are psychologically orphaned because they are deprived of the one person who believed them.

Some judges seem to regard children on a par with items of property to be shared equally regardless of the quality of the relationship. I am aware of mothers being jailed because they refused to hand over children to fathers with convictions for rape and child sex offences ... men who feature on paedophile registers and who would be banned from employment with other people's children.

In the 2002 report, *Family Law and Child Protection*, the Australian Family Law Council made 17 recommendations for changes to the practices of the Family Court to better protect children's rights (Family Law Council 2002). It seems that none of the recommendations has been implemented.

In 2003, I was invited by Liberal Senators to draft terms of reference for a Royal Commission into Child Sexual Abuse. Given the size of the problem, the time that it would take and the cost, I restricted this to an inquiry into the institutions and systems involved, using the UN Convention on the Rights of the Child as a basis. Having consulted with only one service provider, the Prime Minister rejected my proposal, saying that professionals in the field didn't want an inquiry ... they would prefer that the money was spent on victims. A laudable objective – but victims are still waiting for treatment services.

At an Australian Institute of Criminology conference entitled *Child Sex Abuse and the Justice System* (Adelaide, May 2003), members of the Western Australian judiciary claimed to be ahead of other states in creating a child friendly environment for sex abuse victims. Children are interviewed on video by the evidentiary unit and there are draft protocols in place which allow these to be used in all courts. The video interview is used as the child's 'evidence in chief'. One thousand interviews took place in 2006, 707 of which were in Perth. Cross examination – that is, the defence questioning and the child's responses – is also pre-recorded, and the video is presented in court if there is a guilty plea. If the accused pleads not guilty, Western Australian children are seemingly as disadvantaged as their counterparts elsewhere as they have to give evidence in court, albeit from a separate room by video link. Furthermore, in 2007, some children had been waiting two years for their ordeal to end.

WA Police received about 3000 complaints of child sex abuse in 2006 and the DPP prosecuted about four hundred. The office of the DPP estimated that about 5% of reported cases result in a conviction. Furthermore, Australia-wide, those convicted often appeal successfully on the basis of a technicality that has little if anything to do with their offences.

Queensland child victims fare much better. They are rarely, if ever, called to give evidence in the Magistrates Court, and the affected child usually only has to speak to police on two occasions. As in WA, the first interview is video recorded in a child-friendly room by specially trained police officers and

the video (referred to as the s93A tape) constitutes the witness's 'evidence in chief' which is later shown to the jury. Once the District Court has control of these cases, the child is usually cross-examined within six weeks. At the presentation of indictment, the matter is generally given five listing dates to ensure there are no delays on the date set down for the pre-recording of the cross examination (known as the Division 4A evidence). The Chief Judge is concerned that children do not have to wait for hours until parties are ready to proceed. The cross-examination takes place in the same room, again using video-tape which is later presented to the Court. The cross examination takes from 2 to 3 hours, during which time the child is supported by staff of Protect All Children Today (PACT). The child is not called to give evidence at the trial. If there is a re-trial, the two video tapes are replayed for the new jury.

Since the introduction of video taped children's evidence, Queensland authorities have found an increased tendency for child sex offenders to plead guilty between the presentation of the indictment and the date set for the pre-recording. There is then no need for children to give evidence. Their video evidence is often sufficiently powerful to persuade offenders to plead guilty and 'get it over with'. In the year ending 30 June 2006, 584 convictions were entered in Queensland's Supreme and District Courts, an increase of 169 on the previous year. In the year ending 30 June 2005, in almost 80% of trials that proceeded to verdict, the accused was found guilty. Some of these cases were historical where the witness is now an adult. In the months from 1 July 2006 to 8 March 2007, there were 334 orders for children to pre-record evidence compared with 434 during the preceding year.

Police confirm, however, that there are many more reported cases that are not dealt with simply because children lack the maturity and communication skills necessary for cross-examination in an adversarial situation. Thus, child sex offenders are relatively safe when they choose young or disabled children for sex. Internet child porn involves the rape and abuse of babies and toddlers, providing reinforcement for those who view young children as sex objects.

Why should the abuse of children be given much greater priority?

Melbourne University psychiatrist, W.F. Glaser (1997) has described the sexual abuse of children in Australia as reaching plague proportions. He says it accounts for more misery and suffering than any health plague, past or present. Its effects are more widespread and more devastating than other issues which are brought to community attention and which receive substantial government resources – road accidents, AIDS, heart disease, breast cancer and, more recently, violence to women. Child victims have no government funded council to lobby on their behalf. Support services are often fragmented charities, run by abuse survivors who are supported by the sale of lamingtons. I'm the patron of two of them.

Glaser (1997), who works with sex offenders, suggested that if there were a disease affecting the minds and bodies of a third of female children, governments would be rushing to do something about it.

More than half of sex abuse victims suffer PTSD, physical and mental illness, nightmares, drug and alcohol abuse, anxiety disorders and suicidal behaviour (Glaser 1997). Then there's school failure, running away from home to become 'street kids', increased risk of teenage pregnancy, AIDS, prostitution, substance abuse to dull memories, and chronic unemployment. As adults, victims distrust people and are often unable to maintain satisfying relationships. In addition, there's a tendency for female incest victims to marry men like their abusers and the next generation of children is abused. There is also evidence that sex abuse is linked with criminal offending, including sex offending. If we could stop child abuse now, state governments could be selling a jail for building blocks in 30 years' time.

No country can afford to ignore this horrendous problem, either socially or economically. The monetary cost of child abuse to Australian taxpayers in 2003 was calculated as $3.5 billion, $900 million of which was for medical services alone. The long-term social costs, such as drug crimes committed by victims and their chronic ill health, came to a massive $1.3 billion (Kids First Foundation 2003). The costs increase annually.

What do we have to do to convince state governments that it's time to 'get it right'?

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