THE NATIONAL CHILD SEXUAL ASSAULT REFORM COMMITTEE

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From its inception at the end of 1999, one of the purposes of the National Child Sexual Assault Reform Committee has been to think about alternative ways of prosecuting child sex offences. At its first meeting in Brisbane in November 2000, the committee agreed that there should be a national approach to the issue of child sexual abuse and that the first task of the committee would be to collate best practice standards (or minimum standards) in relation to the investigation and prosecution of child sex offences. Part of this work has involved the identification of the barriers embodied within the adversarial system which arguably affect the prosecution of child sex offences and, which, on balance, weigh against the public interest in protecting children from sexual abuse and bringing offenders to justice. Many of these barriers are based on flawed assumptions about children’s propensity to lie, to fantasise or to concoct tales of sexual abuse with each other.

These barriers include:

- the hearsay rule and its effect on evidence of complaint
- lack of corroboration (such as, ear and eyewitnesses and forensic evidence) and the effect of the corroboration warning on juries
- delay in complaint and the effect of the delay in complaint warning on juries
- cross examination and the reluctance of judicial officers to prevent intimidating, humiliating, confusing and harassing questions by defence counsel
- rules preventing the admissibility of evidence that shows the accused’s propensity to engage in sexual misconduct with children
- separation of trials when there is more than one complainant
- jury trials – the jury is an unknown quantity in terms of their knowledge of, and attitudes towards, child sexual abuse
- accused’s right to silence and consequent freedom from cross-examination
- accused’s right to make untested allegations against the complainant about lying, motives for lying and previous sexual experience

The question is whether it is possible to devise a system that addresses all or most of the above obstacles, and how to reply to the charge that further tinkering with the adversarial trial will erode the accused’s right to a fair trial.

The policy reasons for arguing for reform of the child sexual assault trial are based on the large body of evidence that shows that both heterosexual and homosexual child sex offenders have a high recidivism rate, they commonly abuse more than one child during their criminal careers and their abusive behaviour escalates over time with any one particular victim. They are also highly opportunistic and place themselves in situations where they have access to children, either within their own families and communities, or by actively seeking paid or unpaid work with groups of children and then targeting particular children within those groups (Salter, 1995; Elliott, Browne and Kilcoyne, 1995; Colton and Vanstone, 1996). However, the way child sexual assault trials are conducted in Australia indicates that the common law has made a value judgement that defendants need to be protected against unreliable children, rather than that children need to be protected against child sexual abuse. In fact, conviction rates at trial in NSW and SA show that there is less than a one third chance of an offender being convicted at trial.

What then are the options? After researching various overseas specialist courts, I’ve come to the conclusion that a specialist child sex offences court needs to be established, given the fact that some of the barriers identified have been shown to affect the likelihood of an accused being convicted. In fact, I think it is necessary to recognise that the relationship of power that is established by an
offender over a sexually abused child is reproduced within the adversarial trial in the name of ensuring a fair trial for the accused. This power relationship is established through the operation of various rules of evidence and judicial warnings that focus on the dangers of children’s evidence, and through the styles of cross-examination that are permitted in child sexual assault trials. I think that the problem of child sexual abuse cannot be adequately addressed by a criminal justice system that is premised on inaccurate and old-fashioned beliefs about children’s behaviour which manifest in strict rules about delay in complaint, corroboration and concoction. These beliefs and rules are adhered to despite the fact that no empirical evidence exists to verify the assumptions behind them: that delay means concoction, that lack of corroboration means concoction and that if two or more children know each other then the possibility of concoction must be ruled out for one child’s evidence to be admissible in the case of other.

My survey of how specialist courts operate in other jurisdictions indicates that, in establishing a child sexual offences court, it is important to think about the aims and objectives that are sought to be achieved. For example, I think that these objectives should be five-fold:

(i) To minimise the risk of child sexual abuse in the community;
(ii) To minimise the secondary victimisation of child complainants;
(iii) To increase the reporting, prosecution and conviction rates of child sex offences;
(iv) To develop a co-ordinated, integrated approach to the processing and management of child sexual assault cases by all agencies involved in the criminal justice process;
(v) To rehabilitate those convicted of child sex offences and thereby reduce the risk of recidivism by offenders.

I’ve chosen these aims and objectives because they encapsulate the public interest issues involved in the prosecution of child sexual assault. In particular, I consider that minimising the risk of child sexual abuse in the community and reducing secondary victimisation should be the primary objectives of a specialist court, with each of the remaining (secondary) objectives serving to promote the achievement of these primary objectives. This means that some of the proposed features of a specialist court may, or have been shown to, have little impact on increasing, for example, conviction rates, but may, nonetheless, decrease the experiences of secondary victimisation of child complainants. A number of studies have used this latter criterion as a method of assessing the impact of the criminal justice system and/or the effectiveness of specific law reform measures (see the Law Reform Commission of Victoria, 1991; Cashmore and Bussey, 1995; NSW Department for Women, 1996; Heenan and McKelvie, 1997; ALRC and HREOC, 1997; Eastwood and Patton, 2002). In doing so, these studies have recognised the phenomenon of re-traumatisation of child sexual abuse victims, as well as the possible impact of re-traumatisation on a child complainant’s ability to give evidence.

When thinking about the features of a specialist court it is necessary to consider the extent to which each feature would be capable of (i) minimising the risk of child sexual abuse in the community and (ii) reducing complainants’ experiences of secondary victimisation. Ideally, there should be some evidence-based research to show that each of the features of a specialist court is likely to meet at least one of the aims sought to be achieved by its establishment.

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1 These primary aims are consistent with the Convention on the Rights of the Child to which Australia is a signatory. Shue (1980) has identified the state duties that arise from a state’s international obligations as being: “a duty to avoid violating the right in question, a duty to protect from violation of the right, and a duty to aid those whose rights have been violated”. As Moutt (2002: 15) observes, although a state is not responsible for the “acts or omissions of private individuals not acting on the state’s behalf, international obligations impose upon a state the obligation “to establish and maintain the necessary legal and other institutions and remedies through which the rights can be guaranteed”. 

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For example, whether or not a specialist court would be successful in reducing the incidence of child sexual abuse in the community is still very much an unresolved question. If the court were to do so, it would be necessary to recognise that the prosecutorial, sentencing and Rehabilitative processes of the court would need to be linked, since there is sufficient evidence to show that conviction and sentencing, on their own, without the involvement of a specifically designed sex offender treatment program, have little effect on reducing recidivism rates of offenders after release (Salter, 1995; Bagley and Thurston, 1996).

My recommendations would be:

1. That a child sexual offences court be established in each Australian jurisdiction on the grounds that overseas specialist courts (dealing with sex offences and family violence matters) have been found to reduce disposition times and stay rates, to increase the numbers of cases going to trial and proceeding to sentencing, to increase conviction rates and guilty plea rates and to reduce complainants’ experiences of secondary trauma.

2. That a child sexual offences court have exclusive jurisdiction to hear child sexual abuse cases. This means that once a case is assigned to the child sexual offences court, a defendant cannot elect to be tried by another court.

3. That a data collection method be established to allow for an evaluation of the court’s effectiveness and a specific agency be assigned responsibility for managing, monitoring and evaluating the court.

4. Recommended features of a specialist child sexual offences court:
   - Staffed by specialist judges and prosecutors (Ursel, 1997; Sadan, Dikweni and Cassiem, 2001; Weber, 2000) who are trained in child development issues.
   - Judge only trials (Ursel, 1997; Sadan, Dikweni and Cassiem, 2001), thus removing the need for rules which limit the admissibility of tendency/propensity evidence and limiting the discriminatory impact of specific warnings.
   - Use of court-appointed and trained intermediaries to conduct cross-examination (in age appropriate language) on behalf of the defence in order to eliminate contact between defence counsel and the complainant and, hence, opportunities for intimidation and harassment. Based on the model under s 29 of the Youth Justice and Criminal Evidence Act 1999 (UK).
   - Adversarial trials.
   - Specific criteria be established for assignment of child sexual abuse cases to the court (Sadan, Dikweni and Cassiem, 2001).
   - Legal representation for child complainants during the trial, or in limited circumstances to increase the complainant’s participation in the process and access to information (Law Reform Commission of Victoria, 2001: 167-171; ALRC and HREOC, 1997).
   - Abolition of committal hearings (ALRC and HREOC, 1997; s 69, Justices Act 1906 (WA)). Recently the Criminal Law (Procedure) Amendment Bill 2002 (WA) was introduced into the Western Australian Parliament which, if passed, will have the effect of abolishing committal hearings in child sexual abuse cases (to be replaced with a committal mention at which the prosecution will be required to disclose its case to the defence and a plea is entered).
   - Victimless prosecution in cases where the child is too young or otherwise incapable of giving evidence (based on victimless prosecutions of spousal abuse in San Diego: Bigornia, 2000)
Remote room which is located outside the court precinct and equipped with state of the art CCTV facilities, a waiting room and play area.

Mandatory use of CCTV for complainant’s evidence in chief and cross-examination in accordance with s 106N, Evidence Act 1906 (WA) unless the complainant chooses to give evidence in court.

Legislation which permits the pre-recording of a child’s evidence (s 106I, Evidence Act 1906 (WA)) and cross-examination.

An on-going training program for prosecutors be established including support services to enable opportunities for debriefing to prevent burn-out and high staff turnover (Sadan, Dikweni and Cassiem, 2001).

Child witness service to prepare the child and provide pre- and post-counselling (Sadan, Dikweni and Cassiem, 2001; Bellett, 1998; 2000; Dible and Teske, 1993). To be staffed by personnel trained in child sexual abuse matters. Appropriate policy guidelines for pre-consultations with complainants, in particular the content of material that should be communicated to the child for the purposes of court preparation.

Alternative models for punishment of offenders (NSW DPP, 2002) such as diversion of offender (from the criminal justice system) into treatment versus conviction plus mandatory attendance at treatment program.

Attachment of a trial mediation program to the specialist court for historical abuse cases with strict protocols for screening of appropriate cases and an in-built evaluation program in order to assess its effectiveness. The program would be available in those cases where the complainant in an historical abuse case makes a voluntary choice to participate. Voluntary participation by the accused would also be required and may need to be offered as an alternative to sentencing, possibly in combination with a diversionary treatment program.

In NSW, a pilot project is presently being conducted for the prosecution of child sex offences. This initiative was set up after the recommendations of a NSW parliamentary inquiry in 2002 into how child sexual assault prosecutions were being conducted in NSW. The trial is being run as a specialist jurisdiction within the existing District Court and Local Court structures, rather than as a separate court. At the moment, the specialist jurisdiction consists of a specially equipped District Court courtroom and a Local Court courtroom both of which have dual plasma screens to allow for split screen capabilities and document cameras for the transmission of exhibits between the courtrooms and the remote room. There is a dedicated remote room (or remote witness suite) in a different building, from which the child complainant gives evidence via CCTV, although there is provision in NSW for the video of the child’s interview with JIRTs (the investigative team) to be shown as part or all of the child’s evidence in chief with the agreement of the defence. The remote suite was designed to address the needs of child witnesses as identified in the Parliamentary inquiry’s report – it is a secure area with two soundproof rooms which contain CCTV equipment and also includes a reception area and waiting room, a private interview room and a child’s playroom with toys and videos. The child is entitled to have a support person present with them in the remote room as long as that support person is not a witness in the trial. So far, two trials have been conducted.

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The trial is to be evaluated within 2 years of the date of its commencement and will assess various outcomes, such as:

1. whether or not the child sexual assault jurisdiction has decreased court appearance time for witnesses and increased disposition rates of cases;
2. whether or not the environment in which evidence is given is less intimidating for the child witness;
3. whether or not the quality of information and emotional support to witnesses has improved; and
4. whether or not conviction rates have increased.

The evaluation will also assess whether training of staff has been sufficient and appropriate, whether the various agencies involved work effectively and efficiently together and whether the courts have the appropriate facilities and technology.

Although the trial doesn’t involve any legislative changes and is not as comprehensive as a specialist court would be, the trial is a significant strategic step in the direction of creating specialisation in the area of child sexual assault, particularly in relation to protecting the child complainant as a vulnerable witness. It is my hope that we will eventually see the establishment of a specialist court in NSW based on the outcomes of this initial trial.

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