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Child Sexual Abuse & the Criminal Justice System

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Evaluating the operation of the criminal justice system and ensuring that fairness prevails is an ongoing aspect of the Australian Institute of Criminology's research. It is particularly important when vulnerable members of society, such as children, become involved in the criminal justice process. This Trends and Issues paper reports on a study which investigated procedures in this process which impact upon female child complainants of child sexual abuse. Although small, the study highlights some of the ongoing problems which need to be addressed in order that children are not further traumatised through their interaction with the criminal justice system.

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Australian studies which provide detailed data from the perspective of the child complainant of sexual abuse on their experiences in the criminal justice system have been, until now, non-existent. This lack of research has been due, at least in part, to significant ethical and legal considerations, and also the considerable difficulties with gaining access to research participants. We recently examined some of the complex difficulties of encounters with the justice system from the perspective of adolescent females who suffered childhood sexual abuse. The ground-breaking nature of this study emanates from the in-depth experiences of sexually-abused female children in the criminal justice system as told from their own perspectives.

Despite some procedural, structural and attitudinal changes in the criminal justice system, and a considerable body of literature which places under scrutiny the manner in which the justice system deals with child sexual abuse (Australian Law Reform Commission 1997; Brennan & Brennan 1988; Cashmore 1995; Heath 1985; Scutt 1990, 1991; Smart 1989) many children who have been sexually abused continue to suffer further unnecessary trauma during the justice process. This added trauma is frequently a result of either ignorance or indifference on the part of the range of legal personnel with whom the child must interact. Indeed, we found that the criminal justice process itself reiterates many of the emotional and psychological characteristics of the sexual abuse experience. This study provides a range of gatekeepers (including police, defence counsel, prosecutors, magistrates and judges) with in-depth data from the perspective of the sexually-abused female child.

In order to accurately reflect the depth of the stories of the complainants, qualitative data was gathered from twelve adolescent females aged between 12 and 17 years of age in a six stage, semi-structured interview process and triangulated with data from non-offending parents, fresh complaint witnesses, court support workers and legal personnel. Timing, location and length

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of all interviews were determined by the complainants themselves and all interview transcripts were returned to participants for checking and modification. Initial contact with possible participants and their parents/guardians was made by the court support agency (Protect All Children Today). Many of the child complainants most traumatised by the process were not included in the study due to their understandable reluctance to relive their experiences with the justice system. All complainants received some degree of maternal support, although the level of support varied considerably. Three-quarters of the girls had been sexually abused by a relative or family friend. Of the twelve cases, four cases resulted in conviction of the offender, one case was dismissed at committal, in six cases the alleged offender was acquitted, and in one case the offender was convicted on a lesser charge of common assault. (Full details of the research methodology are contained in Eastwood [1998] and will not be repeated here). Despite the desirability of longitudinal research, the complex multi-agency process of accessing participants could not be overcome and as a result, most of the data gathered was retrospective in nature.

The Criminal Justice Process — In their own words...

One of the most significant findings of the study is that half of the young women expressed the view that they would not recommend to other victims that they should report sexual abuse. These complainants expressed strongly that they “went through hell” and “it was not worth it”. Two of the young women have been sexually assaulted since the trial process and refuse to report to police after their previous experience with the courts. These findings reiterate the literature which maintains that only a portion of sexual abuse is reported (Cashmore & Horsky

1987; Whitcomb 1992); and supports the concept that the criminal justice system itself acts as a deterrent to reporting. While some studies appear to indicate that children benefit from disclosure and intervention following sexual abuse (Berliner & Conte 1995), it appears that the involvement of the criminal justice process tends to diminish these benefits. The following discussion presents a summary of the factors identified by the child complainants as causing the greatest difficulty and is supported by the words of the children themselves.

Reporting to Police — In their own words...

This study adds weight to the argument that only a small portion of sexual abuse is reported (Finkelhor 1991, 1994), that reaction to disclosure is a significant factor in reporting, and that young women overcome many physical, emotional and psychological fears in order to disclose the abuse.

I thought by going to police I could stop him from doing it to other girls. (Tracey)

I didn't want to go to the police station... I was scared... it was very hard for me to go there. (Kerin)

While it may be argued that the gender of the investigating officers is irrelevant, and indeed it may be beneficial for the child to deal with a male officer, the preferred choice of the young women for female officers is very clear. No matter how friendly, or caring, the male officer presented, the young women felt humiliated, embarrassed and intimidated at having to discuss intimate details of the assaults with males. The responsiveness of the police in these cases needs to focus on the best interests of the child and beyond resourcing or administrative constraints. As children who have been sexually assaulted, their needs and wants have been contravened or ignored. Wherever possible, police attention to the child's

preference of the gender of investigating officers seems one feasible strategy for meeting the needs of the female child.

I had to go into detail about what happened and stuff, and because it was sexual, I felt really awkward talking to a male. That was why I couldn't tell my Dad because I felt really awkward... So having to tell a male police officer was just horrible... and you had to go into real detail. (Tara)

While all young women found the interview process with police a gruelling procedure, it is interesting to note that where officers allowed some sort of control to the child, the pressure was somewhat alleviated. Police training needs to incorporate strategies for empowering the child and to encourage providing opportunities for them to control certain aspects of the interview process.

They kept telling me I was running the show and if I wanted to stop they would stop... it made me feel in control. (Sarah)

There was also indication that participants found some questions difficult to understand. Questioning appropriate to the age level of the child is important and police need to be informed in the use of relevant language skills.

Sometimes they would say these really long words and I'd be thinking ... what does that mean? (Lyn)

Both parents and children expressed the desire to be kept better informed by police about the progress of the case.

When I tried to ring police, they were never in and they never returned my calls... They kept saying that I must realise that your child is not the only child, until I was ready to scream down the phone that I didn't care less about any other child — she was my concern! (Mother)

I felt left out. I wanted to know details but they wouldn't tell us anything. I wanted to know what was going on, it was really important to me. (Tara)

While limited police resources seems to contribute to this problem, the non-offending parent is often under enormous stress in providing their child with support during the court

process. The frustration of being ignored or uninformed by an investigating officer adds further to the stress placed on the family usually already under pressure, particularly when the alleged offender is a family member.

Initial contact with the criminal justice process for these children was with the police. Characteristic of this stage was a certain naivety. During this early stage, which significantly was prior to any involvement in the court process, these child complainants genuinely believed that all they had to do was tell the truth and the defendant would be pronounced guilty and sentenced to gaol. At this particular point, we found these female children not only relatively naive about the system, but also particularly vulnerable to the attitudes and the information provided by police. Although police may be familiar with the adversarial nature of the courts and the treatment of child witnesses, the child is not. Currently, in some Australian jurisdictions, police who deal with child complainants of sexual abuse are not required to receive training specific to the needs of children. Unless police are trained to provide for the developmental needs of the child, the child may continue to experience considerable harm.

Waiting for Committal and Trial — In their own words...

This study found that complainants waited for 6 to 18 months between committal and trial with an average time of 12 months, which is comparable with other Australian studies (Cashmore & Horsky 1987; Eastwood 1993). The waiting time endured by most complainants prevented the young women from being able to move on with their lives and left many feeling “that it is never going to be over”. At a crucial stage of their emotional, social, and cognitive development, the disruption caused by a stressful twelve-month wait had signifi-

cant consequences on their psychological well-being. The delay also impacted on their ability to be an effective witness and to facilitate the prosecution of the offence/s. When the delay between committal and trial was combined with factors such as adjournments, harassment from alleged offenders, detrimental effects on education, and the need to remember and repeatedly recall details of the abuse, the cost to the child was considerable.

It was really hard because I would get a date to go to court and it would get changed. It was adjourned four times - I got so I didn't believe it was ever going to happen. (Sarah)

It was hard, because he was coming around and giving me death threats at work, saying he was going to kill me for having him charged... he was allowed to walk around as if nothing had happened. I was scared he was going to hurt my friends. (Jo)

Because it took so long, it totally affected my work, it affected my life - because that was the direction my life was... I was just counting down the days till I had to go to court. Everyday I thought about it. (Melanie)

I had nightmares that I would be left in there (in court) by myself... and he would do it to me again. (Kerin)

Strategies to make any significant reduction in the delay appear to have been ineffectual. Although the problem of the wait for trial appears to be partly a procedural one, the problem may be the inability of the justice system to adequately focus on the needs of the female child who has been sexually abused.

The Cross-Examination — In their own words...

The young complainants identified a number of difficulties in the court process including hours and days of waiting in sub-standard witness rooms, lack of support in court, facing the offender or hearing the offender laughing during their testimony, the presence of the jury and other personnel, difficulties with legal language and age appropriate

questioning, the attitudes and behaviour of the judiciary, the corroboration warning, and the verdict and sentencing. However, by far the greatest trauma resulted from the cross-examination experience.

The process of cross-examination is considered the centrepiece of the criminal trial. When the case involves child sexual abuse and the child is the only witness to these offences, successful prosecution can rest almost entirely on the evidence of the child. Brennan and Brennan (1988) maintain that under cross-examination conditions “the child is placed in an adversarial and stressful situation which tests the resilience of even the most resourceful of adults (p. 91)”. All eleven young women who faced cross-examination at trial described the hostile questioning as the worst ordeal of the entire process. The view of defence counsel involved in the study support the adversarial nature of cross-examination and demonstrate it is little wonder that children are traumatised by the process.

It would be considered cowardly not to go for the jugular when cross-examining a child... (defence counsel)

That if in the process of destroying the evidence it is necessary to destroy the child — then so be it. (defence counsel)

In addition, as long as defence barristers display erroneous knowledge about child development and insist that “because the child has the same IQ as an adult, they can largely be treated as an adult” (defence counsel), treatment of the child in courts will continue to be based on ignorance rather than knowledge. Based on this study, it can be strongly argued that all too often this trial centrepiece — the cross-examination — is in itself, child abuse. The following examination of the specific tactics and styles of hostile cross-examination to which the child complainants were subject provides the basis for such a claim.

Nice, then Nasty. A number of young women reported defence barristers who initially presented themselves as smiling, friendly and caring, only later to turn viciously against the girls and accuse them of “wanting it” and of lying. In describing their experiences, it is clear that this tactic fostered trust and encouraged the witnesses to feel safe and secure — for a while. The young women expressed hurt and disappointment when they realised that this was just an act, and their sense of security was shattered when the barrister turned “really nasty”.

At the start he was really sweet... smiling and asking me questions. Then he just went red in the face as if I stuffed up or something... He just turned really nasty — he didn't give me any warning. (Tara)

He was a really two faced man... one minute you think he is nice and the next minute he is saying I wanted it and I couldn't stop crying. (Nicole)

The use of this tactic and its effect on the young witness is also described by a court support person.

... The defence counsel gets up to ask their questions and they start off and they are very friendly... and this child trusts this person and is answering all the questions and thinks they are doing a really good job, and then part way through he will change his tactic... And I believe that is the worst thing — seeing this child destroyed. They are so confused and puzzled that suddenly this person who has been nice and friendly is now accusing them of lying.

This approach is far from harmless. Indeed the process of building up the child's trust and then destroying them is a mirror image of their experiences at the hands of the abuser.

Confuse the Witness. Defence barristers also endeavoured to confuse the young witnesses through a variety of tactics, including repetitive questioning, demanding unrealistic specific times and details, rapid questioning, and repeated interruption to responses offered by the child. The most frequent ploy to confuse the witness was repeated

questioning which usually took the form of “asking the same questions over and over again”.

I was getting tired... it just got really exhausting to have to sit there and repeat myself over and over. (Melanie)

To supplement this tactic, one barrister constantly pretended not to hear the response of the child in order to force them to repeat their answer. One young woman endured two and a half days of cross-examination undergoing the same questions over the same abuse experiences for the third time, before she broke down unable to continue.

After two days of cross-examination I had explained every incident twice. He was going through it a third time. He just kept going through it over and over and over again. He was repeating things all the time... There should be a law against it - they shouldn't be able to question you for that long - two and a half days is beyond a joke. [After vomiting in the witness box a number of times on the afternoon of the third day she could not continue]... I couldn't do it... I couldn't even have done another hour... that is when I withdrew. (Sarah)

The effects of gruelling repeated questioning can be significant in impeaching the credibility of the child witness. Eventually, the young witnesses have difficulty in thinking straight, become bored, exhausted, or completely worn down. As reported by court support workers, repetitive questioning is frequently used to the point where the child is being harassed to such an extent that they will begin to agree with anything. As their concentration wanes, they become more easily confused and in the eyes of the jury, less credible.

Confusion is also engendered in the young witnesses by the use of questioning which demands particulars of time, dates and other details. Many of these questions are impossible for the complainant to answer, as in the case of one child (abused for more than four years) who could not recall when asked, what she was wearing on a

particular date. The inability to answer is then construed as the witness is lying. A defence barrister described his task as “to confuse as to who and what really matters”. It appears this goal of masking the real issue, which is determining if a child has been sexually assaulted, is in direct conflict with the task of law to examine the facts of any matter placed before it in order to discern the truth (Naffine 1990).

Accused of Lying. One of the greatest fears of victims of sexual abuse is the fear of not being believed (Summit 1988). Too often, the abuser maintains the child's silence by claiming the child will not be believed. For many young women, their worst fears are realised and they may be accused of lying or even held responsible by family and friends (Barringer 1992). When the disbelief is distinctly and callously verbalised in the courtroom, the child is left feeling as if they are the ones who are on trial.

He [the defence barrister] yelled at me and called me a liar... I just wanted to get up and throw something at him, but I couldn't. He made me feel like I had done something wrong, or maybe it was my fault. (Melanie)

He was calling me a liar all the whole time... he just kept asking all sorts of questions and you would say something... but it was like no-one believed you. (Susan)

All participants reported being upset and angry when directly accused of lying on many occasions during cross-examination. The effect on the young women was psychologically destructive (Summit 1988). They describe feeling as though the abuse was their fault, that they had done something wrong, and most importantly, “like no-one believed you”. Failure of judges or prosecutors to intervene was also interpreted by the young women as belief that other adults also believed they were lying. In view of the legislation and professional guidelines surrounding cross-examination there is ample basis for prohibiting this kind of intimidatory cross-examination.

Sexual History. In prescribed sexual offences such as rape and attempted rape, the sexual history of the complainant is only admissible if leave is granted from the court (Rule 4 of the *Criminal Law (Sexual Offences) Act 1978* (Qld)). However, limitations to the application of this rule mean that sexual offences against children are not covered. Representing a serious inconsistency, complainants of child sexual abuse (up to 18 years of age) can be subject to questions about their sexual history in order to impeach the credibility of the witness.

The young complainants indicated there are two methods used to include sexual history of the complainant in the testimony of the young women. A number of young women reported direct questioning concerning matters of sexual history.

...he made me out to be the biggest slut and asked me all these questions about different people I had been with and how many boyfriends I had had. I had to tell him but I didn't think it was of any relevance to it. (Jo)

He said to me, "you have had a few boyfriends in the past haven't you". And I said "yes". And he asked me how many of those I had slept with. (Tracey).

The second, more subtle method of implying "promiscuous" sexual history was reported by other complainants and all court workers which resulted in some children saying "the jury must think I am a slut". This type of questioning implied sexually inappropriate behaviour and was often more difficult for the witness to deal with because it relied more on insinuations, sniggering, and rhetorical comments made during cross-examination.

Unfortunately the desired effect was too often achieved by defence counsel. While the sexual history of the young women clearly had no bearing on the charge of sexual abuse, it undoubtedly served to discredit the young women in the eyes of the jury. Such an approach also feeds societal misconceptions of female

sexuality, that is, that women behave in a manner as to incite the assault and are therefore to blame for the abuse (Edwards 1987). The protection offered by the legislation must be applied to all sexual offences — particularly to those involving adolescent complainants of child sexual abuse. The indignity suffered by the young women who were subject to cross-examination about their sexual history only served further to humiliate and degrade them, and to highlight the particular difficulties of intersecting with the justice system as a female child who has been sexually assaulted (A theoretical model of these intersecting identities presented in Eastwood 1998, and Eastwood, Patton & Stacy 1998). However, this inconsistency also raises the issue of victim abuse which occurs in the courts in relation to sexual history, and the ability of the justice system to operate effectively being seriously compromised by the inconsistent nature of this ruling.

"You wanted it". The myths concerning the sexual assault of women are no more effectively revealed than in the experiences of young complainants who were told they "wanted it".

He was starting to make me cry and everything... he started saying "I wanted it", and that is when I started getting an asthma attack. (Nicole)

He kept saying "You wanted to have sex with him"... I got to the point where I was just crying and crying... and I thought I am sick of this, he is just degrading me. (Tara)

The fact that this type of cross-examination is even permitted calls into serious question the understanding of legal personnel of the dynamics of sexual abuse and also demonstrates that age and developmental considerations of the child complainant are ignored. It is indeed an indictment against the criminal justice system that when the female child has been sexually assaulted, instead of the system recognising the abhorrent nature of their experiences, they

are only told that they "wanted it".

Although the issue of consent is irrelevant in cases of child sexual abuse, this tactic deems the child insufficiently adult to tell the truth, but sufficiently adult to consent to sexual activity. This paradox is quite unfair and represents another area of inconsistency.

Irrelevant Questioning. The issue of what is deemed relevant questioning is a difficult one. More than half of participants reported questioning which elicited information they considered totally irrelevant to the abuse experience, and questioning specifically intended to upset the witness. We found one participant was questioned concerning her mother's schizophrenia and subsequently told that her mother had put the abuse into her head, and another child was asked if she knew that she was illegitimate. Surely the scope of cross-examination must be limited to ensure that questions which clearly upset the child are not permitted. It would seem that the *Evidence Act 1977* (Qld) provides for the exclusion of such questioning. A court may disallow a question which, in the opinion of the court, is indecent or scandalous unless the question relates to a fact in issue in the proceeding or to matters necessary to be known in order to determine whether or not the facts in issue existed (s21).

The Follow-Up — In their own words...

Approximately six months after trial, we found the young women feeling anger, frustration and disappointment at their treatment. Issues still of concern include the verdict, the lack of family support, the desire to see changes in the justice system, and the process of healing from the trauma they have suffered, both from the sexual abuse and from the justice process.

I'm finding it hard to fit back in and get on with my life sometimes.

Sometimes I feel like a failure because I couldn't go all the way [with my evidence], but I'm slowly getting on with things trying to fit in again. I let so much go while I was waiting to go to court, that now it's too late to pick everything back up. I go to counselling once a week, which is good I suppose... there's a lot of stress... (Sarah)

Conclusion

The United Nations Convention on the Rights of the Child (1989) requires that under State and Territory Laws, the Commonwealth Government

take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child... (Article 19).

In Australia, the justice system has not adequately addressed this requirement of the Charter. Many of the changes to evidentiary laws and procedures for giving evidence remain haphazard measures which do not operate in all jurisdictions, nor apply to all children. More specifically, this study found that when a female child who has been sexually abused becomes involved with the justice system, the courts become the lawfully sanctioned contexts in which the child is further abused. Despite provision within both professional guidelines (Australian Bar Association 1992, Rule 6.1) and the *Evidence Act 1994* (Cth) s41 for the prevention of "unduly annoying, harassing, intimidating, offensive, oppressive or repetitive" questioning, as well as cognisance of relevant witness characteristics such as age, the process of cross-examination appears to ignore the developmental and psychological needs of the young victims of sexual assault and cause further trauma for the child.

Future studies in this area which employ a qualitative

longitudinal research design would be informative. Such analysis would provide a better understanding of the precise effects of court processes and contribute to knowledge of the long-term effects of the justice process on both female and male child complainants of sexual abuse. However, for this to occur, a number of difficulties will need to be overcome. This will include the need for interagency and bureaucratic cooperation as well as willingness on the part of legal personnel to be open and accountable. Given the manner in which the criminal justice system sets itself apart, this will be no easy task.

This study investigated significant procedures in the criminal justice process which impact upon female child complainants of sexual abuse, as well as the range of consequences of their involvement. The words of one thirteen-year-old girl are indicative of the manner in which the legal process abuses these children and denies them the care and support to which every child is entitled.

...it still feels like I am in the courtroom letting people judge and humiliate me... I s'pose life's like that... (Sarah)

In their struggle to seek justice, these young women have not only survived childhood sexual abuse, but also have survived the abuse of the criminal justice system.

References

- Australian Law Reform Commission 1997, *Seen and heard: Priority for children in the legal process*. Report No. 84. September, AGPS, Canberra.
- Barringer, C. 1992, "Speaking of incest: It's not enough to say the word", *Feminism and Psychology*, vol. 2, pp. 183-8.
- Berliner, L. & Conte, J. 1995, "The effects of disclosure and intervention on sexually abused children", *Child Abuse and Neglect*, vol. 19, pp. 371-84.
- Brennan, J. & Brennan, R. 1988, *Strange language*, Riverina Literacy Centre, Wagga Wagga.
- Cashmore, J. 1995, "The prosecution of child sexual assault: A survey of NSW DPP solicitors", *The Australian and New Zealand Journal of Criminology*, vol. 28, pp. 32-54.
- Cashmore, J. & Horsky, M. 1988, "The prosecution of child sexual assault", *Australian and New Zealand Journal of Criminology*, vol. 21, pp. 241-52.
- Eastwood, C. 1998, *Surviving child sexual abuse and the criminal justice system: Young women seeking justice*, Doctoral Thesis, Queensland University of Technology, Brisbane.
- Eastwood, C. 1993, "Child Sexual Abuse: The role of the family, the legal system, and other support structures in moderating the consequences of the abuse", Masters Thesis, Queensland University of Technology, Brisbane.
- Eastwood, C., Patton, W., & Stacy, H. 1998, *Surviving child sexual abuse and the criminal justice system: Intersecting identities*. Paper presented to the ANZSOC international conference, July, Gold Coast.
- Edwards, S. 1987, *Female Sexuality and the Law*, Martin Robertson, Oxford.
- Finkelhor, D. 1991, "The scope of the problem", in *Intervening in child sexual abuse*, eds K. Murray & D. Gough, Scottish Academic Press, Edinburgh, pp. 9-17.
- _____. 1994, "The international epidemiology of child sexual abuse", *Child Abuse and Neglect*, vol. 18, pp. 409-17.
- Heath, I. 1985, *Incest*, Director of Public Prosecutions, Melbourne.
- Naffine, N. 1990, *Law and the Sexes*, Allen & Unwin, Sydney.
- Scutt, J. 1990, "Confronting precedent and prejudice: Child sexual abuse in the courts" in *Understanding and managing child sexual abuse*, ed. K. Oates, Harcourt Brace, Sydney, pp. 312-41.
- _____. 1991, "Law reform and child sexual abuse in Australia" in *Incest and the community: Australian perspectives*, ed. P. Hetherington, University of Western Australia, Perth, pp. 117-38.
- Smart, C. 1989, *Feminism and the power of law*, Routledge, London.
- Summit, R. 1988, "Hidden victims, hidden pain: Society's avoidance of child sexual abuse", in *Lasting Effects of child sexual abuse*, eds G. Wyatt & G. Powell, Sage Publications, Newbury Park, CA, pp. 39-60.
- Whitcomb, D. 1992, *When the victim is a child*, National Institute of Justice, US Department of Justice.

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