CHILD WITNESSES IN THE CRIMINAL JUSTICE SYSTEM - THE ISSUE OF VULNERABILITY

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There is little doubt that child victims of sexual abuse are vulnerable to further harm through exposure to the criminal justice system. Recent research has clearly demonstrated that child victims who give evidence in court are often negatively affected by their experiences with the court process. But which children are most vulnerable and how can this vulnerability be assessed and managed? Are traditional assumptions about which children are most susceptible to additional harm accurate? This paper explores the factors which point to vulnerability for child victims of sexual abuse who are involved in the criminal justice system. A framework for the assessment of vulnerability is proposed and discussed. Practical strategies to address these factors are explored in an effort to reduce the incidence of further harm being inflicted upon children via the legal system.

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Children are a vulnerable group in our society if merely developmentally. This inherent vulnerability, exacerbated by the experience of sexual abuse, puts child victims at a distinct disadvantage when faced with the criminal justice system. The current climate in the area of child sexual abuse and the criminal justice system is one of increasing consternation at the inadequacies and difficulties of this system for child victims. Many, from positions both within and outside of the system, are advocating for comprehensive changes to the manner in which child sexual abuse is dealt with by the law. There are calls for the establishment of alternative systems and processes. For those practitioners who are working within the current system, this debate is crucial and multifaceted. For the children and families who are now or soon to become involved in the criminal justice system as it stands, the implementation of any significant structural changes will be too late.

As practitioners working directly with such children and families, the development of methods to assist us to immediately address the inadequacies of the criminal justice system is a priority. This paper explores the factors that can increase the vulnerability of child victims of sexual abuse who are involved in the criminal justice system as it currently operates in South Australia (SA). An assessment framework to enable practitioners to prioritise the most vulnerable children by identifying their specific vulnerabilities is proposed. It is acknowledged that debate on the “big picture” components of this issue is germane and necessary, however the urgent needs of those who must deal with what now exists must also be recognised and addressed.

**Vulnerability as Recognised by the Criminal Justice System**

This paper begins by exploring assumptions regarding the vulnerability of children participating in the criminal justice system in SA. The majority of discussion stems from direct practice experience of the writers. The most fundamental assumption that has been made over the past 10 years is that some victims/witnesses are more vulnerable than others. This assumption is borne out in legislative changes for vulnerable witnesses. Vulnerable witnesses under SA legislation are defined as:

a) a witness who is under 16 years old
b) a witness who suffers from an intellectual disability
c) a witness who is the alleged victim of a sexual offence to which the proceedings relate; or
d) a witness who is, in the opinion of the court, at some special disadvantage because of the circumstances of the case, or the circumstances of the witness.¹

The legislation of such vulnerable witness categories has resulted in these witnesses having some level of input about how they give evidence. This “choice”, on the surface of it, provides witnesses with an opportunity to offer a preference for the vulnerable witness provision that will enable them to give evidence under circumstances that will “protect the witness from embarrassment or distress, and (to) protect the witness from being intimidated by the atmosphere of the courtroom”.² This would appear to be an advantage to witness populations deemed as vulnerable.

The introduction of choice or preference can even be discussed in therapeutic terms for trauma victims in terms of regaining some internal sense of safety. *(Judith Herman quote - Heidi)* The criminal justice system however, is not a therapeutic one. Any therapeutic gains made by participants can only be seen as coincidental and possibly made with extraneous support or intervention. Indeed, this is seen when exploring vulnerable witness choice in determining how best to give their evidence. Their “choice” is contingent on the grounds of the application, objections by the defence counsel and discretion of the judge or magistrate. Juries are given instruction regarding any inference being drawn regarding guilt or innocence of the accused where vulnerable witness provisions are in place. Therefore, vulnerable witnesses are permitted to be vulnerable in terms of the criminal justice system.
as long as illumination of vulnerability does not impact on the objective process of justice. The decision of R vs WS in 2000 notes that that the use of vulnerable witness provisions such as closed circuit television “serves the purpose not only of protecting the witness from embarrassment, distress or intimidation but it can have a consequential effect of increasing the quality of the evidence”. At best, however, the vulnerable witness provisions enable the criminal justice system to enhance the adage of ‘do no more harm’ while aiming for the objective administration of justice.

**Assumptions - Child Witnesses and Vulnerability**

The criminal justice system has defined children as being specifically vulnerable when giving evidence. The assumption in this categorisation is that children are intrinsically more vulnerable than adults as witnesses in court. This assumption is expanded further in SA by the employment of Witness Assistance Officers (WAOs) at the Office of the Director of Public Prosecutions (ODPP) who deal with children who are victims or witnesses. The vast majority of cases in which children give evidence relate to sexual or physical violence against their person by an adult. This in itself justifies the inclusion of children as a population vulnerable to exploitation. At a theoretical level there is rarely any argument that children are a vulnerable group and need to be protected from predatory behaviour and traumatic experiences. As noted by Herman, “…repeated trauma in childhood forms and deforms the personality. The child trapped in an abusive environment is faced with formidable tasks of adaptation. She must find a way to preserve a sense of trust in people who are untrustworthy, safety in a situation that is unsafe, control in a situation that is terrifyingly unpredictable, power in a sense of helplessness”. Despite minor structural and cultural shifts in practice, the criminal justice system is not child focused, therefore increasing children’s vulnerability within this system. ***“…the child’s sense of powerless as a result of the sexual abuse is then compounded by the manner in which the justice system disempowers the child.”***

Another assumption with respect to child witnesses is that their evidence will be unreliable. As noted Seen and Heard, “(T)he perception has been that children are prone to fantasy, that they are suggestible and that their evidence is inaccurate.” Research has demonstrated that the long held beliefs that children will be unable to remember accurate details about abuse are incorrect and that children’s cognitive and recall skills have actually been undervalued. However, it is acknowledged that children’s memories will be severely damaged after long delays, and that skilful interviewing can assist children to consolidate and retain their memories.(Seen and heard). Discussion with respect to how children can be assisted in this area within the current system will be presented later.

Further assumptions exist about which specific children will be more vulnerable within the criminal justice system. One commonly held belief is that young children are more vulnerable than older children. In an internal report by the ODPP into the use of vulnerable witness provisions for children, a defence lawyer commented that “…for 12 - 16 year olds, there is less force in the argument about the need for greater protection for children, ….this goes to the heart of the question about “vulnerability””. A question to a defence lawyer about the effectiveness of the vulnerable witness provisions in balancing the rights of the accused with the need to protect children drew the response, “…where it is a truly vulnerable witness, all this is justified. Where it is used as a matter of course without inquiry, including as a result of someone’s age, it is prejudicial to those defended.” Another defence lawyer commented that “…there are some precocious young women feigning vulnerability…” . It has been noted by Witness Assistance Officers that older children often experience more vehement and lengthy cross examination than younger children, with a tendency
Through the experience of the writers the supposition that young children are intrinsically more vulnerable than older children is often incorrect. Younger children in many cases have more family support, can be more often believed by adults at the time of disclosure and can have greater access to formal support than some older children. Young children are often subjected to less voracious cross examination by defence. Older children are frequently at risk of experiencing disadvantages such as homelessness, drug and alcohol use and lack of family supports. Within and outside of the system, older children may be perceived as being more sexually aware and more likely to have a motive to make an accusation of sexual abuse than younger children and to understand the consequences of such an allegation for an accused person. It is important to note that the writers do not reproduce the reliance upon assumptions and beliefs in practice and assume for example that an older child will be less vulnerable than a younger child, but raise the point that this demonstrates the need for more individualised assessments.

Although there is ample evidence and general acceptance that children are vulnerable participants in the criminal justice system, there are not established practices implemented to ascertain which children are most vulnerable. Superficial and generalised assumptions about child witnesses can lead to a flawed use of resources and unsatisfactory outcomes for children as a consequence. In order to make accurate assessments about which children are most susceptible to further harm, it is suggested that a more precise framework could be implemented on a case by case basis.

**Vulnerability Issues for Child Witnesses**

There are many examples of elements of the criminal justice system that increase the vulnerability of children within it. These issues are explored and discussed in depth in the recent study by Dr Christine Eastwood. This study found that common concerns for those involved in the criminal justice system were the delays in the legal system, (including the length of time before a trial begins and the waiting at court when the trial has actually started); the possibility of seeing the accused at court; technical problems with the use of screens and closed circuit television; the embarrassment of talking about details of the offence/s in evidence-in-chief; the distress of cross-examination; (p.128 control issues); the requirement to give evidence at committal proceedings in some cases; and the anger and distress experienced at not guilty verdicts, decisions not to proceed or to enter a nolle prosequi and inadequate sentences. It is the experience of WAOs working with children and families in SA that similar issues exist for child victims in this State.

An additional concern noted by WAOs in SA is the issue of matter of severance when a matter initially involves more than one victim. In these cases legal arguments about whether or not the trial should be separated so that the evidence for each victim is heard separately is often heard during the voir dire in the first few days of the trial. Depending in the outcome of these arguments, the trial may then go ahead with respect to only one of the victims, with new trial dates needing to be listed for the other victims, obviously creating additional delays and significant anxiety for these children and families.

**Role of Witness Assistance Officers**

In working with a group of people who have already been exploited or subject to traumatic events how do we ensure that they are not further exploited or traumatised within or by the system? How do we tackle the inaccuracies of some of the assumptions made about child victims and potential witnesses? In SA, a range of support services have been established. The South Australian Police (SAPOL) have established Victim Contact Officers in positions throughout the state. Victim Support Service offers a comprehensive non-government service to people who have suffered as a result of a criminal offence. Within the Witness Assistance Service of the ODPP the equivalent of 1.5 full time
senior social workers are employed to deal exclusively with child victims/witnesses and their families or caregivers. These positions maintain an average caseload of approximately 200 children between the ages of 0 – 18 years, 95% of whom are victims of child sexual abuse (and some family members). The role of WAO’s in these positions can be seen as twofold; to work directly with children and families in an attempt to minimise negative impacts of the system and to work from within the system to promote change, challenge assumptions and advocate for the needs and rights of child victims and witnesses.

Broadly, the role of WAOs at the ODPP in matters involving children is to provide information and support to children and their non-offending family members throughout their involvement in the criminal justice system. The majority of Witness Assistance Service (WAS) referrals come from ODPP solicitors, however, the WAS also accepts referrals from external sources such as the police, Family and Youth Services (FAYS), Child Protection Services, Victim Support Service, and direct requests from victims and family members. It is ODPP policy that all child victims of sexual abuse are referred to the WAS.

It is an important part of the WAO’s role to ensure that the child and the family are well informed about the legal process and the relevant elements of the criminal justice system to assist the child and family to be able to make judgements about their preferred course of action. Without accurate, comprehensible and timely information, children and young people and their families are more at risk within the system. As noted by Raphael, “the justice system may further disempower victims through lack of knowledge of the system.” WAO’s provide a range of support to children and families, including attendance at meetings or “proofings” with the child, family and solicitor or prosecutor; referral to and liaison with counsellors and other support agencies; consultation with solicitors, prosecutors and investigating officers; conducting court familiarisation tours; assisting children and families in preparation for court; providing information about vulnerable witness provisions such as court companions, closed circuit television (CCTV) and screens; ensuring the child has access to his/her statement or interview video if appropriate; ensuring the child has an appropriate court companion (on some occasions the WAO will undertake this role); attendance at court for support during the trial, and at submissions and sentencing if there is a guilty verdict or plea; assistance with Victim Impact Statements; and crisis counselling and debriefing throughout the process.

WAO’s are in a unique position to advocate both externally and internally for children involved in the criminal justice system. On a practical level, an example of such advocacy from within the ODPP can include a request for the allocation of a female prosecutor to a particular trial. In a scenario where the child’s view of whether or not he or she will be able to give evidence in a trial differs to that of his/her parent/s or caregiver/s, WAO’s often advocate for the child and assist the parent/s to understand the importance of the child’s view being acknowledged, respected and prioritised within the boundaries of the legal position.* Considered interviewing. - TAFE course assisting, solicitors/prosecutors to ask age appropriate questions etc

**Practice Theory**

This paper deals with assessment rather than being prescriptive with regard to the therapeutic or professional response to individual pathology. It looks at how practitioners can assess the internal and external dynamics of an individual and either provide or recommend appropriate resources to facilitate interactions which are understandable while minimising disruption.
A psycho-social model of practice requires the practitioner to take into account and embrace an understanding of the individuals past and present as central components to helping. In applying this statement to assessing appropriate support for a person dealing with the criminal justice system, it is crucial to take into account how a person has managed to cope with trauma, either as a result of the crime being prosecuted or other trauma or stress they may have experienced as an individual. A range of factors need to be considered when assessing the individuals capacity to cope with stress and trauma in attempting to reduce, or at the least, monitor the impact of the criminal justice system on that person.

The individual’s environment will also carry with it a history. How is the individual supported in their environment, what structural or cultural barriers may exist which could impact on the effect of the criminal justice system on that person? What is happening in the present which may assist or detract from the person’s ability to participate in the criminal justice process?

The criminal justice system itself may exacerbate or reinstate maladaptive coping strategies or unsupportive environmental factors.

This model suggests that these three components be viewed separately as well as in terms of their interaction. The person, their environment, their position in the CJS and how they interact. It is paramount to examine the internal pressure on the individual, the external pressure on the individual and current life situations which may impact on the individual’s ability to intervene effectively on all levels.

Another underlying assumption with this model is that change in one part of the system affects the whole system and the subsequent interactions. In attempting to promote recovery from trauma it is vital to view the individual personality as having a capacity to change or grow as well as the capacity for external influences to be modified.

In viewing this model in conjunction with the complexities of the CJS, the need to monitor the individual, their environment and the CJS is of primary importance to the practitioner and to the CJS. In being presented with a caseload of vulnerable clients, all dealing with the CJS and experiencing unique internal and external pressures, the problem of how to prioritise service delivery and maintain the practitioner’s duty of care becomes complex. This is especially true in a service delivery environment that is exerting pressure through extremely high caseloads and mounting demands on professional time and expertise. In this climate, the question of how to maintain professional and service standards becomes a vexed one.

How can a practitioner determine the most vulnerable in a population of already determined vulnerable clients. This becomes a more complex issue when the role of the practitioner is, specific to one life situation or event (CJS) and resource poor in terms of the time available to offer the client.

Fit in the model where you can - eg flexibility bit - how these can/do all interact. - see notes

In order to make appropriate assessments within both the practice reality and theoretical framework, an assessment tool is proposed in the next section. This is a tool that can be used when prioritising caseloads, allocating resources and in appropriately directing case planning and support. This is not a therapeutic tool although being able to direct support more accurately may be evaluated as beneficial.
**Assessment tool for vulnerable witnesses within the Criminal Justice System**

**Method of recording assessment**

All assessment categories will be measured on a scale of 1 - 10. 1 being irrelevant and 10 being most relevant.

Any measurement of 5 or over will require comment from the assessing practitioner. For any measurement of 4 or under, comment would be at the discretion of the assessing practitioner.

‘At risk’ assessments will be required where self-harm / suicide risk presents or mandatory reporting requirements are highlighted.

The results are plotted on a graph where the Y axis = relevant / not relevant and the X axis = assessment categories. Notes are be made on the same sheet for ease of reference. (see attached excel sheet)

**Purpose of assessment**

The assessment fall into three broad categories:

1. Individual
2. Environmental
3. Criminal Justice System (CJS)

These assessment categories align with the underpinning psych-social model which draws on the concept of ‘the person in the situation’ thereby dictating that the person and the situation be assessed separately and in terms of the interaction between them. Interaction and intervention can incorporate both direct and indirect process, at the practitioner’s professional discretion.

In conducting this assessment a snapshot of the dynamics of the individual, their environment and their interaction with the CJS is produced. This assessment does not negate the need to continually gather and/or incorporate new information. New or more current assessments can be incorporated when the assessing practitioner sees merit in re-assessing the dynamics.

The assessment information could be used in the following ways:

1. To formulate case plans and subsequent intervention strategies.
2. To assist in the identification of vulnerabilities (within an already vulnerable population) to enable equitable and measured prioritisation of services/resources.
3. To monitor aspects of the interaction between witness and the CJS for indirect action eg. reports or advice to prosecutors / solicitors.
4. To supply practice / service information with regard to organisational evaluation or outcome measurement.
5. To provide anonymous, empirical data to improve knowledge / analysis of victim vulnerability within the CJS.
This method of assessment should be viewed as a tool for the assessing practitioner. The framework of the assessment exists to prompt the assessing practitioner to review common vulnerability factors, within unique practice experiences, where the variables can be potentially infinite.

An assessing practitioner is required to apply professional expertise in looking beyond the assessment categories where required. As in any assessment process the practitioner should recognise any experience, knowledge or background which may impede the objectivity of a reliable or useful assessment. The potential differences between practitioners using this assessment tool, coupled with the unique individual variables of specific cases, means it is not reliable to compare different practitioners assessments at an individual level.

The data forming the basis of the assessment is useable where assessments are applied within its individual context. That is, in providing an overview of the dynamics involved in that case in addition to a qualitative method of reviewing the assessing practitioners expertise in broad professional terms. Conversely, the data itself is only internally valid in broad empirical terms when a significant collation of cases provides general trends in outcomes.

In summary this assessment tool can be valid when used at an individual case level to assist practitioners to direct, review or prioritise their case work or as a broad collation of general outcomes which establishes trends.

Assessment categories and considerations

**Individual factors**

1. Developmental considerations
   - Delay / verbal / intellectual / age specific/
   - Learning difficulties eg. ability to read
   - Gender considerations

2. Level of coping, stress or anxiety
   - Maladaptive coping strategies eg substance/drug abuse, previous or current self harm
   - ‘At risk ‘of harm from self
     → If assessed as 5 or above further risk or suicide assessment should take place

3. Internal sense of safety (*or level of traumatisation ???*)
   - Presence and severity of post traumatic stress reactions
   - Diagnosis of Post Traumatic Stress Disorder.
   - Adequacy of first response
   - Ability to talk about the detail of the offence
   - Pre-existing factors eg mental health

4. Relationship to the accused
   - Any contact with the accused
   - Any blame / responsibility attached to the victim
5. Victims own sense/perception of vulnerability
   • Either internal/environmental / or CJS

Environmental factors

1. Informal supports
   • Family structure/functioning
   • Family breakdown due to allegations
   • Family view of prosecution
   • Ability of child to identify one ( or more) informal support they can speak to if feeling upset

2. Formal supports
   • Regular, therapeutic support
   • Therapeutic support source available if necessary
   • Regular / effective communication between Investigating Officer - WAS - Counsellor - Family and Youth Services

3. Cultural factors
   • Marginalised or disenfranchised population
   • Disadvantaged due to cultural norms / confidentiality within community etc.
   • Language barrier to verbal and written communication

4. Socio-economic Factors
   • Housing stability / income stability
   • Country / isolated e.g. access to services / physical isolation
   • Barriers to participating in the CJS

5. “At risk” of harm
   • Environmental risk
     → This category is an alert to mandatory reporting requirements: assess responsibility

Criminal Justice System Factors

1. Significance of next in court date
   • Trial, S269A, S23, oral committal, sentencing/submissions

2. Intense short term WAS support
   • Matter not likely to proceed eg. no reasonable prospect of conviction / witness unwilling to proceed
   • Guilty plea or verdict - Victim Impact Statement / court support required
   • Inadequacy of sentence / Not guilty verdict
3. Knowledge of Criminal Justice System
   • Giving evidence i.e. chief /cross
   • Knowledge of VWP
   • Understanding of process
   • Expectation of outcome
   • View of victim / family to proceed with prosecution

4. Voir Dire considerations
   • Severence / VWA / allocation of specific prosecutor
   • Circuit matter

5. Experience of Criminal Justice System to date
   • Lengthy opinion/investigation period
   • Difficulty with process or instigation of complaint procedures
   • Trial vacated – no judge/pulled from list
   • Vulnerable witness equipment not working
   • VWP denied

As with many organisations, resources are often scarce and distributed in a competitive environment, usually taking from one source and transferring to another. Resources often remain finite. This is very much the nature of most public agencies that have priorities and targets, which often change or are designed to respond to external or political pressure.

This funding pressure then translates in terms of team or agency specific initiatives. Within the ODPP this pressure is constant. The current political climate, through the enactment of VOC legislation, has allowed an expansion in the recognition of victim’s rights/principles?**. While funding goes somewhat to meeting these principles in terms of support services, the demand exceeds the services available. So when working with a designated group of vulnerable witnesses, the question becomes how do you determine whom in that group is the most vulnerable? At what times are they vulnerable? What assessment can be made to ensure individuals are supported in meaningful ways with scarce resources? As a practitioner, how do you prioritise within a high caseload?

**Need to discuss strategies to address vulnerabilities**

Case examples

Agency appropriate assessment tools/frameworks are also imperative in term of professional accountability both to the agency and the client group. Just as funding or resources pressure ultimately impresses efficiencies on teams, so to is the pressure translated to individual professionals to meet project/program goals as well as to respond appropriately to the service recipient. How then does a practitioner working with an already identified vulnerable group, then prioritise their casework to have the best outcome for the individual and the CJS? FROM A POOL OF CLIENTS ALREADY IDENTIFIED AS VULNERABLE WHO ARE THE MOST VULNERABLE?????
Need a conclusion

(Victims) . . . seek and deserve justice, but if such justice is “prima non nocue” first not to harm, it must understand and respond to their psychological needs and incorporate these understandings into just practice and just outcomes.” xiii

Raphael p31. “While it is not the role of the justice system to provide counselling or love, it is clear that many victims perceive it as cold and uncaring, or even overtly rejecting.”

Sumner; “in a democratic society, the criminal justice system needs to be in tune with the feelings and needs of the community and meet its demands for justice for victims of crime. In the interests of justice, victims are treated with compassion and understanding. In circumstances of violent crime, what is just may be seen in two frameworks; what the individual perceives as just and what they experience in services provided for them and what is determined as just by courts, the law, charters of victim’s rights and so forth. (Raphael p27)

“serves the purpose not only of protecting the witness from embarrassment, distress or intimidation but it can have the effect of increasing the quality of the evidence”.p18 vwp

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i Evidence Act 1929 Section 13 (10) Evidence (Vulnerable Witnesses) Amendment Act 1993 No. 53 of 1993 [Assented to 27 May 1993]  
\[\text{Came into operation 1 September 1993: Gaz . 15 July 1993, p. 520.}\]

ii Ibid 13 (1)

iii R vs WS Supreme Court of SA (Court of Criminal Appeal) 13 September 2000

iv Herman, J p97

v Eastwood p119


viii D Poole and L White Tell Me Again and Again: Stability and change in the repeated testimonies of children and adults(p305 Seen and heard)

ix Internal Report ODPP p92

x Ibid p93

xi The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System

xii Raphael p31

xiii Raphael p34