AUSTRALIAN INSTITUTE OF CRIMINOLOGY

trends & issues

in crime and criminal justice

No. 250

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

Christine Eastwood

This paper presents a summary of findings from a report to the Criminology Research Council on the experiences of child complainants of sexual abuse in the criminal justice system in three Australian jurisdictions.

The aim of the research was to investigate the processes surrounding, and the consequences of involvement in, the criminal justice system from the perspective of the child complainant. Interviews were conducted with children, their parents/guardians, crown prosecutors, defence lawyers and judicial officers. When asked if they would ever report sexual abuse again following their experiences in the criminal justice system, only 44 per cent of children in Queensland, 33 per cent in New South Wales and 64 per cent in Western Australia indicated that they would.

The paper suggests that legislative and procedural reform, and a more child-centred policy focus, are required in order to prevent damage being done to the child by the justice system. Such damage may contribute to non-reporting of sexual abuse by children, allowing abusers to act with impunity.

Adam Graycar
Director

The criminal justice system continues to present governments, courts, the judiciary, legal profession and community with the vexatious issue of encouraging child complainants of sexual abuse into a system which results in further trauma and abuse of the child (ALRC & HREOC 1997; Eastwood, Patton & Stacy 1998). Most Australian jurisdictions have been slow to implement critical reforms that provide substantial protection for the child. Instead, legislators have enacted superficial changes. In doing so, they have failed to address the real issue of abuse inflicted by the justice system itself and the manner in which children as a group are disadvantaged in the legal process (ALRC & HREOC 1997). In many jurisdictions, policies have emanated not only from a lack of understanding of the developmental perspective of the child, but also the more complex issue of "centuries of disbelief and suspicion of children who accused adults of sexual crimes" (Kelly 2002, p. 364). Legislative reforms have been piecemeal and provide protections which are invoked at the discretion of the court despite evidence that discretionary provisions permit inconsistent application and add more stress and uncertainty for the child (Easteal 1998; Plotnikoff & Wollfson 2002).

Two decades ago, when the extent of sexual abuse was re-ignited in public awareness, the importance of "believing" the child was established as a cornerstone of the child's

May 2003

ISSN 0817-8542
ISBN 0 642 24298 4

Criminology Research Council

Australian Institute
of Criminology
GPO Box 2944
Canberra ACT 2601
Australia

Tel: 02 6260 9221
Fax: 02 6260 9201

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psychological survival. Prominent researchers (Berliner & Barbieri 1984; Finkelhor 1984) emphasised the crucial importance of "acceptance and validation" to the child (Summit 1983, p. 179). There was an implicit assumption that the truth children struggled to tell would be self-evident in the legal system. This optimism rapidly diminished when it became clear how legal practices and procedures systematically disadvantaged children, and the extent to which lawyers used their adult and professional status to intimidate the child. The strongest tactic was to undermine the child's credibility—and using the worst excesses of the adversarial court system, it became "open season" on child witnesses. These abusive practices continue, although some well accepted adversarial practices in Australian courts would be unlikely to comply with the *UN Convention on the Rights of the Child* which protects children's rights and dignity in court (Kelly 2002).

There is a growing awareness and articulation that substantial legislative and procedural reform has not given children the belief, respect, protection or justice they deserve and to which they are entitled, and that a cultural shift is needed (Easteal 2001; Kelly 2002). There is also increasing frustration that despite decades of reform, children's court experiences continue to be "lessons in injustice, inhumanity and disrespect" (Kelly 2002, p. 368).

Method

The aim of the present research was to investigate *from the perspective of child complainants of sexual abuse,* significant processes and consequences of involvement in the criminal justice system. The study involved 130 participants. The focus was on in-depth interview data gathered from 63 child complainants (61 females and two males) aged eight to 17 years (average 13.9 years) who sought justice through the criminal courts in Queensland (18), New South Wales (9) and Western Australia (36). Interviews were also conducted with 39 parents/guardians and 28 legal personnel (including crown prosecutors, defence lawyers and judicial officers) across the three jurisdictions. Background data were provided by court support personnel.

A number of organisations acted as gatekeepers in gaining access to participants: Protect All Children Today (PACT) and the Office of the Director of Public Prosecutions in Queensland, the Victim Support Service in New South Wales, and the Child Witness Service in Western Australia. This enabled the children to feel free to decline to participate and ensured confidentiality.

Ethical considerations included written informed consent, procedures to ensure confidentiality, use of pseudonyms, the right to withdraw from the study at any time, and University Human Research Ethics Committee approval. Wherever possible, some degree of control was given to children at various stages of the research process: in the structure and content of the interview, modifications to transcripts, and seeking input in the discussion of analysis and findings. Over 250 hours of interviews were transcribed verbatim, and in conjunction with case notes, formed the base data.

Key Findings

When asked if they would ever report sexual abuse again following their experiences in the criminal justice system, only 44 per cent of children in Queensland, 33 per cent in New South Wales and 64 per cent in Western Australia indicated they *would.* (Based on research data, the higher response in Western Australia appears to be indicative of more child-friendly provisions in that state.) It is worth noting that the outcome of the criminal trial was not necessarily a predictor of response to this question, as two-thirds of children who experienced convictions said they would *not* report sexual abuse again. Comments from the children indicated a widespread belief that the process was not worth the trauma suffered.

> *It makes me feel like it is no good going to court…It is just a waste of time…They don't look after you. They couldn't care less. They are not interested…It is the hardest thing and it ruins your life. You never forget it.*
> (NSW child, 14 years)

> *We are supposed to be free after this but we are not free, we are even more caged up. It's a joke—don't put yourself through the trauma.*
> (NSW child, 16 years)

> *It's too hard, I wouldn't want to go through it again.*
> (WA child, 16 years)

Parents also maintained that the way children are treated in court leaves many children damaged and disillusioned.

> *She is still very traumatised by the process and still cannot talk about it.*
> (Qld parent)

> *She just wondered why she bothered. She is quite disillusioned and quite angry. She said "they didn't believe me"…Children aren't stupid.*

They picked up on how ridiculous the system was—it needs big changes.
(Qld parent)

Legal participants were asked if they would want their own child in the criminal justice system if the child was a victim of serious sexual assault. Only one-third of legal participants indicated they *would*. Like the children, legal participants frequently articulated a belief that it is not worth the trauma suffered by the child and that the process is "cruel and horrible".

It's a terrible thing to have to say, but don't put yourself through it.
(NSW prosecutor)

Their rights have been invisible—they have been denied very basic rights…the trial process is flawed for anybody, but for children it is not only flawed—it is cruel.
(Qld judiciary)

Given the significant percentage of children who would not re-enter the system if sexually abused again, and the percentage of legal participants who would not want their own child in the system, it is not surprising that the only point on which child complainants and defence counsel agreed was that the process offers neither care nor protection to the child.

No way—it's horrible…it's not worth it.
(Qld defence)

The Crown don't care about the child. The police don't care about the child. And I don't care about the child. You see the trial is not about the child.
(Qld defence)

The study identified a number of issues for child complainants including difficulties reporting the abuse, lack of child-friendly facilities in courts, giving evidence in chief, pre-recording evidence, judges and magistrates, verdict and sentence, and problems with legal language (see Eastwood & Patton 2002).

However, overwhelmingly the three key difficulties identified by the children across all jurisdictions were:

- waiting for trial;
- seeing the accused; and
- the cross-examination process.

Waiting for Committal and Trial

Complainants in this study waited eight to 36 months between reporting and trial. The average wait was 18.2 months. The delay between reporting and trial was 20.8 months in Queensland and 16.4 months in New South Wales. Although the delay was 17.5 months in Western Australia, one-third of complainants fully pre-recorded evidence months prior to trial. The detrimental effects of adjournments and re-trials were also identified. Children frequently expressed the view that "it seemed like it took forever" and "it was always on my mind".

The waiting is so hard because you don't feel secure—I think because the courts have made you feel like it is never going to be over and done with…they just don't understand the pain that you go through. It's really hard.
(WA child, 14 years)

According to the children, the waiting time endured prevented them from moving on with their lives and made them feel that the ordeal was never going to end. As commented by one parent, "it was like her life was on hold." The psychological effects exhibited by participants during the wait for trial such as nightmares, suicide attempts, self-mutilation, self-hatred, fear of further victimisation by the offender, depression, inability to concentrate on schoolwork, fear of returning to court after committal experiences and fear of not testifying well at trial, were compounded by the delay.

Disruption caused by an 18-month wait may have significant consequences for psychological wellbeing. One and a half years "waiting and worrying" represents a significant proportion of a child's life at a crucial stage of their emotional, social, and cognitive development.

Despite stated policy and claims by the three jurisdictions that children are given priority in court listings, practical remedies are evident only in Western Australia where children are increasingly fully pre-recording their evidence. The lengthy wait of around 18 months for trial fails to address the trauma that delay has on the child.

Seeing the Accused

The process of giving evidence was a key issue discussed by the children, parents and legal participants. It should be noted, however, that legal participants did not reflect the perspectives of the child in many aspects. For example, for the children the issue of the use of closed-circuit television (CCTV) was more about fear of seeing the accused than the purely evidentiary focus of the legal participants. All children who came face to face with the accused in the precincts of the court or in the courtroom commented on the disturbing nature of the encounter.

I didn't feel nice seeing him—just remembering.
(QLD child, 14 years)

Within the courtroom, children may be protected from facing the accused through two means: the use of screens and the use of CCTV facilities. The use of screens in the eastern jurisdictions was sporadic and inconsistent. Many children in Queensland (30 per cent at

committal and 50 per cent at trial), some as young as 10 years of age, were refused the use of screens. Data gathered from complainants, parents and legal practitioners indicated the use of CCTV is virtually non-existent in Queensland, inconsistent in New South Wales, but standard practice in Western Australia.

Under Queensland legislation, CCTV and screens may be made available for "special witnesses". When a lack of facilities is combined with the reluctance of prosecutors to use CCTV, the nature of the discretion provided in the legislation, and the tendency of judicial officers to consider the measure unfairly prejudicial to the accused, the legislation is rendered virtually ineffective. Not one child in Queensland in the current study was permitted to give evidence via CCTV either at committal or trial. The level of trauma to Queensland children who were required to give evidence in court, both at committal and trial, without CCTV, was particularly evident.

In New South Wales, child witnesses in a "personal assault offence" proceeding have the right to give evidence using CCTV unless:

- the court considers it is not in the "interests of justice" to do so;
- urgency makes their use inappropriate; or
- the child chooses not to.

Forty-three per cent of the children were refused use of CCTV at trial, and at no time was this the child's choice.

The need for CCTV to be standard procedure for all children, thereby removing the uncertainty which surrounds its use, is no better portrayed than in the comments of a New South Wales mother whose daughter had been threatened with death if she told anyone about the abuse.

> *I watched my daughter mortified at the prospect that she may have to face the offender in court, it nearly destroyed her—the fear of actually having to see this man again…I do not see what difference it makes to the court whether evidence is given by video, but it makes a huge difference to the victims. It gives them extra courage to carry on and also saves them the humiliation of being in a packed courtroom.*
> (NSW parent)

All children in Western Australia (except one child who chose not to) gave evidence via CCTV—70 per cent gave the evidence at trial and 30 per cent fully pre-recorded their evidence months prior to trial. Therefore, complainants gave evidence only once. In Western Australia, the use of CCTV for an "affected child" under the age of 16 years at the time of complaint is mandatory where it is available, unless the child chooses to give evidence in court. Unlike Queensland and New South Wales, the choice is in the hands of the child, not the courts. In practice, CCTV facilities in Western Australia are of a very high standard and widely used. Children reinforced the level of protection offered to them by the use of CCTV.

> *It's easier…because if someone is yelling at you through the TV, it's not as bad as yelling at you from five feet away.*
> (WA child, 16 years)

Another child reported:

> *Defence counsel spoke very loud and it was like he was always having a go at me. But I just tried to stay calm and told him it wasn't true…I was glad I wasn't in the courtroom but on the CCTV for this.*
> (WA child, 14 years)

The findings in Western Australia contrasted with the uncertainty and trauma suffered by children in eastern jurisdictions who faced the possibility or the reality they would give evidence in court in the presence of the accused.

The reasons why courts are reluctant to allow children the use of CCTV were presented by some legal participants in eastern jurisdictions with comments that use of CCTV erodes the rights of the accused, the child would not take giving evidence seriously, conviction rates would fall, or that the child is needed in court living out the trauma to get a result. There is also evidence where CCTV provisions are discretionary, that prosecutors may discourage the child from using CCTV in the belief that a conviction is more likely.

In contrast, prosecutors, defence lawyers and judges in Western Australia commented on the effectiveness of the legislation and the mandatory use of CCTV. Prosecutors reported it facilitated the child's evidence because the child exhibits better concentration, is more attentive and less traumatised by the experience. Defence counsel in Western Australia noted it has not affected the rights of the accused, understood it was designed to prevent further damage to the child and believed its use does not affect conviction rates.

Only Western Australia allows the child, rather than the court, to decide whether or not to use CCTV. Children in other jurisdictions would benefit from similar legislation which protects them from facing the accused in the courtroom.

Cross-examination at Committal and Trial

In recognition that abusive cross-examination does occur, all jurisdictions have enacted legislation to try to control the manner of cross-examination. Courts have always had

inherent power, although limited, to control cross-examination. Queensland recently amended section 21 of its *Evidence Act 1977* to disallow an improper question that is offensive, intimidating, misleading, confusing, annoying, oppressive or repetitive. In New South Wales under section 41 of the *Evidence Act 1995*, questioning must not be unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. The Western Australia legislation states the court may forbid a question which is considered indecent or scandalous, intended to insult or annoy, or needlessly offensive (section 26, *Evidence Act 1906*).

Despite legislative attempts, there is overwhelming evidence from the children that unacceptable and abusive cross-examination continues.

> *Everyone in court was just watching me get all this. And making me feel worse. And I would cry and they wouldn't do anything or help me. I didn't have a support person, we had nobody. So I was in a court full of old people that just wanted to be grumpy at me. I didn't really want to be in there so I tried to answer the questions as quickly as I could so I could just get out of there.*
> (NSW child, 16 years)

Children described cross-examination that continued for hours or days as horrible, confusing and upsetting.

> *He was trying to get me to say all this stuff that wasn't true.*
> (NSW child, 15 years)

and

> *…he made me angry and upset…he implied that I asked for everything.*
> (NSW child, 16 years)

Being accused of lying was the most hurtful part of the process for children in all states. One parent commented that when the barrister called her child a liar, "it nearly tore my child apart."

In a case study of cross-examination in a Queensland committal, the crying child was repeatedly shouted at and asked more than 30 times to describe the length, width and colour of the penis of the accused. She was forced to draw the penis "to scale" although she said she could not draw. The child was repeatedly subject to intimidating, misleading, confusing, annoying, harassing, offensive and repetitive cross-examination. Despite successive warnings from the bench, defence counsel refused to act in accordance with the legislation. The child was subjected to further and ongoing abuse by an adult, and was not treated with respect, dignity, care or humanity.

Children in Western Australia were:

- cross-examined on one occasion only;
- cross-examined for much shorter periods of time than those in the eastern jurisdictions;
- benefited from knowing with certainty prior to giving evidence that they would not see the accused; and
- appeared to be less intimidated with the degree of separation offered by CCTV.

Prosecutors and judicial officers in Queensland and New South Wales commented that cross-examination is often about intimidating the bench, that junior prosecutors are frequently intimidated by senior counsel, and that committals are a big money earner for defence counsel. They also indicated that all too frequently children face a torrid time during cross-examination and a core of defence counsel use the committal to terrify the children and to "belt them up" prior to trial.

> *Because of the (committal) hearing I was really emotional until the trial. I was getting more tense…then I started having nightmares telling me to kill myself…Everyone was saying that it (the trial) is bigger than the hearing and they'll be yelling at me more, and that kind of scared me because I don't like getting yelled at.*
> (NSW child, 13 years)

In summary, every Queensland child was cross-examined in the courtroom at both committal and trial. Some children in New South Wales were required for cross-examination at both committal and trial. Every child in Western Australia was cross-examined once only. The use of intimidating and aggressive cross-examination at committal to unnerve children for trial—in the absence of a jury—seems to be a frequent defence tactic, and requires consideration of the call for abolition of committals (as in Western Australia) in cases involving child complainants.

In recognition of the problem of repeated cross-examination, both the ALRC and HREOC (1997) and the Standing Committee on Law and Justice (2002) recommend the child give evidence on no more than one occasion and advocate pre-recording the entire evidence of the child. The current findings present considerable evidence that being subject to cross-examination at committal and trial is damaging for the child.

Comment on Cross-examination

For various reasons, legislation to control cross-examination has not worked. The reasons are varied:

- Many judicial officers would not recognise if questioning is oppressive or intimidating *for a child*.
- Some magistrates are unwilling to "enter the arena", particularly at committal proceedings, despite legislation which restricts misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive

questioning of the child complainant.

- Even when control of abusive cross-examination is attempted, some defence lawyers refuse to comply with the legislation and very little can be, or is being done to remedy the situation.
- The ability of courts to restrict persons allowed to be present during proceedings was originally intended to protect the child. However, the behaviour of defence lawyers is now hidden and without openness and accountability.
- In all other professions, adults who work with vulnerable children must undertake training and abide by ethical guidelines for the treatment of children. Defence lawyers who cross-examine child complainants need to be trained to conduct appropriate questioning of children and should be required to adhere to ethical guidelines.

Conclusion

Given the manner in which the law traditionally sets itself apart, it is no easy task to persuade every Australian jurisdiction that nothing less than substantial legislative and procedural reform will prevent the abuse of children by the justice system. The ineffectiveness of legislation to control cross-examination substantiates the notion that reform must go beyond legislation, and must include a concomitant shift in culture, attitudes and beliefs about sexual abuse and about children.

Worthwhile, explicit and repeated recommendations have been made by a myriad of inquiries and reports. Most remain ignored and unimplemented, including key recommendations made by the ALRC and HREOC (1997) in relation to the three problem areas identified by the children in the current study. Policy-makers in many jurisdictions have still not adequately addressed the greatest areas of difficulty for child complainants identified in this study: the long delay between reporting and trial, being forced to see the accused, and damaging cross-examination at committal and/or trial. A more child-centred focus needs to drive policy, and legislation must be clear and unequivocal to ensure the intent of legislation is not continually thwarted.

In the end, as reported in the current study (Eastwood & Patton 2002), if children refuse to report sexual abuse because of damage done by the justice system, the abusers are allowed to act with impunity. The law must be redefined to rebalance the justice system in favour of the victim similar to recent policy directions in the United Kingdom (Criminal Justice Service 2002). It must recognise erroneous beliefs, ineffective legislation, damaging practices and the reality of sexual abuse. If the law remains deaf to the voices and needs of the children it purports to protect from harm, it fails by any measure of what constitutes "justice".

Note

This paper summarises findings from a study funded by the Criminology Research Council (see Eastwood & Patton 2002).

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Dr Christine Eastwood is a lecturer at Queensland University of Technology

General Editor, Trends and Issues in Crime and Criminal Justice series:
Dr Adam Graycar, Director
Australian Institute of Criminology
GPO Box 2944
Canberra ACT 2601 Australia

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