

**Paedophilia
Policy
and
Prevention**



**Australian Institute of Criminology
Research and Public Policy Series
No. 12**

*edited by
Marianne James*

Paedophilia: Policy and Prevention

**Australian Institute of Criminology
Research and Public Policy Series**

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Ms Marianne James is a Research Analyst at the Australian Institute of Criminology in Canberra. She has extensive research experience in all areas of family violence. Her research experience has included: crime and older people, the prevention of child abuse and neglect, violence against women and paedophilia. Currently, she is responsible for the National Homicide Monitoring Program. Previous experience includes employment at the University of London, the Parliamentary Library and the High Court.

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Kylie Miller

Ms Kylie Miller is a Senior Analyst in the Strategic Intelligence Unit of the National Crime Authority, a position she has held since 1993. Ms Miller has undergraduate and postgraduate qualifications in Psychology (Bsc and MA) and is currently studying for a Masters of Criminology. She has held research positions within the Department of Corrective Services, UK Leicestershire Constabulary, NSW Homecare

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John Nicholson

Mr John Nicholson SC came to the NSW bar in 1977 after a career in teaching and in the industrial union of teachers from independent schools. For seven years he practised principally in criminal and common law. In 1984, he was appointed a Public Defender. Mr Nicholson took silk in November 1994. In 1996, he was appointed the Deputy Senior Public Defender. His practice is primarily Supreme Court trials and pleas, and arguing appeals before the Court of Criminal Appeal.

Chris Puplick

Mr Chris Puplick is President of the NSW Anti-Discrimination Board and Chair of the Privacy Committee of NSW. He is also President of the Australian National Council on AIDS and Related Diseases; the AIDS Trust of Australia and the Central Sydney Area Health Service. He served as a Senator for NSW from 1978 to 1981 and from 1984 to 1990, including a period as a member of the Shadow Cabinet.

Patrick Tidmarsh

Mr Patrick Tidmarsh is the coordinator of the MAPPS (Male Adolescent Program for Positive Sexuality) program, run by Juvenile Justice, Victoria. MAPPS is responsible for assessment and treatment of all adolescent sexual offenders on Juvenile Justice orders in Victoria. The program has been running for four years and includes a new sister program in Gippsland, South East Victoria. Juvenile Justice also funds a lower tariff adolescent sexual offender program run by the Children's Protection Society.

Mr Tidmarsh has been working with offenders for ten years, and exclusively with sexual offenders for the last seven years. Before moving to Melbourne he worked at the Gracewell Clinic in the UK, then the only community residential facility for adult sexual offenders in Europe. Mr Tidmarsh was also a founder member and Project Director of the Geese Theatre Company, a group specialising in theatre and drama therapy work for prison and probation.

Frank Vincent

Justice Frank Vincent graduated in law from the University of Melbourne in 1959 and was admitted to practise as a barrister and solicitor of the Supreme Court of Victoria in 1960. After signing the Roll of Counsel in 1961, he practised as a barrister in the areas of criminal law and general common law work until 1974. At this time, he commenced employment with the Victorian Aboriginal Legal Aid Service and later with the Central Australian Aboriginal Legal Aid Service. Justice Vincent resumed practice as a barrister in 1975 and was appointed one of Her Majesty's Counsel in 1980. In April 1985, Justice Vincent was appointed to the Supreme Court of Victoria. In the same year he was appointed as Deputy Chairperson of the Victorian Adult Parole Board. In 1987, he became the Chairperson of this Board, a position he still holds today. Justice Vincent is also currently the Chairperson of the Monash University Graduate Studies Advisory Committee and Chairperson of the Board of Management of the Victorian Offenders Support Agency in Melbourne (a Post-Release Service). He is a lecturer in the Monash University Post-Graduate Program on Contemporary Problems in the Administration of Criminal Justice and a committee member of the Victorian Chapter of the Australian Academy of Forensic Science.

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Mr Nigel Waters has been Head of the Privacy Branch within the Human Rights and Equal Opportunity Commission since 1989. He is responsible for implementing the work program of the Federal Privacy Commissioner under the Privacy Act 1988 and other legislation and also for advising the Commissioner. From 1984 to 1989, Mr Waters was Assistant Data Protection Registrar for the United Kingdom, where he was responsible for major policy areas involving central and local government and the private sector, as well as for Registrar's advertising, publications and training activities. In 1994-95, Mr Waters was seconded to the Administrative Review Council where he undertook a review of the Commonwealth government's system of Merits Review Tribunals for appeals against administrative decisions.

Mr Waters' previous work experience includes planning, economic and management consultancy. He holds Masters degrees from the University of Cambridge and the University of Pennsylvania.

Foreword

ADAM GRAYCAR

The debate surrounding the issue of paedophilia has continued in the wake of the Royal Commission into the NSW Police Service and its special report on paedophilia. Is paedophilia an illness which can be treated? Can offenders be rehabilitated? How can we prevent child sexual abuse? How can we protect young children? We are facing issues of criminality, trust and well-being. They are powerful issues that strike at the well-being of the young and the vulnerable, and therefore at the well-being of the community as a whole.

An important part of the work of the Australian Institute of Criminology is to conduct research and provide information which informs public policy. Accordingly, the Institute convened a conference in April 1997 to highlight current research and discuss these important issues.

This publication in the Research and Public Policy series brings together the different perspectives of the various professions involved: health; criminal justice; legal; welfare; and service providers. It forms the basis of a balanced approach to the formulation of public policy concerning this highly emotive, but fundamental issue in society today.

Canberra

16 September 1997



Introduction

MARIANNE JAMES

In the last few years, both in Australia and in other parts of the world, a very emotional public debate on paedophilia has emerged. In Australia, this has largely been a result of the publicity surrounding the Wood Royal Commission into the NSW Police Service which, during the final two years of its inquiry, focused almost exclusively on issues concerned with paedophilia. The preliminary findings of the Royal Commission were published in June 1997 with an additional report on paedophilia published in August 1997. In Belgium in September 1996, there was an unprecedented public display of outrage after the arrest of a child molester who was responsible for the disappearance of several young girls. In the United States, on 17 May 1996, President Clinton signed legislation, commonly referred to as “Megan’s law”. This requires that people be informed when sex offenders move into their neighbourhood.

In response to these growing national and international concerns, the Australian Institute of Criminology convened a conference on 14 and 15 April 1997 at the University of Sydney to discuss policy and prevention issues surrounding paedophilia. This conference was well attended by academics, health and welfare professionals, lawyers, policy makers, police and people from Commonwealth, State and local government agencies. The specific aim of the conference was to explore various interpretations of paedophilia, to provide a forum for professionals (from all relevant disciplines) to inform their practice and to generate ideas that could also inform policy. Papers presented at the conference covered the areas of: detection and reporting; investigation, prosecution and defence; public education; treating offenders; and implications for civil liberties.

Issues surrounding paedophilia are, however, extremely complex. In many ways the term paedophilia is a misnomer. The term itself can be emotive and misleading. Paedophilia is not, as the media would lead us to believe, usually committed by strangers who randomly molest children with whom they have had no previous contact. Conversely, their victims are more likely to be boys or girls with whom they have forged a social acquaintance. Paedophiles are, in the main, sex offenders who can be neighbours and relatives, social workers, child care workers and teachers, church leaders, politicians, judges and doctors. They may be well educated or not; rich or poor; married or unmarried; employed or unemployed. Paedophile offenders are not easily recognised — they look and, in public, behave the same way as everyone else; they are found in every suburb, organisation and walk of life; some are married and have sex with their partners and/or other adults as well as with children; other paedophiles gain satisfaction only from sexual contacts with children. Research does, however, indicate that the vast majority of offenders are male, a significant number of whom are adolescent.

Paedophilia is therefore part of an intricate web of deviant behaviour which is specifically directed towards the sexual abuse of children. The sexual abuse of children, in turn, is one element of child abuse which also includes physical and emotional abuse. All forms of child abuse

can result in later social problems such as youth homelessness, childhood prostitution, juvenile offending, mental health problems, drug and alcohol abuse and the inability to form relationships. Its antecedents include the attitudes of our society to children, to sex and to violence, as well as the effects of childhood experiences.

With the increased public awareness of the issues surrounding paedophilia, it is timely that policy in this area be structured in a careful and considered manner so that this behaviour is prevented and children protected. This needs to incorporate an approach which integrates and coordinates the specific aims and objectives of all concerned agencies such as the police, courts, lawyers and social workers as well as education and other relevant government departments. The integration of programs and activities at State, Territory and local government level would reduce the possibility of gaps in any prevention program and also help to clarify specific roles and responsibilities. Ideally, this should be coordinated at Federal Government level to ensure the implementation of best practice models based on minimum standards.

Preventing child sexual abuse involves changing those individual and community attitudes and beliefs, behaviours and circumstances which allow the abuse to occur. In the first instance, well-developed primary prevention strategies which aim to prevent the sexual abuse of children from occurring at all are essential. These strategies should be directed at both children and adults by including such components as prolonged mass media advertising, education through the publication of educative materials and personal safety programs for children. Children from pre-school age can be taught that sexual abuse is not acceptable behaviour. These programs should be extended into adolescence in the form of raising self-esteem. Then, secondary prevention programs which target specific sections of the population considered to be more at risk and in greater need of support are required. By understanding complex family environments, it is possible to formulate prevention programs for families who may have special needs; for example, people living in rural and remote areas, Aboriginal and Torres Strait Islander peoples, those who are physically and intellectually disabled and those

from non-English speaking backgrounds. Because research indicates strong links between child abuse and later social problems, intervening before the abuse occurs can save millions of dollars in service provision for the victims of child sexual abuse.

Tertiary prevention programs are also needed. These refer to interventions which help those who have already been abused and also help to rehabilitate the offenders. As resources in this important area are constantly shrinking, there has been some controversy surrounding the treatment of sex offenders and thereby diverting funds which could be used to support victims. Indeed, as society becomes more focused on the problem of child molesters, the demand for longer terms of incarceration as a solution to the problem has escalated. However, the fact is that these sex offenders will be released from prison one day and returned to the community and that community needs to be protected. These offenders will continue to present a risk of re-offending unless they somehow come to understand their behaviour. Treatment must be a coordinated effort which includes the clinical components as well as the supervision and casework services provided by social workers, institutional staff as well as legal officers and court officials. It should include services for both adult and juvenile offenders both incarcerated and outpatient.

Sentencing, while reflecting the serious nature of the offence, should take into account the time required for treatment. For this to be properly monitored, there needs to be special conditions for parole with the use of especially trained staff for monitoring. All members of the legal profession and the judiciary should be made aware of the consequences of all aspects of child sexual abuse. There should also be special training for investigating police, rapid prosecutions to reduce victim trauma for child victims and videotaping of victim interviews. In the

United States, the Supreme Court recently held in *Hendricks v Kansas* (1997) that sex offenders who continue to be a threat can be the subject of involuntary civil commitment in the mental health system even after they have served their prison sentences.

Similarly, every institution owes a duty of care to those for whom it is responsible. This is especially important when the clients of an institution, whether, state, church or private enterprise, are children. Systems of oversight and accountability should be developed within institutions to prevent the abuse of children in their care. Breaches of the duty owed by an institution to its charges should entail civil and criminal liability, as appropriate. Guidelines for the selection of staff to care for young children and a system of tracking convicted offenders should be put into place. Consistent mandatory reporting legislation should also be introduced in all States and Territories throughout Australia.

This publication in the Australian Institute of Criminology's Research and Public Policy Series reproduces a cross-section of some of the papers delivered at the conference. By drawing together different perspectives from health professionals, criminal justice professionals, legal professionals, welfare professionals and service providers, as well as the implications for the civil liberties of the offender, it is hoped that this balanced approach will contribute to the practical formulation of policy.

Reference

Royal Commission into the NSW Police Service 1997,
*Royal Commission into the NSW Police Service
Final Report*, (Commissioner J.R.T. Wood),
Royal Commission into the NSW Police Service,
Sydney.

1



Paedophilia: The Public Health Problem of the Decade

BILL GLASER

Imagine a society afflicted by a scourge which struck down a quarter of its daughters and up to one in eight of its sons. Imagine also that this plague, while not immediately fatal, lurked in the bodies and minds of these young children for decades, making them up to sixteen times more likely to experience its disastrous long-term effects. Finally, imagine the nature of these effects: life-threatening starvation, suicide, persistent nightmares, drug and alcohol abuse and a whole host of intractable psychiatric disorders requiring life-long treatment. What should that society's response be?

The scourge that we are speaking of is child sexual abuse. It has accounted for probably more misery and suffering than any of the great plagues of history, including the bubonic plague, tuberculosis and syphilis. Its effects are certainly more devastating and widespread than those of the modern-day epidemics which currently take up so much community attention and resources: motor vehicle accidents, heart disease and, now, AIDS. Yet the public response to child sexual abuse, even now, is fragmented, poorly coordinated and generally ill-informed. Its victims have no National AIDS Council to advise governments on policy and research issues. They have no National Heart Foundation to promote public education as to the risks of smoking and unhealthy lifestyles. They do not have a Transport Accident Commission to provide comprehensive treatment and rehabilitation services for them.

A massive public health problem like child sexual abuse demands a massive societal response. This conference is hopefully about formulating such a response. But firstly, we need to acknowledge and understand the problem itself, and this is, sadly enough, a task which both professionals and the community have been reluctant to undertake, despite the glaringly obvious evidence in front of us.

How have we responded until now?

Until very recently, our professional ignorance regarding child sexual abuse was profound. Yet the data we needed has never been hard to find. Early nineteenth-century Londoners were well aware that in three of the city's hospitals during eight years there had been 2700 cases of venereal disease among girls aged between eleven and sixteen years (Pearsall 1981). In the 1890s, "minors" constituted over half of the prostitutes in Vienna and Paris (Rush 1980). A parliamentary committee in New South Wales, reporting between 1859 and 1860, found evidence that girls as young as seven were being prostituted in Sydney (Finch 1991).

Furthermore, there was extensive knowledge about the identity of the abusers, the nature of the abuse and the effects of this upon a vulnerable child. In a remarkably prescient paper given in 1896, no less a figure than Sigmund Freud addressed all of these issues. The most "numerous" of his eighteen cases of "pure hysteria and of hysteria combined with obsessions" resulted from abuse by an adult, including, "all too often, a close relative". There was no doubt in Freud's mind that the relationship was exploitative;

...on the one hand the adult who cannot escape his share in the mutual dependence necessarily entailed by a sexual relationship, and who is yet armed with

complete authority and the right to punish, and can exchange the one role for the other to the uninhibited satisfaction of his moods, and on the other hand the child, who in his helplessness is at the mercy of this arbitrary will, who is prematurely aroused to every kind of sensibility and exposure to every sort of disappointment and whose performance of the sexual activities assigned to him is often interrupted by his imperfect control of his nature needs — all these grotesque and yet tragic incongruities reveal themselves as stamped upon the later development of the individual and of his neurosis, in countless permanent effects... (Freud 1896, reprinted in Masson 1985).

Even the great sexologist, Krafft-Ebing, who labelled Freud's observations a "fairy-tale", nonetheless was well aware of the dangerousness and deviousness of child molesters. In his book on sexual perversions, which ran to twelve German editions alone and was widely translated, he pointed out the "inexhaustible" range of types of sexual assault committed by child molesters and also emphasised that, despite the "monstrosity" of their deeds, many abusers were "psychically normal" (Krafft-Ebing 1965, page 370).

Less than nine years after his initial observations, however, Freud had retracted them. In 1905, he admitted that he "overestimated" the frequency of childhood sexual abuse and placed a "higher value" than was necessary, on its effect on later development. Ten years later, the retraction had gone further and he was able to state that if a victim's "father figures fairly regularly as the seducer, there can be no doubt either of the imaginary nature of the accusation, or of the motive that has led to it". Indeed, there was no great difference in the consequences of the victim's memories "whether fantasy or reality has had the greater share in these events of childhood". (Freud 1905, 1915).

The effects of extra-familial child sexual abuse were similarly downplayed or ignored. A text book which was recommended reading for medical students as recently as twenty years ago declared that:

... various authorities who have examined children who have been seduced have concluded that the emotional as opposed to the physical

damage which is done to children is more the result of adult horror than of anything intrinsically dreadful in the sexual contact itself (Storr 1974, p. 105).

The same author stated that sexual intercourse in paedophilic activities was "extremely rare" and that they occurred "not from a superfluity of lust, but rather because of a timid inability to make contact with contemporaries" (Storr 1974, pp. 100, 102).

In many cases, professionals often resorted to victim-blaming in order to explain the laying of criminal charges against an apparently respectable member of society. Writing only thirty years ago, a prominent Sydney psychiatrist expressed his indignation regarding

... a powdered and painted thirteen year old who looked at least eighteen and haunted low class hotels or picked up drunks and offered them her favours for a small reward; or the garage man who was visited by a ten year old eleven times for sexual purposes before she decided the recompense was inadequate and informed the police; ... these can hardly be called examples of seduction of the innocent (McGeorge 1966).

Our response to child sexual abuse over the last century, therefore, has been largely that of denial. If we do not deny the offences, then we refuse to recognise the victims. If we do not deny that there are victims, then we refuse to recognise their suffering. The reasons for this state of affairs are complex and arise from a combination of entrenched patriarchal values, child (and woman) hatred disguised as pseudo-science and misguided "sexual liberationism" (Rush 1980; Masson 1985). However, the denial cannot continue. We must now not only define the problem but define paedophilia as a problem in order to deal with it effectively.

What is paedophilia?

Given this deliberate and widespread ignorance, it is not surprising that misleading stereotypes of child sexual abuse still prevail. The term "paedophilia" unfortunately has two grossly misleading connotations. Firstly, despite the implications of its Greek

etymology, paedophilia is not a love of children but a lust for them. The sole aim of the paedophile is to sexually abuse children. Any display of care, affection or friendship towards the victim is always secondary to this.

The second problem with the term “paedophilia” is that it is associated with crude caricatures which are often fostered by paedophiles themselves. “I don’t pounce on small children in public parks, I don’t play around with choir boys and I don’t kidnap babies in prams; therefore I can’t be a paedophile,” they might say. Their partners and friends, and the general community willingly accept these protestations, without realising that there is no such thing as the typical paedophile and that paedophilic behaviours can occur in virtually any sort of circumstance.

For these reasons, the terms “child sexual abuse”, or even better, “child sexual assault”, are preferable. Nevertheless, the word “paedophilia” is used widely and there should be agreement on an appropriate definition. The one that I would suggest is that given by the fourth edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*. There, the diagnostic criteria for paedophilia are:

A. Over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges or behaviours involving sexual activity with a prepubescent child or children (generally aged thirteen years or younger).

B. The fantasies, sexual urges or behaviours cause clinically significant distress or impairment in social, occupational or other important areas of functioning.

C. The person is at least sixteen years and at least five years older than the child or children in criteria A.

There are exclusionary criteria for relationships between older teenagers and under-aged partners and one can specify the sex of the preferred victim, whether the relationship is incestuous or not and whether the perpetrator is solely attracted to children or not.

This definition is not entirely satisfactory. Its major drawback is that it implies that paedophiles are psychiatrically abnormal in some way, whereas this is nearly always not the case. Its advantages, however, are that it stresses that paedophilic

fantasies and behaviours are rarely one-off events, that the central motivator for paedophiles is always that of deviant sexual interest and that the paedophile is the cause of his own problems. This last point is very important: it is the paedophile’s sexual deviance which has to be dealt with, not family dysfunction or victim seductiveness or any one of a range of explanations for child sexual assault which have been postulated in the professional literature throughout the years.

Who are paedophiles?

As recent events in Australia have shown, they can be anyone. They can be politicians, priests, diplomats, football heroes, financial advisers, teachers, social workers, doctors and judges (James 1996). There have been a number of attempts to try and delineate the characteristics of paedophiles and to separate them out into sub-groups (*see*, for example, Knight 1988; Knight & Prentky 1990) but these are marred by their ignorance of “normal” male sexual behaviour and by their skewed selection of subjects for study (usually imprisoned offenders). A number of surveys have shown that the majority of “normal” men fantasise about sexually initiating a young girl; between 4 and 17 per cent acknowledge that they have molested a child. Tertiary students in both the US and Australia self-report a wide range of deviant fantasies and activities including voyeurism, obscene telephone calls, sex with animals, rape and child abuse (Crepault & Couture 1980; Finkelhor & Lewis 1988; Malamuth 1988; McConaghy & Zamir 1992a, 1992b). It is thus likely that (for example) the poor social skills said to characterise paedophiles are probably more an indicator of why they get caught, rather than why they offend. “Socially skilled” paedophiles are better at intimidating their victims or seeking them offshore in Thailand or the Philippines (O’Grady 1992).

Most child sex abusers start young; the median age of onset for same-sex paedophilic offenders is around seventeen years (Abel et

al. 1988). Clearly this has important implications for treatment and prevention programs (Vizard et al. 1996).

About the only generalisation that can be safely made about paedophiles is that most of them are males. Female child abusers do exist but most studies emphasise a picture of a woman who is suffering major social and economic disadvantages, psychiatric illness or intellectual disability and domination by a male partner who is the primary offender (O'Connor 1987; Faller 1987; Johnson & Schrier 1987).

Who are their victims?

Conservative estimates, using carefully designed random surveys of non-clinical community populations, have consistently shown that one in four women and one in eight men will have been subjected as children (*see* the summary in Salter 1988, ch. 1) to unwanted sexual touching, fondling, assaults or even rape, in North American communities. For women victims, these figures have now been verified by similar careful studies performed in New Zealand (Romans et al. 1996) and Australia (Fleming 1997). In the Australian study, the majority of women victims experienced "contact" abuse, 27 per cent of which involved actual or attempted vaginal or anal intercourse. Most abuse occurred before age twelve and the mean age at the first episode of abuse was ten years. The vast majority of the abusers were relatives (particularly fathers and stepfathers) or male family acquaintances.

This predominance of offenders who are known to the victim is important. Traditional stereotypes have provided a model of the "incestuous" family which seems to exculpate the offender — he has to cope with a passive "colluding" mother and a pseudo-mature "seductive" daughter (Cole 1992). However, there is no empirical evidence to support this explanation; in one survey, 66 per cent of one hundred and ninety-nine incest offenders had victimised non-family members (Abel et al. 1988). An incest offender is simply a paedophile who sometimes abuses his own children or young relatives. (It is a pity that most clinicians have little knowledge of criminological ideas — opportunity theory provides a better explanation of incest than family dysfunction ever did!)

While it has been thought until recently that the majority of child sexual abuse victims are female, it is now becoming increasingly obvious that a substantial minority, up to forty-five per cent, are

boys (Watkins & Bentovim 1992). Boys appear to be especially susceptible to offenders with multiple victims; incarcerated offenders themselves report that 62 per cent of their child victim contacts are with boys (Abel & Osborn 1992).

It is frightening to realise that children form the majority of the victims in *all* forms of sexual crime. During 1993-94 in Victoria, 62 per cent of sexual assault victims were aged less than seventeen years; 44 per cent were aged less than fourteen years (Victoria Police, quoted in Parliament of Victoria, 1995). Not only do sex offenders selectively victimise children, they also exploit the most vulnerable in an already vulnerable group: as recent experiences in Australia sadly demonstrate, child sexual abusers wreak the most havoc amongst children in institutional care, those from disrupted families and children with intellectual or other disabilities (*see*, for example, Hayes 1993).

What do paedophiles do?

It has taken us a long time to learn that perpetrators of child sexual abuse rarely commit only a single act with a single victim or a single type of abuse. Most offenders have multiple victims, often both boys and girls. Most offenders are long-term recidivists. The oldest offenders in the clinic where I consult are in their eighties; they are all paedophiles. Correspondingly, sex offenders always form the oldest group in prison populations both in Australia and overseas: burglars, car thieves and brawlers all appear to give up their criminal careers in their thirties, but paedophiles just keep on offending (Parliament of Victoria 1995, ch. 6).

The harm caused by child sexual abuse is immeasurable. As we have seen, for a large number of victims, there are the consequences of brutal and forced sexual penetration including bruising, tears to the perineal area, venereal disease and other infections and urinary tract problems. Immediate psychiatric concerns include a wide variety of behavioural

and emotional problems, such as sleep disturbance, nightmares, compulsive masturbation, precocious sex play, disturbed relationships with peer groups and parents and regression of behaviour such as loss of toilet training skills.

Hopefully, these problems can be dealt with as soon as they are discovered. More problematic, however, are the long-term effects of abuse. Using fairly conservative definitions of “disorder”, a comprehensive New Zealand study of randomly-selected community participants found that the rate of current psychiatric disorder in women reporting childhood sexual abuse was three times that of a non-abused control group (Mullen et al. 1993). Psychiatric and social problems can take virtually any form including depression, anorexia nervosa, substance abuse, multiple personality disorder, suicide attempts, sexual difficulties, general relationship problems and difficulties in acquiring appropriate parenting skills. There may also be long-term physical problems such as chronic pelvic pain and irritable bowel disorder. There is now incontrovertible evidence of a firm link between childhood sexual assault and the development of many of these problems in later life, even after factors such as social disadvantage, family dysfunction and other forms of abuse are taken into account (Finkelhor & Brown 1988; Asher 1988; Conte & Berliner 1988; Oats 1990; Jakobson & Herald 1990; Bifulco et al 1991; Mullen et al. 1993; Fry 1993).

Why do paedophiles do what they do?

Although this is a question often asked by courts, governments and community agencies, it is one which is least likely to receive, or need, an answer. Various theories suggest specific biological, social, developmental and psychological factors, or a combination of any or all of them (*see*, for example, Marshall 1989). It is doubtful whether an ultimate “cause” for paedophilia will be discovered; this is regrettable but, pragmatically speaking, it is not necessary. As will be described later, there are already effective ways of dealing with the problem which only require appropriate resourcing and coordination to achieve a massive decrease in the number of current and potential victims.

From the point of view of the therapist, it is positively dangerous to ask an offender to contemplate why he has offended. Such questions inevitably produce a long list of excuses for his behaviour rather than any effective plans to do something about it (Glaser 1996).

How do paedophiles do what they do?

By contrast, this is a question which is least often asked by courts, governments, community agencies and other decision-makers. It is difficult for most people to understand that a paedophile’s offending activities are only the end-stage of a long and complex process often called “grooming”, which begin with the nurturing of deviant fantasies, proceeds through the long-term planning and rehearsal of the abuse and culminates in a complex relationship that, for the child, is both exploitative and loving, cruel and kind, perverted and normal, all at the same time. When a barrister interrogates a victim in court as to why they repeatedly returned to an offender’s house, why they invited him to their wedding, why they continued sexual activity with him, despite their disgust, shame and humiliation, they are often unable to answer. This is no reflection on the victim’s credibility, rather, it is a tribute to the paedophile’s deviousness and his ability to convince both himself and his victims that black is white and white is black.

The hallmark of child sexual abuse is the use of denial, not only by the offender but by his friends, his family, his employers, therapists, criminal justice personnel, the media and the wider community. That denial can occur at many levels: denial of the behaviour itself (“it didn’t happen”), denial of responsibility for it (“it was the grog”), denial of the harm caused to the victim (“she never complained”) or denial of the need for interventions (“I will never do it again”) (Salter 1988). This, combined with the bribery, threats and intimidation practised by all paedophiles, not only secures the compliance of the victim but makes them poor witnesses of the truth.

It has often been said that paedophiles tend to be “good with children”. That is

precisely what makes them so dangerous; this “goodness” is difficult to differentiate from (say) “good” parenting. One has to talk with many victims at length to realise how insidious and how overwhelming has been the influence of an offender on all aspects of their lives. One must listen to the woman who continues to mourn her deceased abuser, because she had always been his “special” child after he commenced sexual intercourse with her at the age of eight and her sisters refused him. One must see the young man who was praised as being one of the “good lads” by his sporting coach whenever he indecently assaulted him and who is now bewildered and angry because the offender has suddenly lost interest in him, having told him that “good lads” don’t do these things past a certain age. One must understand the woman sexually assaulted as a child by her father, who has struggled successfully with a mental illness for many years but who has now relapsed because the offender’s own serious illness makes her feel guilty about telling her aged mother about the abuse. These are not just soap opera stories; they are the devastating effects of cleverly-planned and executed assaults on the mind and body of a child.

What do we do now?

Currently, the major challenge in dealing with child sexual abuse is to understand the big picture. Even though the myths and stereotypes are being slowly replaced by empirical knowledge, the social response is fragmented and uncoordinated, seemingly dictated more by arbitrary bureaucratic and administrative boundaries than by any comprehensive and effective strategies.

What is needed is an approach which will link what we know to what we can do. The comparison of paedophilia to a plague is more than just a vivid metaphor. It suggests that lessons can be learned from the other great scourges and pestilences of human history. In particular, there have always been three major components to public health problems of this magnitude (Foege 1991).

Definition of the problem

As we have already seen, child sexual abuse needs to be defined as a problem. It has taken us a long time to recognise that child sexual abuse carries with it a high morbidity (particularly long-term physical and psychiatric disorders) and probably a high mortality in the form of premature deaths due drug and alcohol abuse, suicide and chronic physical disease. Even now, however, our knowledge is still

limited. There is still no good national child sexual abuse database and different sources — the police, courts, correctional services, protective services, health care providers, victim services and community agencies — provide incomplete and conflicting accounts of what is actually happening. There are still enormous gaps in our knowledge about the nature and prevalence of child sexual abuse and the needs for services; it is probable that we do not even know that the gaps exist (Parliament of Victoria 1995, ch. 3).

Perception of risk

There are some who say that we are becoming unnecessarily panicky about child sexual abuse. The evidence is that we have not panicked enough. We are still like the village-dwellers in certain parts of India whose culture has encouraged them to fatalistically accept the ravages of smallpox, year after year, despite the existence of vaccination and other control methods (Foege 1991). Even though we can see the damage being done to the vulnerable and needy members of our society, we remain reluctant to act.

The New South Wales Royal Commission is simply the most recent in a long line of enquiries into child sexual abuse which have been conducted in most Australian jurisdictions over the last ten years. The Commission’s findings that police repeatedly failed to investigate paedophile activity (*Sydney Morning Herald*, 21 March 1996) or that the education department allowed suspected paedophiles to continue teaching in schools (*Herald-Sun*, 17 March 1997) are just more spectacular examples of a widespread malaise. Protective services workers still assume that they can assess notifications of child sexual abuse by only making a couple of phone calls or that they do not need to report a crime involving child sexual assault if there are no current protective issues. Courts and legislatures still seem to be reluctant to

contemplate changes in legal procedures or rules of evidence which would (for example) permit hearsay evidence in special circumstances, give broader judicial discretion to allow the hearing of joined charges where multiple victims are involved, eliminate delays in bringing child sexual assault offences to trial and provide suitable facilities (including the presentation of video evidence and closed circuit television monitoring) for child witnesses. There are still too many doctors, psychologists and psychiatrists who, through greed or ignorance, are only too happy to provide one-sided reports about offenders to not only the criminal courts but those having jurisdiction over children and families (Parliament of Victoria 1995, ch. 5 and 8).

But the most important influences on our perceptions of the dangerousness of child sexual abusers are the media and popular culture. A great deal has been written about the effects of pornography on the way sex offenders behave and on how we view them (see, for example, Goldsmith 1993). Kiddie-porn on the Internet, however, is far less sinister than images of models looking like schoolgirls, coyly displaying their sexuality as they parade next year's fashions. The makers of Calvin Klein jeans were recently forced to withdraw advertisements which showed a young teenage boy being encouraged to "rip that shirt off" by an obviously older male who was interested in his "real nice body" (*Canberra Times*, 9 September 1995). Clearly, protective behaviours programs in schools are not going to be of much help if the advertisements for the brand-name fashions so much sought after by the young continue to associate style with adult exploitation of children's bodies.

The social response.

As with most public health problems of this magnitude, the response needs to be at the community level. The identification, assessment and treatment of individual victims (and offenders) is not enough. Indeed, as has been shown with the modern plagues of heart disease, AIDS and road accidents, the response needs to be institutionalised. There must be a well-planned, highly coordinated and effective bureaucracy that can provide national or at least state-wide surveillance and monitoring of the problem, a useful analysis of the data received and prompt communication of the results of that analysis to all concerned government departments, professionals and agencies. In many cases this centralised bureaucracy will also coordinate or even operate treatment and rehabilitation services, policy

development units, public education campaigns, research facilities and programs evaluating outcomes and costs of these various interventions.

This type of organisation is almost totally lacking in the area of child sexual abuse and for that reason, there are still huge deficiencies in knowledge and service provision. In particular, there are two areas of need which, one suspects, can only be remedied by a comprehensive program coordinator at a national level. The first is that of services to victims. Currently, there are long waiting-lists at every Centre against Sexual Assault in the country. The professionals who are trained to help survivors with their problems remain pitifully few in number. Every day arbitrary and heartbreaking decisions must be made in order to prioritise the limited services available; in New South Wales, adult victims of child sexual abuse are seen as only a "third priority", even though the ongoing difficulties of a mature adult raped and abused as a child thirty years ago may be just as disabling as those of the child abused yesterday (New South Wales Parliament, ch. 8). It is indeed ironic that the child experiencing emotional distress following a horrifying motor vehicle accident will receive, without cost, special education facilities, help with career advice, salary benefits if they were working and years of treatment. The child experiencing the same sort of distress after a brutal sexual assault may well be entitled to nothing.

The second great area of need concerns the assessment, treatment and monitoring of the offenders themselves. There has been an ongoing debate as to whether perpetrators "deserve" the treatment resources which might otherwise be devoted to victims. This, however, arises from a serious misunderstanding. The "treatment" offered to paedophiles does not have the aim of comforting them or alleviating their distress. Modern treatment techniques, particularly cognitive-behaviour therapies, relapse prevention and pharmacological methods aim to make the offender take responsibility for his

actions, reduce the level of his deviant sexual arousal and develop strategies to deal with situations where he is at risk of re-offending. The measure of successful treatment is not that of a happy perpetrator but rather of a safe victim.

Modern treatment techniques are spectacularly successful. Carefully-designed studies now claim a long-term recidivism rate of 6 per cent, compared with the thirty-five per cent found in untreated control groups (New South Wales Parliament, ch. 12; see also Marshall et al. 1993, and Marshall & Pithers 1994).

The simple incarceration of offenders, however, has no, or even an adverse, effect. Harassed, abused and locked up in “protection” for their offences, they simply become more secretive about them, and invent ever more elaborate and cruel fantasies to occupy their time until they are released. One middle-aged offender, who had kidnapped and trapped his six-year-old victim in his bedroom, was asked what he had learned from his prison experience after he was burned badly when boiling water was thrown over him. He replied: “that will teach me not to tell the truth to the police next time”.

This is not a plea for mercy for these undoubtedly cunning and devious offenders. However, from the pragmatic point of view, we have to realise that nearly all child sex abusers will be released back into the community sooner or later, following which they can take the opportunity to offend again and again (you will recall that the oldest offenders I have encountered are in their eighties). Rather than locking them up for long periods of time, we must give them the skills and the incentives to keep themselves out of trouble.

These sorts of considerations merit a radical rethink of sentencing policy. We have to stop separating the culpable, who deserve tariffs, from the rehabilitable, who deserve treatment. Paedophiles probably deserve both, but if we are to protect the community on a long-term basis, then much of the average paedophile’s sentence may need to be spent in a non-custodial setting, in a supervised hostel environment with appropriate treatment conditions and restrictions on his movements. It might now be time to consider the imposition of long-term reviewable community-based sentences rather than lengthy or indeterminate terms of imprisonment.

Ultimately, however, to do all these things, we must radically rethink our attitudes as a community. We must understand child sexual abuse as a problem of national importance. We have to understand its devastating consequences for the victims, their families and the community at large. And most of all,

we have to understand the how and the why of paedophilia: the subtle, bizarre and cruel ways in which seemingly blameless and upright men insidiously cripple the most vulnerable members of our society. We have possessed that understanding for a long time; we have ignored it for too long. Shakespeare well understood sexual lust and he could well have been describing the lusts of a paedophile when he wrote these lines:

*Th’ expense of spirit in a waste of shame
Is lust in action; and till action, lust
Is perjured, murd’rous, bloody, full of
blame,
Savage, extreme, rude, cruel, not to trust;*

*Enjoyed no sooner but despised straight:
Past reason hunted; and no sooner had,
Past reason hated, as a swallowed bait,
On purpose laid to make the taker mad:*

*Mad in pursuit, and in possession so,
Had, having, and in quest to have,
extreme,
A bliss in proof, and proved, a very woe;
Before, a joy proposed; behind, a dream.*

*All this the world well knows, yet none
knows well
To shun the Heaven that leads men to
this Hell.*

(William Shakespeare Sonnet 129)

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2



Opinion, Policy and Practice in Child Sexual Abuse: Implications for Detection and Reporting

DIANNA KENNY

Current Context

Sex and society

Few people are conscious of the deep influence exerted by sexual life upon the sentiment, thought and action of man in his social relations to others (Krafft-Ebing 1908).

In his book, *Sexuality and its Discontents*, Jeffrey Weeks (1991) describes sex in relation to society as a “never ending duel” (p. 96) between individual and social needs, between sexual freedom and the regulation of sex, between nature and culture, and between what constitutes normal and abnormal sex. Throughout history, the biological imperative of sex has been tempered by social and cultural imperatives, as expressed in, for example, disapproval of, and attempts to regulate, masturbation, active female participation in (and enjoyment of) sex, extra-marital sex, non-genital sex, recreational (as opposed to procreational) sex, homosexuality, and pornography. Each of these expressions of sexuality have gradually become integrated into the fabric of 20th century Western culture. Are we now, as a society, contemplating the admission of paedophilia to the list of erstwhile taboos which have become fashionable and acceptable?

Informed debate and policy making on paedophilia are hindered by entrenched misconceptions about sex, sexuality and sexual offending. The women’s movement, gay rights’

movement, media hyperbole, ill-informed public opinion, and the zealotry of self-interested health and helping professionals have all contributed to the current controversies surrounding acceptable codes of sexual conduct, particularly as they relate to children. Before attempting to unravel these, we need to locate the sexual abuse of children in the wider context of child maltreatment.

Children and society

Children are the least articulate and most exploited population suffering from society’s failure to confront realistically the phenomenon of human sexuality (Swift 1978).

Society has rarely treated its children well. The abuse of children as a permissible right is recorded in Roman law. Children could be abandoned, brutalised, murdered, or sold into slavery or marriage by parents whose behaviour attracted no social sanctions. The use of children for the sexual gratification of adults also has a long history (Goodwin 1988). The sexual use of pubescent boys was practised in ancient Greece (Vanggaard 1972), and prostitution, using both male and female children, was widespread in 14th century Florence (Goodrich 1976). Historical records from the 18th century indicate that

homosexual adult/child sex was accepted practice in Asia and Africa (Trumbach 1977) and that 12-year-old virgins were for sale in Britain during the 19th century (Bullough 1964). The extent of abuse occurring in 16th century England prompted law makers to pass a Bill in 1548 protecting boys from sodomy, and in 1576 protecting girls under 10 years from forcible rape, with both offences carrying the death penalty (Radzinowicz 1948). Various sexual activities involving children are currently practised in a number of cultures, including India, the Middle East, Thailand, Cambodia and the Philippines (Barr 1996). The child sex trade is big business, the rights and needs of children irrelevant.

Sexual exploitation is but a small subset of exploitative child labour. In Western society, children were not officially recognised to have individual rights until 1966. The United Nations Organisation designated 1979 the International Year of the Child, in recognition of the worldwide problems pertaining to the care of children. Although the sexual abuse of children is currently taking centre stage in our community, only one in five cases of child abuse is sexual. Physical and emotional abuse accounts for most of the abuse suffered by children and the person most likely to abuse a child is the child's mother (Angus & Woodward 1995). The physical abuse of children did not gain legal or medical status until Kempe, Silverman, Steele, Droegemueller & Silver (1962) introduced the *Battered Child Syndrome* into medical nomenclature and laws were passed mandating certain professionals to report cases of possible maltreatment. Today, physical abuse continues to be under-recognised and under-reported, both in the USA (Warner & Hansen 1994) and Australia (Winefield & Bradley 1992).

Incest and Inter-Generational Sex

Extent of the problem

Accurate estimates of the prevalence of intra- and extra-familial adult/child sex are difficult to obtain. Estimates ranging from 0.6 per cent to 62 per cent have been reported (Kilpatrick 1992; Peters, Wyatt & Finkelhor 1986), with current local wisdom placing the figure at one in four girls and one in 12 boys (Coochey 1996).

Estimates from elsewhere demonstrate similar variability. For example, Henderson (1983) reported frequencies ranging from between one to two cases per million to 5000 cases per million. Such figures are fraught with distortions produced by reckless definitions of what constitutes sexual abuse of children and by the use of non-representative or very biased sampling techniques on which to base estimates. It is important to distinguish between childhood and adolescent sexual experiences and childhood and adolescent sexual abuse. Many studies reporting incidence fail to make this distinction (Finkelhor 1979; Kilpatrick 1992).

Concerted efforts have been made to obtain more accurate figures by attending to methodological shortcomings and sources of error. Using large probability samples, the American Humane Association (1987) estimated that 18 per 10,000 children were sexually abused in 1985. The National Incidence Study conducted by the National Centre for Child Abuse and Neglect (1988) estimated the rate at 2.1 children per 1000 (that is, 21 per 10,000) for 1986. Judith Ennew (1986), in her book, *The Sexual Exploitation of Children*, argued that "The use of gross numbers masks a battle for resources... for the welfare dollar...A single case study based on real life is more powerful than talk of thousands or millions" (pp. 143-4). This is, of course, not entirely satisfactory because the welfare dollar must be distributed equitably based on need.

The most accurate indicators of the extent of the problem are substantiation rates, although these are thought to significantly underestimate the extent of the problem (Ames & Houston 1990; James 1996). Child abuse statistics for 1993 compiled by the Department of Community Services and the NSW Criminal Court reported 3767 confirmed cases of child sexual abuse, from which only 253 persons were charged with sexual offences against

children, of whom 168 had convictions recorded [New South Wales (NSW) Child Protection Council 1996]. During 1993-94, there were 5000 children nationally under the age of 16 involved in substantiated cases (Angus & Woodward 1995). In NSW, in 1994-95, there were 1299 cases of confirmed child sexual abuse. In 80 per cent of cases, children were abused by a person known to them, and 20 per cent were abused by a stranger (NSW Department of Community Services 1994-95). The ratio of girls to boys was approximately 3:1 (Angus & Woodward 1995). In a report prepared for the NSW Department of Community Services, Humphreys (1993) found that 31.6 per cent of child victims had been abused by perpetrators under 16 years of age. Almost all sexual offences against children are perpetrated by males (Herman 1990).

A relatively small number of men are responsible for a large number of offences. In one study, 232 child molesters admitted to the molestation of an average of 76 children (Abel, Mittelman & Becker 1987). In extreme cases, the number of children offended against by a single perpetrator can run into the thousands (Wilson 1981). Paedophiles gaoled for sexual offences often report that they have committed many more offences than those for which they have been charged and incarcerated (Groth, Longo & McFadin 1982). There is a high probability that men who offend outside the home are also engaged in incestuous relationships with their own children (Abel 1989).

Is incest/inter-generational sex harmful?

The facts which emerge from an investigation are inextricably connected to the values and beliefs of those who shape the research questions and the design of data collection instruments... (Hudson in Kilpatrick 1992).

Although a very large body of research indicates that sexual abuse in childhood carries with it considerable risk of both current and future psychopathology (Briere & Zaidi 1989; Goodwin 1982; Hunter 1990; McNulty & Wardle 1994; Oates 1992; Romans, Martin, Anderson, Herbison, & Mullen 1995; van der Kolk, Perry, & Herman 1991; Wolfe, Sas, & Wekerle 1993),

there has been recent speculation about whether incest/inter-generation sex is harmful to all children. Henderson (1982), for example, asks

whether incest has existence outside the incest taboo. Is the harmfulness of incest solely a consequence of the shame and guilt attendant on violating a taboo? If the taboo were to attenuate or even vanish as did the taboo against masturbation, would incest be psychologically noxious, or even of any psychological interest? (p. 35).

Some researchers claim that precursor characteristics, such as a chaotic family structure, a chronically depressed mother and/or an alcoholic father, account for any damage done rather than the incestuous behaviour per se (Henderson 1982). Others argue that specific factors related to the incestuous behaviour, such as the degree of relationship between the abuser and the child, the use of force, penetration, and repeated incidents correlate with later self-destructive behaviour (Hunter 1990; Romans et al. 1995). Still others point to the act of disclosing the sexual abuse as the primary distressing event, carrying with it as it often does, the risk of hostile and rejecting responses from significant others in the victim's social support network. The removal of the offender from the home (in the case of father or stepfather perpetrators), and consequent dissolution of the marriage, may all constitute serious life stresses for the disclosing child (McNulty & Wardle 1994). Inadequate or harmful responses to disclosure of sexual abuse given by both parents (Jehu 1988) and professionals (Frenken & van Stolk 1990) have been frequently reported as contributors to subsequent psychological maladjustment. For example, lack of maternal support to children following the disclosure of incest was associated with increased foster placement and increased psychopathology (Hubbard 1989). Bentovim (1988) suggests

that the major taboo is not against sexual abuse per se but against talking about it. This reluctance to acknowledge the existence of sexual abuse has been described variously as a “shared negative hallucination” (Goodwin 1985), “a male sexist phenomenon” (Rush 1980) and “a societal blind spot” (Summit 1988, p. 51)

In addition, some researchers argue that the reliance on single case studies, and atypical or clinical populations in sexual abuse research may have resulted in an overestimation of the links between sexual abuse and subsequent psychological damage (Knutson & Scharz 1994; Widom 1988). The paucity of longitudinal and prospective research is also problematic (Knutson 1995). However, recent studies using random community samples have found statistically significant associations between sexual abuse in childhood and the development of psychopathology. Characteristics of sexually abused children include withdrawal, altered school performance, change in appearance and weight, precocious sexual behaviour, conduct problems, anxiety and depression (Knutson 1995). The presence of sexual precocities appears to be the primary distinguishing characteristic between abused and non abused girls (Friedrich 1993). Adult sequelae include deliberate self-harm (Romans et al. 1995), the development of Post Traumatic Stress Disorder (Wolfe, Sas, & Wekerle 1993), and a range of other symptoms, including depression, poor self-esteem, risk of revictimisation, somatisation, personality disorders, and social withdrawal (Jumper 1995).

The issue is not whether children are harmed by sexual relationships with adults. The evidence is clear that some, perhaps most, children are harmed. We know that some symptoms are specific to certain ages and that some children show no overt symptoms at the time of disclosure or discovery (Kendall-Tackett, Williams & Finkelhor, 1993), but it cannot yet be concluded that these children have not suffered harm. The task for researchers is to clarify the conditions under which children suffer harm. We know that some symptoms are specific to certain ages and that some children show no overt symptoms at the time of disclosure or discovery (Kendall-Tackett, Williams & Finkelhor, 1993), but it cannot yet be concluded that these children

have not suffered harm. While the available research is uncertain about the relationship between child/adult sex and subsequent psychological damage, it is the responsibility of society to act cautiously in the development of policies, laws and strategies to protect children from potentially damaging experiences.

Paedophilia: Definitional and legal dilemmas

Sex has become a potent political issue because of a perplexing and seemingly endless conflict of beliefs as to the appropriate ways of living our sexualities (Weeks 1991).

In an article in *The Weekend Australian*, Beatrice Faust (1997) asks the question, “When is a paedophile not a paedophile?” The answer depends on whether you are seeking a medical or a legal definition. Legally, paedophilia is not a crime. Paedophiles who are apprehended are charged under a number of offences including statutory rape, sexual assault, indecency, and involvement in child pornography or child prostitution, among others. The medical definition, presented in the Diagnostic and Statistical Manual of Mental Disorders (DSM IV, American Psychological Association 1994) is equivocal. Its opening statement frames the definition of paedophilia in terms of “sexual activity” (author’s emphasis), of an individual 16 years and older with a prepubescent child (generally 13 years or younger) (p. 527). It further states, however, that to be diagnosed a paedophile, the age difference should be *at least 5 years* (author’s emphasis). This definition begs the question as to whether or not a 16-year-old who has sexual contact with a pubescent 13-year-old is a paedophile. To further add to the confusion, the diagnostic criteria (302.2) state that paedophilia may be diagnosed in the presence of “sexually arousing *fantasies*,

sexual *urges*, or *behaviours* involving sexual activity with a prepubescent child..."(p.528). Although the term *epehebophilia*, referring to the sexual attraction of adult males to post-pubescent/adolescent boys (DeAngelis 1996) has not yet found its way into the DSM, it is currently forming the basis of the defence in a highly publicised case currently being heard in NSW courts.

The answer to Faust's question is not yet complete as it also depends on where in Australia the sexual activity occurred. In the Australian Capital Territory (ACT), the age of consent for males is 16, in NSW 18, in Western Australia 21, and in Tasmania, there is no legal age of consent for males. So a 21-year-old who engages in consensual sex with a 16-year-old partner is a paedophile in NSW and Western Australia but not in the ACT. What is the legal situation if the under age partner is a prostitute who enters into a paid agreement for sex? In a recent case, a man was charged with an act of sexual penetration with a child aged between 10 and 16 and one of inducing a child to take part in an act of prostitution. In handing down a 12-month suspended sentence, the judge pronounced the offender's behaviour "serious and strictly prohibited" but recognised that he "did not seduce the boy into prostitution". A spokesperson for the Prostitutes Collective of Victoria said that the charges against the man were "ludicrous" as "both parties had given their consent and incorporated a working agreement for sex". The judge stated that the issue of the boy's consent was "irrelevant" because he was 14-years-old, and therefore below the age of consent (Dean 1997).

For consent to occur, a person must know to what he/she is consenting and be free to say yes or no (Finkelhor 1979). Did this 14-year-old male prostitute give informed consent? The spokesperson for the Prostitutes Collective of Victoria stated that "Many street-based male sex workers are there by circumstances beyond their control, but are there because they want to make money and have made that choice" (op. cit.). There was no further interest taken in the 14-year-old boy in this case. No questions were asked about the "circumstances beyond his control" that had so constrained his life choices. Where was his family? Why was he not at

school? Where did he live? This boy knew to what he was consenting as he had consented to negotiated, paid sex on many previous occasions. Was he free to say yes or no? Perhaps we could argue that he could be selective with his prospective clients, and he could have refused sex with this particular man in this instance. But was he free to say no to living on the streets and to earning his daily bread by selling his body for sex? Lawyers and judges would and did say that this is not a legal question, and was therefore irrelevant to legal proceedings.

Clearly, there are major difficulties with the age of consent concept and its laws. A number of commentators have offered alternatives, such as assessing offences on the presence or absence of deception, fraud, coercion or violence (Faust 1985; Wilson 1981), and the symmetry or asymmetry of the relationship in terms of knowledge, maturity and power (Finkelhor 1979). In The Netherlands, minors aged between 12 and 16 are accorded the discretion to proceed with prosecution (Faust 1995), thereby recognising the moral and legal dilemmas that this age group poses for legislators.

Ames and Houston (1990) argue that the sociolegal definition of childhood based on age be replaced by a biological definition based on the presence of secondary sexual characteristics. They further argue that the "true" paedophile is sexually aroused by slim and small body build in which secondary sexual characteristics are absent, and that defining paedophiles according to these criteria of arousal permits accurate differential diagnosis of paedophilia from other types of sexual offenders.

Despite the difficulties and debate surrounding the grey areas in the child sexual abuse literature, where boundaries are blurred regarding what constitutes a child, consent and abuse, there is support for the view that pre-pubertal children cannot freely give informed consent for sex with an adult (James 1996). This inability is related to issues of cognitive and emotional maturity as well as body size and shape. Age of menarche varies widely and usually occurs

between the ages of 10 and 16 years (Peterson 1996). Puberty for boys can be equally as variable (Nielson 1987). This means that the rate of physical development may not always be in step with the rate of cognitive and emotional development. It is also possible for cognitive and emotional development to be out of step with each other, further complicating the question as to when a child is freely able to enter into a sexual relationship with an adult. Further, there are power imbalances between children and adults which interfere with the giving of consent. These include the economic dependence of children on familial perpetrators and the emotional pressure to comply with adults' wishes. Taken together, a child's lack of knowledge, experience, understanding and power are incompatible with the ability to freely enter into a sexual relationship with an adult.

Governmental and professional responses to child sexual abuse

How does society deal with men who sexually offend against children? From the previous sections, it is clear that incest and other inter-generational sexual practices are prevalent, and that the true rates of offending cannot be known because of under-reporting by both victims and professional people in whose care children are placed, such as the non-abusing parent, doctors, teachers, clergy and welfare personnel. In very few cases of substantiated abuse are perpetrators either charged or incarcerated. Reasons given for this include low reporting rates, the very young age of many of the victims, problems with the initial investigation, failure of inter-agency cooperation, levels of proof required by the criminal justice system and absence of corroboration (NSW Child Protection Council 1996).

In a recent position paper produced by the NSW Child Protection Council (1996) on the management of sex offenders, one of the stated aims was "...to improve the ability of individuals, organisations and agencies to *identify and intervene* (author's emphasis) to help children who are being sexually abused" (p. 3). A number of factors were considered to be putatively connected to the current failures to detect and manage such cases. These included a lack of community awareness of the dynamics of child

sexual abuse, the skill of offenders in both concealing their actions, and in intimidating their young victims to keep silent, misconceptions about the reliability of children's reports of abuse, and mishandling of evidence needed to ensure a conviction.

A major hindrance to progress in this area is the unwillingness of those in positions of power and authority in the relevant legal, educational and welfare institutions, to take the necessary action to protect children from the risk of sexual exploitation. Two key examples of this failure to act can be found in recent revelations of the extent of abuse that has occurred over many years of children placed in the care of church and education authorities. Recently, it was revealed to the Royal Commission into the NSW Police Service that the Department of Education in NSW had acted to protect teachers who were being investigated for sexual misconduct within departmental schools (*Sydney Morning Herald*, 20 February 1996, p. 2). The departmental response to a teacher against whom allegations of sexual misconduct had been made, was to transfer that teacher to another school, *without notifying the new school of the potential threat to children that this teacher poses*, (author's emphasis) (Statement made by Ros Coomber, Director of the Department's Case Management Unit, reported in the *Sydney Morning Herald*, Thursday, 6 March 1997, p. 8), or to leave the school system with "glowing references" that do not disclose their conduct (*Sydney Morning Herald*, Thursday, 6 March 1997, p. 1). The Royal Commission also produced evidence that "a large number of teachers had been recorded as leaving the teaching service for medical reasons when in fact they were facing allegations of sexual misconduct" (op.cit). In view of the evidence that there is no regulatory authority in NSW covering the teaching profession, and that current methods of handling complaints of

sexual misconduct against teachers is inadequate, it is therefore surprising that both government and non-government education authorities have expressed strong opposition to the proposal that such a body be established.

A balance between the rights of the accused teacher and the welfare of students must be maintained, in view of the claim by the Education Department to the Royal Commission that many of the allegations of sexual misconduct against teachers are “vexatious” and that as few as 2 per cent of cases meet the required standard of proof. There is a view among some teachers that the child is an active agent and therefore blameworthy; more so, if the child did not resist the advances of the perpetrator or had previous sexual experiences (Johnson, Owens, Dewey & Eiseberg 1990).

Elsewhere, there are a growing number of cases in which paedophiles in positions of responsibility for vulnerable children have been detected by authorities within the institution and simply transferred to similar positions elsewhere within the system (Kiraly 1996). The church has been equally reluctant to recognise the problem of paedophilia in its ranks. Although public awareness has increased in recent years, clergy who abuse their parishioners or children in their care have, until recently, escaped effective legal sanctions. The privilege and escape from legal sanction by clerics has a long history. In the early days to the Christian Church, clergy enjoyed extraordinary sexual privileges and exercised power to exact sexual submission among women parishioners, children, and nuns (Rush 1980).

It seems anomalous that when mandatory reporting of child abuse was introduced into the state of Victoria, clergy were excluded from the mandated list of professionals required to report suspected cases of abuse. This exclusion precluded children under the care of church based institutions from legal protection (Lawrence 1996). Young and Griffith (1995) argue that the legal system is reluctant to enter into this issue because of “their fundamental respect for the freedom of religion” (p. 421). These authors question whether society does in fact value religious freedom above protection of clients who have been sexually abused by clergy.

In Australia, the growing recognition of the extent of sexual boundary violations by clergy

and increasing community and government pressure to act, the Catholic Church, in collaboration with the University of New South Wales (UNSW), has established “Encompass”, a national therapy program for the treatment of Catholic clergy. Encompass’s National Chief Executive Officer, Associate Professor Alex Blaszczynski from UNSW, told me that sexual boundary violations are equally common among clergy from other religious denominations, but these groups had not been pursued so vigorously because of the perception that the Catholic Church is wealthy and more able to pay compensation to victims than other church groups.

Accusations of sexual abuse in child custody and access disputes

With the increased awareness of child sexual abuse generally during the 1970s and 1980s, came an increased acceptance by the mental health profession that all cases of alleged sexual abuse of children were true. At this time, there was a reluctance to give the benefit of the doubt to fathers in such cases (Yates 1993). In family court matters involving custody and access disputes, polarised positions were adopted by different professional groups, ranging from a presumption that all allegations were true (Horner, Guyer & Kalter 1993) to assumptions that all allegations were false (Corwin, Berliner & Goodwin 1987; Gardner 1987; Green 1986; Schudson 1992).

Two large scale studies, involving 603 and 9000 families respectively in dispute over custody (McIntosh & Prinz 1993; Theonnes & Tjaden 1990), have demonstrated that fewer than 2 per cent of custody cases involved allegations of sexual abuse. A number of other researchers have estimated that the false accusation rate is between 8 per cent and 16.5 per cent (Jones & McGraw 1987; Penfold 1995). This means that

false accusations of sexual abuse in child custody and access disputes is estimated to occur in between 0.125 per cent and 0.25 per cent of all cases involving custody disputes.

It is very difficult to assess the veracity of claims of sexual abuse of children in these circumstances. Indeed, in a study of 48 mental health specialists, Horner, Guyer & Kalter (1993) found very little agreement about how to determine the likelihood of abuse and about recommendations for custody and access. Awad (1987) states that because of the difficulties in ascertaining the truth in these matters, the clinician may reach only one of three conclusions: that sexual abuse has probably occurred, that sexual abuse has probably not occurred, or that the clinician remains uncertain about probability. He cautions that clinicians should take into account the child's relationships and attachments, as well as the allegations of sexual abuse in deciding matters related to custody and access. In recent work, Gardner (1994) has modified his views that most allegations are false and developed a set of 70 differentiating criteria against which to assess the accused, the accuser and the child. Several other researchers have also developed protocols and checklists against which allegations may be tested (de Young 1986; Leavitt & Labott 1996; Perry & Gold 1995; Wehrspann, Steinhauer & Klajner-Diamond (1987). Most have not yet been experimentally validated.

Ritual Child Abuse

Extent of the problem

Myth has the task of giving an historical invention a natural justification...
(Roland Barthes).

Ritual child abuse has been claimed to occur both in the present and the past. In recent times, past occurrences have been "recovered" by clients undergoing various forms of therapy. It is difficult to ascertain the proportion of recovered memories that fall into the category of ritual child abuse or its variants/synonyms (organised sadistic abuse/satanic ritual abuse). One estimate, based on survey questionnaires from 133 families who had one member who had accused one or more members of this type of abuse, suggests

that 50 per cent of cases reported "repeated physical violence or forced anal or vaginal penetration." Eighteen per cent of allegations were of satanic ritual abuse (Wakefield & Underwager 1992, p.486). In an Australian survey of 206 helping professionals working in sexual assault services, women's refuges, women's health centres, and community health centres, 79 respondents reported an increase in cases involving organised sadistic abuse from 8 in 1990 to 123 in 1994 (O'Donovan 1996).

Satanic ritual abuse has only recently made its reappearance. The modern form can be dated to 1980, with the publication of a book entitled, *Michelle Remembers*, in which a Canadian psychiatrist and his patient (now wife), Michelle Smith, relate the story of Michelle's alleged sexual abuse and torture by a satanic cult which included her parents as members (Lotto 1994). I say reappearance because it resembles the Salem witch hunts and magical thinking that was evident in the 16th and 17th centuries, so graphically portrayed in the movie, *The Crucible*, based on the play by Arthur Miller. The question is not whether such cults and practices exist. Clearly, there have been several disturbing incidences involving the mass killing by, or the mass suicide of, members of various cults. The question is whether people can be involved in such activity as children and then grow to adulthood with no memory of having participated in cult activities of the nature described by Michelle Smith. Initially, there was considerable support for this view in some medical, therapeutic and legal circles (Briere & Conte 1993; Gleaves 1994; O'Donovan 1996; Olio 1989; 1994; Terr 1990). Equally, there are fellow sceptics (Holmes 1990; Levine 1996; Loftus 1993; Lotto 1994; Spanos 1996; Wakefield & Underwager 1992; Victor 1993, Watters 1993). The arguments for and against are complex and centre around issues related to the nature of memory (Ceci & Loftus 1994), incorporating

the concepts of repression (Holmes 1990; Pope & Hudson 1995), dissociation (Bremner, Krystal, Charney & Southwick 1996), amnesia (Schacter, Harbluk & McLachlan 1984) and “recovered” memory (Bowers & Farvolden 1996; Kihlstrom 1994; Loftus 1993), the therapeutic techniques designed to assist in the recovery of memory, including hypnosis (Brenneis 1994; Sheehan, Andreasen, Doherty & McCann 1986; Spence 1994; Yapko 1994), psychoanalysis (Berger 1996), dream interpretation, age regression, and participation in survivor group therapy (Brenneis 1994; Yapko 1994); and the development of Post Traumatic Stress Disorder (PTSD) (Wolfe, Sas, & Wekerle 1993) or multiple personality disorder (MPD) [now called Dissociative Identity Disorder (DID) in DSM IV], in response to sexual abuse in childhood (Read & Lindsay 1994; Spanos 1996).

I refer the interested reader to the many research and position papers on these issues. My own position is that the weight of evidence supports the exercise of caution when assessing the veracity of claims of ritual sadistic abuse or any form of child sexual abuse uncovered in therapy, for which no previous memory existed. Psychoanalysts who assert that the need to establish the veracity of an allegation of child sexual abuse is “pathological” and “supports simplistic conceptions of psychopathology” (Berger 1996, p. 167) or who assert that narrative rather than historic truth is paramount in the psychoanalytic relationship (Haaken 1995) are now out of step with peak bodies regulating the practice of psychotherapy.

Response of the helping professions

The helping professions, including psychiatrists, psychologists, social workers and counsellors embraced this new phenomenon of recovered memory of ritual abuse enthusiastically. In a survey of American Psychological Association members, 800 reported that they had treated cases of ritual abuse (Watters 1993). The First International Conference on Multiple Personality/Dissociative States was held in Chicago in 1984. At the fifth conference held in 1989, a survey revealed that 25 per cent of participants’ clients had reported satanic ritual abuse. DSM IV takes a less than courageous position in the debate about prevalence. It states:

The sharp rise in reported cases of Dissociative Identity Disorder in the United States in recent years has been subject to very different interpretations. Some believe that the greater awareness of the diagnosis among mental health professionals has resulted in the identification of cases that were previously undiagnosed. In contrast, others believe that the syndrome has been over diagnosed in individuals who are highly suggestible (p. 486).

In a recent study examining psychotherapists’ beliefs regarding the iatrogenic creation of false memories, Yapko (1994) found that many psychotherapists erroneously believed that memories obtained through hypnosis were more likely to be accurate than those simply recalled, and that hypnosis could be used to recover accurate memories as far back as birth. These beliefs provide fertile soil for the germination and elaboration of false memories.

Lotto (1994) asks the question, “Why do so many people, including respected psychotherapists and scientists, believe these tales to be true? ...What personal, group and cultural fantasies and wishes are being expressed by both the “victims and those who believe their story?” (p. 383). Lotto (1994) proposes that in an age of holocaust, genocide and mass murder, and an age in which more than half of Americans surveyed in 1990 claimed that they believed in the devil, it is not so difficult to believe in the ritual abuse of children. He states that

The belief in the existence of an identifiable group of evil doers provides a convenient and effective projective screen,...or scapegoat, onto which individuals and groups can project their own unacceptable impulses. There is also the added benefit of then being able to

attack and attempt to annihilate this now externalised evil group (p. 388).

From this credulous beginning, the psychotherapeutic profession has gradually become more cautious, advising practitioners to “recognise the asymmetrical nature of the patient-therapist relationship and “the power of suggestive influences” (Bowers & Farvolden 1996, p. 386).

Fifteen years after the debate on recovered memories erupted, professional bodies such as the Australian Psychological Society (APS) McConkey & Sheehan (in press), in the American Psychological Association (APA 1995), and the UK Council for Psychotherapy (UKCP) (Casement 1997), have all now published position statements. Because all these groups have drawn similar conclusions, only the APS response will be outlined here. The essential elements are summarised below.

- Memory is a constructive and reconstructive process, and as such, can be influenced by the context of the event and the context of remembering. Memories can be altered, deleted, and created by events that occur during the time of encoding, during the period of storage, and during any attempts at retrieval.
- There is no established scientific relationship between trauma and memory.
- Memories that are reported either spontaneously or following the use of special procedures in therapy may be accurate, inaccurate, fabricated, or a mixture of these.
- Accurate, inaccurate, and fabricated memories cannot be distinguished in the absence of independent corroboration.
- Psychologists should be alert to the role that they may play in creating or shaping false memories.
- Psychologists should understand clearly the difference between narrative truth and historical truth, and the relevance of this difference inside and outside the therapy context.
- Psychologists should be alert to the different demands and processes of the therapeutic and legal contexts in dealing with allegations based on recovered memories.

- Psychologists should use caution in responding to questions from clients in pursuing legal action.

This tempered response from the profession has only emerged after a number of sensationalised cases of so called ritual abuse had caused massive disruption to the lives of hundreds of families and cost millions of dollars in law suits.

Accusations of this form of abuse have not been limited to the retrieval of past memories in therapy. Current cases involving very young children have been reported and the trials of the alleged perpetrators have been covered in minute detail by the media. I refer here to two of the best known examples — the McMartin Preschool satanic ritual abuse trials (Manhattan Beach, California) and the Dale Akiki Daycare centre case (San Diego, California), although, regrettably, there are many others. Soon after the McMartin case became public property, similar accusations of ritual abuse were made in many states of the USA (Nathan 1991). As the details of these cases have been well documented and publicised, I will refer only to salient matters relating to the involvement of therapists.

Kee McFarlane, a social worker at the Children’s Institute International (CII) in Los Angeles, found that 369 of 400 children interviewed in connection with the McMartin Preschool allegations to have been subjected to bizarre rituals including anal rape, animal mutilation and kidnapping through secret tunnels. Glenn Stevens, a former assistant district attorney who worked on the case before deciding that it was a hoax, noted that most of the children who spoke of tunnels were going to the same therapist, Martha Cokriel. Except for one, none of the children had disclosed any form of abuse until interviewed by staff at CII. When the jury witnessed McFarlane’s taped interviews which were coercive and at times abusive of children who denied that

abuse had occurred, the defendants in the case were acquitted. In a similar case, the longest in San Diego history, Dale Akiki was acquitted of all counts of child molestation after the jury decided that the children had been systematically brainwashed by parents and therapists, that the claims were fantastic (for example, that he had brought an elephant and a giraffe to class and killed them) and that no physical evidence to support the charges had been found.

False accusations

You will all be aware of the recent threat of an unknown individual to poison packets of Arnotts biscuits if demands relating to police handling of a murder case were not met. The perpetrator established his intent with the authorities by sending them a packet of biscuits which contained lethal doses of poison. The ramifications of this act were profound. All Arnotts biscuits were withdrawn from supermarkets nationally, Arnotts workers' were laid off, causing financial and emotional hardship to many families. The company attempted to produce a tamper free biscuit wrapping, probably at great cost, and forfeited \$10 million dollars in lost production and sales. A false report of abuse has to be responded to in the same way as a false report of fire or a bomb threat or indiscriminate poisoning. However, responding to accusations of abuse has a down side; there is an economic cost to the community and an emotional cost to individuals and families when an accusation of abuse has been made. In addition, community resources that are expended in dealing with a false accusation are diverted from genuine cases, thereby increasing their suffering. It could be argued that it is not possible to ascertain when an accusation is false until after an extensive investigation has been conducted. This may have been true five years ago, but there is now accumulating evidence that some accusations may not warrant intensive investigation, particularly cases involving recovered memories and/or ritual or organised abuse.

Wakefield and Underwager (1992) have proposed five provisional criteria for assessing the likelihood that the alleged child sexual abuse did not occur. These are summarised below. Sexual abuse probably did not occur

- when there is no corroborating evidence and the alleged behaviours are highly improbable (for example, bestiality, ritual abuse with several people involved, vaginal or anal penetration of a very young child);
- if the alleged events are highly deviant and the accused is psychologically normal;
- when a woman is accused of sexually abusing a child;
- if the recovered memory is for abuse that occurred at a very young age (that is, during infancy);
- when the accusing adult claims repression or amnesia and only recently remembers the abuse (pp. 499-501).

Response of the Legal Profession

The response of the legal profession to litigation in recovered memories cases has been surprising. The abuse of forensic evidence in several internationally publicised cases (for example, Lindy Chamberlain, the Guildford Four, the Birmingham Eight), together with an honourable history of caution in admitting new types of forensic techniques into evidence (for example finger printing, DNA matching) should have made the courts cautious in their treatment of memories recovered in therapy. Compared with recovered memory therapy, hypnosis looks positively scientific, yet evidence based on hypnosis is not admissible in court. This is as it should be, in view of robust evidence that memories recovered under hypnosis are unreliable (Spanos, Quigley, Gwynn, Glatt, Cardena & Spiegel 1991; Perlini 1991). Yet proponents of recovered memories have lobbied judicial systems in many jurisdictions to accept such memories as evidence. In the USA, 28 states have extended their statutes of limitation to

permit such cases to be heard. Hochman (1994) estimated that 10,000 charges of recovered memories of sexual abuse in childhood have been made, mostly by women, accusing, most often, their fathers of heinous acts of ritual abuse, including baby breeding and sacrifice, cannibalism and blood drinking, and violent acts of sexual assault. Courts were awarding massive sums, in the millions of dollars, in damages to women on the basis of their recovered memories (Hochman 1994). Even in recent civil actions, courts have ruled in favour of plaintiffs on the basis that "to reject a diagnostic category generally accepted by those who practise...psychiatry would be folly" (Civil Action No 92-2139-EFH, District Court of Massachusetts, reported by Ewing 1996). In another case in the US Supreme Court (68 F.3d.597, 1995, reported by Ewing 1996), the court granted summary judgment for the defendants, after finding that there were insufficient safeguards in the way in which the memories were recovered. The safeguards included an appropriately qualified hypnotherapist, a permanent record of the sessions, and other corroborating evidence. On appeal, the higher court rejected the safeguards approach as too restrictive. It proposed an assessment of recovered memory suits on a case by case basis to "assess if the testimony was sufficiently reliable".

The next chapter in this legal saga has begun. This involves retractions of sexual abuse claims and the lodging of law suits against therapists. In addition, there are now powerful and determined backlash lobby and support groups for people who claim to have been falsely accused. In some states, laws have already been changed so that social workers can be sued for violations of civil rights.

Public reactions

It appears that the tide of public opinion is turning from uncritical acceptance of claims of sexual abuse recovered in therapy, to scepticism. In a study using a mock juror paradigm, Tetford and Schuller (1996) found that jurors were less likely to believe plaintiffs who claimed to have recovered memories that had been repressed before therapy than those who had always remembered the abuse. Female jurors were also

more likely to believe a claim if the woman was not in therapy.

A strong backlash movement is gaining momentum in Europe (Gedney 1995) and America (Campbell 1992). A number of movements and organisations (for example, VOCAL (Victims of Child Abuse Laws), FMSF (False Memory Syndrome Foundation)) for people who have been falsely accused of child molestation and abuse are advertised on the Internet (<http://www.isc.org/men/falsereport/child.html>). By 1993, 7000 people had reported that they were victims of false sexual abuse accusations, of which 17 per cent involved satanic ritual abuse (Jaroff 1993).

Implications for Detection and Reporting

The child sexual abuse domain continues to be plagued by the dual problems of under-detection, as in the case of incest and institutional abuse by clergy, teachers and welfare personnel, and over-reporting, as is the case of recovered memories and ritual abuse. What can account for this state of affairs?

Many myths surround the popular and professional appreciation of the nature of child sexual abuse and its perpetrators. These myths have been reified as doctrine and a number of policies and practices have been derived from them which drain the public purse and yield not only barren outcomes, but serve to divert the allocation of resources and funding from needed research and prevention.

One of the most entrenched myths is that children are primarily at risk from strangers. There is now ample evidence to indicate that between 75-95 per cent of offenders are either related or known to the child (Herlihy 1993). This has not deterred those who wish to deny that most child sexual abuse is occurring in places of safety such as the home, the school, the church and child care institutions and is committed by

those in positions of trust, from developing “Stranger Danger” education packages. This approach is based on a denial that the oldest and most proscribed taboo, that of incest, is being practised within our community. It is also one of the least disclosed forms of child sexual abuse.

Related to the myth of stranger danger is the stereotype of the paedophile as “a dirty old man”. A common related misperception is that most paedophiles are homosexual. Paedophiles are, in fact, not easily recognised because of their diverse representation among all occupational, socioeconomic and sexual preference groups within the community (James 1996). Faust (1997) argues that the “hysterical demonising of paedophiles” hinders both rational debate and the development of rational solutions to child sexual abuse. In addition, Herlihy (1993) proposes a classificatory system for paedophiles, with each type requiring separate strategies for detection. Of the four types, active or “hard core” paedophilia, consisting of predatory, repeat offenders, and “market” paedophiles, those who exploit children for economic gain, are the most appropriate targets for police.

Claims that children understand, have control over, and are active agents in, the sexual relationship (Johnson, Owens, Dewey & Eiseberg 1990) have gained currency in recent years. For example, there is a view among some teachers that the child is an active agent and therefore blameworthy in cases of sexual abuse, and more so, if the child did not resist the advances of the perpetrator or had previous sexual experiences (Johnson, Owens, Dewey & Eiseberg 1990). Protective behaviours education programs, in which children are taught about “good” and “bad” touching and their rights to say no to bad touching are underpinned by the premise, perhaps inadvertently, that children understand the basis for the differences between good and bad touching and that they are free to give or withhold consent to the adult involved.

Other myths and/or misapprehensions about child sexual abuse in our community include the view that incest and other sexual activities with adults are not psychologically damaging to children (Jumper 1995; Knutson 1995), and that sexual abuse perpetrated by adolescents is merely sexual exploration (NSW Child Protection Council 1996). There is also a danger that we as

a community fail to acknowledge the current status of adult/child sex as a criminal act (NSW Child Protection Council 1996).

The proliferation of self-styled experts who possess “a lethal combination of zealotry and incompetence” (Kaushall, in Levine 1996) have contributed more heat than light to issues in child sexual abuse. These people often lack knowledge of the fundamentals of child development and often have not received appropriate training in the specialised techniques needed to conduct child abuse allegation interviews (Benedek & Schetky 1987). Children differ from adults in cognitive and emotional functioning and failure to understand and cater to these differences may result in both false negative and false positive findings regarding sexual abuse allegations.

Over-reporting has also been related to the trend for helping professionals to assess every type of maladaptive behaviour as indicative of child sexual abuse. Often the purported indicators are diverse and contradictory. For example, sexual promiscuity is said to be an indicator, but so is anorgasmia and lack of interest in sex. Other putative indicators include “parent adoration”, “childhood masturbation”, and “homosexuality” (Littauer & Littauer 1988, pp. 299-300). As Loftus (1994) cogently points out, “If everything is a sign of past childhood sexual abuse, then nothing is” (p. 444). In a similar vein, Knutson (1995) argues that either the actual incidence of sexual abuse is lower than presumed, or that the presence of adverse consequences are less than commonly believed. He states that:

... if a large segment of the general population has experienced some event (i.e. sexual abuse) at a rate far in excess of the base rate of the presumed adverse consequence of the event, it is unreasonable to suggest that the event

itself produces the adverse consequences (p. 421).

The inadvertent impact of

. . . those who attempt to stimulate public concern and policy changes by reporting the widespread nature of undefined sexual abuse might be inadvertently suggesting that . . . sexual abuse is not severe in terms of its consequences (p 421).

On the other hand, under-detection and under-reporting, constituting false negative allegations, among professional groups including doctors, teachers, mental health workers and residential care workers has been widely noted (Lombard, Michalak & Pearlman 1986; Rindfleisch & Bean 1988; Winefield & Castell-Mcgregor 1986). The reluctance of doctors to perform genital examinations on girls, fear of legal repercussions, and lack of data on what constitutes genital abnormalities in prepubertal girls are just some of the reasons proposed for the under-detection of sexual abuse by the medical profession (Abrams, Shah & Keenan-Allyn 1989).

This all adds up to a somewhat tacit and ambivalent acceptance of paedophilia within the family and within the legal, educational and welfare institutions within our community. The hysteria surrounding ritual abuse has served to deflect attention, and therefore to hinder detection of "garden variety" child sexual abuse. It is time that we refocused our attention.

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3



Detection and Reporting of Child Sexual Abuse (Specifically Paedophilia): A Law Enforcement Perspective

KYLIE MILLER

This paper discusses the detection and reporting of child sexual abuse, specifically paedophilia, from a law enforcement perspective. In doing so, it will first briefly touch on the National Crime Authority (NCA) and the reasons for their current assessment of this area. It will then discuss the NCA's definition of the term *paedophile*, the characteristics of paedophiles and the extent, reporting and detection of child sexual abuse and paedophilia.

The NCA is a national law enforcement agency established in 1984 under Commonwealth, State and Territory legislation. Its mission is "to counteract organised crime and reduce its impact on the Australian community by working in co-operation and partnership with other agencies". The NCA investigates organised criminal activity of national importance by using a multi-disciplinary team approach which utilises the expertise of specialists such as financial investigators, intelligence analysts, police investigators and lawyers in conjunction with its special powers to summon documents and witnesses.

In 1994, following a review of Commonwealth law enforcement arrangements, the NCA was tasked by the Federal, State and Territory Governments to complete strategic intelligence assessments on a range of organised crime groups. These groups were identified by the review as either currently or potentially active in organised crime in Australia. One of the areas

the review identified was paedophile networks and organised paedophile activity.

The NCA's national strategic assessment of organised paedophile activity has been completed and was distributed to Australian law enforcement agencies in July 1997. It is important to note that while all Australian law enforcement agencies provided information for the assessment, the NCA's role was not to conduct active investigations in this area, but simply to assess the current situation. While the assessment focuses on "*organised paedophilia*", this paper refers primarily to child sexual abuse in general and the *individual* paedophile.

Definition of Paedophile/Paedophilia

Any conclusions reached in the discussion of paedophilia rely heavily on the way certain terms are defined. Use of the term paedophile can be very problematic as it is rarely used with any consistency and it means different things to people from different disciplines. The clinical definition of paedophile is very different from its application in law enforcement, which is

different again to its interpretation by the general public.

The definition of paedophile adopted for the NCA's strategic assessment was determined following a review of relevant literature, and after extensive consultation with all Australian law enforcement agencies. It is not a law enforcement definition per se, as the term paedophile has no basis in legislation, but is a working definition for the purpose of the assessment.

The NCA refers to paedophiles as *adults who act on their sexual preference for children*. In other words, paedophiles are those who prefer and seek sexual activity with children rather than adults.

What is a child in this context? While clinically a paedophile is defined as someone with a sexual preference for *prepubescent* children, the NCA definition uses a sociolegal interpretation of child and makes no distinction between sexual activity with pre-pubescent and post-pubescent children. In this context, the term "child" refers to anyone below the statutory age of consent in each Australian jurisdiction, an age which varies from State to State.

It is very important to understand that not all child sex offenders are paedophiles — paedophiles are a sub-set of child sex offenders. One of the most useful typologies of child sex offenders for law enforcement purposes (but not, perhaps, for other disciplines) is the division between preferential and situational child sex offenders.¹ Preferential offenders are paedophiles and situational offenders are those who prefer adult sexual partners but who, at times of stress, convenience or curiosity, may engage in sexual activity with children. It can, however, be difficult to determine unequivocally whether a child sex offender is a paedophile unless their entire offending history

¹ For further details of the situational/preferential dichotomy, refer to P.E. Dietz, 'Sex Offenses: Behavioural Aspects', *Encyclopedia of Crime and Justice*, S.H. Kadish (ed.) New York 1983, vol. 4, pp. 1489-90; K. Lanning, *Child Molesters: A Behavioural Analysis for Law Enforcement Officers Investigating Cases of Child Sexual Exploitation*, 3rd edn, National Centre for Missing and Exploited Children, Arlington 1992; and A. Burgess & M. Clark, *Child Pornography and Sex Rings*, Lexington Books, Toronto 1984.

and their true sexual preference is known. Some professionals consider that all child sex offenders should be regarded as paedophiles until it can be shown otherwise. When using the term "child sex offender" in this paper, I am referring to paedophiles and situational offenders in combination.

From a law enforcement perspective, an understanding of the preferences and methods of operation of paedophiles may assist in their detection and in the detection of further victims. While they come from a diverse range of age groups, occupations and socioeconomic groups, the most common characteristics of paedophiles are that they:

- are overwhelmingly males;
- have multiple victims;
- usually know their victims (Angus & Woodward 1995, p. 28);
- have a long-term and persistent pattern of behaviour;
- offend against more boys than girls — male victims of paedophiles outnumber female victims by a ratio of two to one. It is important to note, however, that while boys are more likely to be the victims of *paedophiles*, girls are more likely to be victims in *reported* child sexual abuse cases overall (Angus & Woodward 1995, p. 12);
- have sophisticated methods and well planned techniques to access, groom and sexually abuse victims; and
- have a tendency to collect extensive quantities of paedophile-related material, including child pornography and child erotica.

Repeat Offending

Paedophiles are usually long-term, repeat offenders. They tend to engage in predictable sexual activity, and their past history is likely to be a good indicator of future behaviour.

Studies of offenders have shown that a small number of men are responsible for a large number of offences and that the reoffending rate for paedophiles who prefer boys is much higher than for those who prefer girls (APA 1994, p. 527). In 1987, Abel et al. conducted a study of 232 “child molesters”. This study revealed that over their lifetime, these offenders abused an average of 76 child victims each (Abel et al. 1987).

At the extreme, some Australian offenders have admitted to individually abusing thousands of children. For example:

- Clarence Osborne, a Queensland paedophile, claimed to have abused and kept records of, over 2500 boys in a period of 20 years. Not one of these alleged victims reported the abuse (Wilson 1981).
- William Allen, a teacher and former member of the Australian Paedophile Support Group, boasted in the early 1980s that he had participated in sexual activity with approximately 2000 boys (Comrie 1985, p. 126).

Extent of child sexual abuse

In recent years, there has been a significant increase in the attention being focussed on paedophilia and over the last decade law enforcement knowledge regarding paedophiles has also increased dramatically. Nevertheless, only a fraction of child sex offenders come to the notice of law enforcement, and an even smaller proportion are convicted for their crimes.

One of the most often asked questions is, how big is this problem? Because it is not possible to estimate the number of paedophiles in Australia, in the following discussion of extent I refer to all child sexual abuse, not just abuse committed by paedophiles.

It is extremely difficult to gain a national perspective on the extent of child sexual abuse in Australia, because it is such a hidden phenomenon. Two types of data are collected regarding child sexual abuse:

- the number of child sexual abuse cases *reported* to authorities; and
- research into the *prevalence* of child sexual abuse in the population.

Reported Incidence of Child Sexual Abuse

On a national level, even data on the *reported* incidence of substantiated child sexual abuse is fragmented and cannot be reliably compared across States and Territories or between agencies. This is because data collection is based upon different definitions of child sexual abuse, different ages of consent, differing interpretation of legislation, and differing methodologies of reporting and collection. As a result, it is not possible to determine with any accuracy the total number of child sex offences reported to police services and welfare authorities in combination on a national basis.

Therefore, statistics of reported incidence should be viewed with caution, and as a significant *underestimation* not only of the incidence of child sexual abuse, but also of the number of child sexual abuse cases that are actually reported to authorities. This caution is particularly warranted when independent research indicates that only 1 to 10 per cent of child sexual abuse incidents are ever reported (*see*, for example, Naylor 1984; Russell 1983; Fuller 1989).

Reasons For Under-Reporting

The reasons for this significant level of under-reporting are complex and varied. The following are reasons why sexual abuse by *paedophiles* is unlikely to be reported (ICAC 1994; Watkins & Bentovim 1992; Campagna & Poffenberger 1988; Lanning & Burgess 1984):

- Firstly, reporting of child sexual abuse may be low because of the “grooming” and seduction techniques that paedophiles commonly use to engage in sexual activity with children. Contrary to public opinion, child victims are not usually raped or physically forced into sexual activity with paedophiles.

According to the NSW Department of Community Services, the predominant mode of sexual abuse is fondling. Paedophiles are often reluctant to physically hurt the child, since any injury to the child would risk the termination of their relationship. In fact, Australian law enforcement agencies have reported relatively few known instances of violence associated with paedophile activity. Rather, the child is typically coerced into participating over a long period of time. This grooming process not only wears down the inhibitions of the victim, but also reduces the likelihood that the child will report the sexual activity. It is important for those who are involved in the detection, investigation or prosecution of child sexual abuse to recognise that a bond can develop between the victim and the paedophile. The child may therefore be unlikely to report the offence, be interviewed, or testify against the offender.

- Secondly, the child may not at the time see themselves as a victim, either because some victims are so young or innocent that they do not realise their treatment is abnormal, or because teenagers can be sexually experimental and therefore some adolescents would not have been ashamed of what had happened to them.
- Thirdly, besides the fact that most sexual activity is of a very personal and private nature, the victim may not report because they feel guilty, embarrassed, ashamed or partly responsible for the sexual activity. Paedophiles can use this to their advantage. For example, David Techter, the organiser of a US-based pro-paedophile organisation, the Lewis Carroll Collectors Guild, used his experiences as an offender to describe one of the reasons behind the low reporting of child sexual abuse. He explained on American television that the child “I first had an affair with for about six months would masturbate me while I was fondling her. If you fondle a child just that one time, he or she may run and tell. But if it is repeated then they accept part of the responsibility because they allowed it to happen again ... [and] ... so they’re guilty too” (cited in Tate 1990, p. 152). In addition, boys may not

report abuse because they may be doubly ashamed by fearing that they are a homosexual, or that they will be seen as such. Furthermore, some paedophiles may supply victims — particularly adolescent boys — with drugs, cigarettes, alcohol or pornography, thereby involving them in other “taboo” activities and victims may consequently be very reluctant to report their sexual abuse.

- A victim may not report the abuse because they are afraid of the offender. While physical violence is uncommon, a paedophile will often threaten victims that they are not to talk to anybody about the relationship they are having with the paedophile.
- The child victim may consider that if they do report the abuse, the adult offender is more likely to be believed than the child. In many instances, the paedophile is in a position of trust or has an occupation involving children and is rarely suspected of abusing these relationships.
- There may be a reluctance by the child or parents to report an offence, in order to avoid subjecting the child to additional trauma through the criminal justice process.
- And finally, some organisations may be reluctant to inquire into child sexual abuse allegations, or report it, for fear of the consequences. For example, the Royal Commission into the NSW Police Service has identified instances in the NSW Education Department and the Catholic Church where the welfare of the child has been neglected to protect the organisation. This tendency towards bureaucratic self-preservation has allowed paedophiles to infiltrate organisations to gain access to children,

and to remain in protected positions for years where they can continue to abuse these children.

Over the last few years, there has been a perception in Australia, as well as internationally, that child sexual abuse is increasing. While in Australia it is not currently possible to determine whether child sexual abuse has increased over time, it is likely that *reporting* of child sexual abuse is increasing, and will continue to increase. This growth, however, is unlikely to be due to an increase in the actual incidence of child sexual abuse and is more probably due to an increase in community awareness of the problem, increased support for victims and the introduction of mandatory reporting for some professional groups.

Prevalence of Child Sexual Abuse

Because only a small proportion of child sex offences are reported to authorities, a more realistic measure of the extent of child sexual abuse can be provided by population *prevalence* research. While numerous studies have been conducted overseas, the first Australian study to measure the extent of child sexual abuse in the community was conducted in 1988 by Goldman and Goldman. This study on a sample of tertiary students found that 28 per cent of women and 9 per cent of men had, as children, experienced sexual activity with a male at least five years older than them. In this study, the term “sexual activity” was used broadly and ranged from an invitation to do something sexual to exhibitionism and fondling, through to actual or attempted sexual intercourse. The children were on average 10 years of age when this activity occurred (Goldman & Goldman 1988). While methodology between studies varies widely, these figures are comparable to many other international prevalence studies. Leventhal examined a number of population-based prevalence studies conducted in a variety of countries (limited to those that defined child sexual abuse as contact cases in children less than 16) and arrived at a very crude mean child sexual victimisation prevalence rate of 21 per cent for women and 6 per cent for men. (J.M. Levanthal, ‘Epidemiology of Child Sexual Abuse’, in: Oates, R.K. (ed.), *Understanding and Managing Child Sexual Abuse*, Harcourt Brace Jovanovich, Sydney 1990.)

Prevalence statistics indicate, therefore, that the number of child sexual abuse cases reported to authorities is only a small fraction of the number disclosed in adulthood surveys of childhood experiences, and that in terms of extent and potential harm, child sexual abuse of both boys and girls constitutes a serious problem in Australia. The ability of researchers to provide current, relevant and reliable prevalence figures can help law enforcement agencies to make a better claim on scarce resources, and can assist in identifying the demographics of those children particularly at risk, so that these resources can be most effectively targeted.

Detection

Child sexual abuse is carefully concealed and among the most difficult of offences to detect. The two major problems facing law enforcement in the detection of child sexual abuse are the significant level of under-reporting by victims, and the secrecy surrounding the commission of the offence. The possible repercussions of being labelled a paedophile makes offenders incredibly cautious. As a result, paedophiles will often have no criminal history, even though they may have been sexually abusing children for years.

Furthermore, child sexual abuse by *paedophiles* is difficult to detect because they have a tendency to obtain employment or voluntary positions in which they have easy access to children. These can include positions such as teachers, scout masters, sports coaches and child care workers, in which they are less likely to arouse suspicion as a result of their interaction with children. Detection is hampered further by lack of physical evidence, the tendency of some paedophiles to move residence on a regular basis, to change their name or use an alias.

As paedophiles are usually long-term repeat offenders, the distinction between situational child sex offenders and paedophiles is an important one for law enforcement in terms of detecting further victims of abuse, and in assessing the offender's potential for future offending. During investigations it is important for law enforcement officers to understand that there is a distinct possibility an alleged offender may be involved in a range of previously unreported offences. In fact, the prospect of multiple victims should always be considered in every child sexual abuse investigation.

Current Methods of Detection

While child sexual abuse is difficult to detect, it can be discovered in a number of ways. Apart from the victim reporting the sexual abuse (even years later), the following are examples of some of the methods by which child sexual abuse, particularly that perpetrated by paedophiles, can be detected.

- Children who have been sexually abused may demonstrate inappropriate or anti-social behaviour in situations where it can be reported by other adults.
- Information can be received from anonymous informants — via means such as Crimestoppers or the annual Operation Paradox telephone hotline into child abuse.
- Upon further investigation, initial reports of child sexual abuse can enable the detection of other victims or even other offenders.
- Paedophiles commonly keep a collection of child pornography and child erotica (which is increasingly being obtained from the Internet and computer bulletin boards) and further investigation into someone who possesses or imports child pornography may reveal whether the offender is also involved in the actual sexual abuse of children.
- Victims and/or offenders may be identified from home-made child pornography. Many paedophiles take photographs or videos of their victims. In some cases, they will take photos or videos of themselves or other adults engaged in sexual activity with the children. For example, a South Australian child sex offender was detected, and has since been convicted, when his mother

found a video tape of him sexually abusing a five-year-old girl, and reported him to authorities (*The Adelaide Advertiser* 20 July 1996, p. 8). In addition, the press has reported that the NSW Police Service Child Protection Enforcement Agency (CPEA) has recently identified, from an examination of home-made child pornography, a number of paedophile victims who were sexually abused and photographed over twenty years ago (*Sunday Telegraph* 1 September 1996 p. 34).

Given the seriousness of child sex offences, and the growing public concern about this area of crime, law enforcement agencies need a committed and coordinated approach to detecting and countering paedophilia. Experience has demonstrated that establishing proactive, intelligence-driven investigative units is the most effective law enforcement response to paedophilia, and this approach is being increasingly implemented by many Australian police services. Using specialist units in this way, offenders are likely to be identified and apprehended far earlier, with less resources, than with the traditional complaints-based approach (which tends to identify one offender per investigation).

Conclusion

In conclusion, the number of child sexual abuse cases reported to authorities is only the “tip of the iceberg” and the true extent of child sexual abuse in Australia cannot be reliably determined. Because of numerous difficulties in the reporting, detection, investigation and prosecution of child sex offences, an offender runs very little risk of being *convicted* for his or her crimes.

Given the very low rehabilitation rate for paedophiles, their tendency towards lifelong offending, and the high number of potential

victims, it is clear that resources expended on the *detection* of child sexual abuse, need to be balanced against resources devoted to the *prevention* of child sexual abuse. Although law enforcement plays an important role in detecting and countering child sexual abuse, the criminal justice system cannot deal with this problem alone: it needs to be tackled holistically. Police, lawyers, the courts, welfare services, teachers, doctors, parents and the media all have a role to play in countering child sexual abuse, and a cooperative and coordinated effort is vital to successfully reducing this problem.

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4



Problems in the Prosecution of Paedophiles

MARGARET CUNNEEN

The prosecution of persons charged with offences related to sexual activity with children is commonly hampered by features not present in most criminal proceedings. This paper will therefore discuss four characteristics of child sexual assault cases which tend to render them more difficult matters in which to secure a conviction than murders, thefts or non-sexual assaults.

Allegations of Multiple Offences by One Alleged Victim

It is rare for an indictment in a child sexual assault trial to contain only one count. In most cases, the indictment carries representative counts of a course of sexual conduct taking place over a period of weeks, months or years.

In non-sexual matters, the multiplicity of counts would tend to strengthen the Crown case. In sexual offences against children, however, the fact that a child complains of being the victim of an adult's sexual advances on numerous occasions leads to the obvious and logical questions: "If this was happening, why did she/he go back?" (in the case of an accused who is outside the family) and: "Why didn't she/he tell someone?" (in the case of an accused within the family).

A paedophile known to, and trusted by, a potential child victim, traverses several phases in the gradual but persistent seduction which leads to sexual abuse. Juries often fail to appreciate the fact that a child can endure repeated sexual abuse because there are other aspects of the relationship

which are positive. They do not see how the child, who may be experiencing guilt about indulging in the sexual activity, will be reluctant to disclose it for fear of being punished, particularly when the abuser has suggested that the child would be blamed, doubted and/or admonished.

Juries, in common with many lawyers and other professionals involved, are not cognisant of the likelihood — perhaps more so in the case of boys of around the age of puberty — that the initial sexual encounters, at least, are physically enjoyable and come at a time when the natural sexual curiosity of the child assists the offender.

Some years ago I prosecuted in a trial (*R v BCH*, unreported, CCA, 7.10.92) in which a boy who was then 17-years-old alleged that he had met the accused at the age of 11 and had spent many weekends over the course of the next three years with him. The boy was from a modest background and his mother had recently remarried and had a new baby. He felt somewhat rejected from his family. He explained how he had been in the company of another boy when the accused had befriended them at the beach. The accused suggested to the boys that they each introduce him to their mothers as the other boy's uncle so that they would be allowed to stay overnight, go on outings and use the attractive facilities of the accused's beachside home.

What followed was a classic grooming of the boy, with the use of pornography and alcohol, into sexual activity culminating in

anal intercourse. The victim was paid money for most of these acts. In conference, the victim indicated to me (somewhat shamefully) that he had found much of the sexual activity pleasurable.

Anticipating the inevitable defence submission to the jury to the effect: "Why would a boy return to stay with a man who was hurting him?" I put to the jury that even the sexual activity was not completely unpleasant to this pubescent boy. The jury had to be made aware that a child's acquiescence, or even willingness, is quite likely to be secured in situations of non-violence, generosity and, of course, affection.

The accused, who was in his 50s, was convicted. He had been charged numerous times before with sexual offences against boys but had never been found guilty.

The public perception is, of course, of the paedophile who plucks a screaming child from a public place and performs a sudden and violent sexual act upon him/her. Of course in those, relatively uncommon, circumstances it is reasonable in these times to expect a complaint at the first reasonable opportunity.

This, however, is not the way most paedophiles operate. Juries should be made aware, during the course of evidence in a trial, of the way it is alleged the accused ingratiated himself into the child's confidence and blurred, in the child's perception, the distinction between appropriate and abusive behaviour. Only then can the evidence provide an answer to the question: "Why would she/he go back?".

The multiplicity of offences in child sexual assault cases contributes to the overwhelming difficulty of delay in complaint. Child victims are so confused about the activity in which they have become embroiled, tempered as it frequently is by aspects which, to the child, are enjoyable and positive, that they do not disclose. Not only is it more difficult for children in delayed complaint cases to recall the detail of the assaults (the number of which is likely to increase in proportion to the delay) but the children giving evidence look and behave very differently from the way they did at the time they say the abuse began.

The courts do recognise the dilemma of the child sexual assault victim. The case of *R v Chamilos*, (unreported, CCA, 24.10.85) which

was the foundational case for the modern practice of child sexual assault law, was decided in 1985, the year a range of legislative protections were extended to child victims of sexual assault, enabling the prosecution of many matters which earlier would have failed, for example, those in which the child's evidence was uncorroborated.

O'Brien CJ of the Criminal Division, Court of Criminal Appeal said (at p. 9)

...Once established the difficulty of the child in disclosing the relationship or even dissociating herself from it become exacerbated especially where the association is incestuous. It is not an unusual feature in trials of this kind that the association remains clandestine until some development precipitates its disclosure or discovery...It is quite unlike the situation where an adult who is a total stranger to the child molests her...

One of the legislative innovations of 1985 was the application to children of section 405B of the *Crimes Act 1900*, requiring a judge to warn a jury, whenever the subject of complaint arises, that absence of complaint or a delay in complaining does not necessarily indicate that the allegation is false and that there may be good reasons why a victim would hesitate in or refrain from making a complaint.

The challenge for a prosecutor is to establish and impart the specific reasons in the particular case, to the court.

Multiplicity of Victims

The child sexual assault offender is likely to have many victims. A serial murderer or repeat bank robber usually makes the detection and prosecution process easier, leaving more physical evidence, witnesses and tendency evidence each time she/he commits a crime.

Fear of contamination and infection of children's evidence means that it doesn't work this way in the prosecution of paedophiles.

Teachers and other people working with children are commonly accused by several children of having assaulted them at around the same time. The courts have consistently taken the view that "as sexual cases (are) liable to arouse prejudice, there should be separate trials where an accused is charged with a number of offences" (Beazley JA in *R v GL Harvey* (unreported CCA 11.12.96) referring to *De Jesus v R* [1986] 61 ALJR 1).

Harvey's case (*ibid*) concerned a teacher accused of indecent assault by four girls under 10. The Court of Criminal Appeal decided that some evidence tending to corroborate the evidence of one of the complainants had been wrongly admitted by the trial judge. A new trial was ordered on the basis that a jury having heard the evidence supporting one of the girls may not have approached the determination of the balance of the charges with a fresh and independent mind.

Beazley JA (with whom the remainder of the court agreed), concluded her judgment in this way:

There is no doubt that the jury verdicts in this case are flawed because the charges were heard together....this case serves as a salient reminder, both to the Court and Crown Prosecutors (and for that matter to defence counsel) of the dangers inherent in doing so and of the need to give careful consideration to whether there should be separate trials in circumstances such as the present (ibid at p. 38).

This reinforces the principle enunciated in *Hoch v R* (1988) 165 CLR 292 where the trial judge had refused to direct separate trials in relation to the allegations of three boys, two of whom were brothers and of whom the third was a friend, who alleged sexual misconduct against a childcare worker employed in the children's home in which they lived. The trial judge had decided that the complaints were of sufficient similarity to support each other. The High Court, however, held that the similar facts which had been admitted were "reasonably explicable" on

the basis of concoction and should not have been admitted. It follows that the High Court maintained the trials should have been separated.

Although it is manifestly the case that, as a matter of fairness, if there is a close relationship, opportunity and motive for concoction, the trials of various complainants should be separated, routine separation of trials of children with some connection with one another can work as injustice upon the prosecution. Where several children in a class complain of similar impropriety by a teacher and separate trials are ordered, each jury is presented with a single child out of a class of perhaps 30 and the natural assumption is that this must be the only child who has complained, as, if it were otherwise, the prosecution would have alluded to it. A quite inaccurate picture of the available evidence is thereby presented.

The situation can arise where one child who has complained of being a victim him/herself but who also offers some corroborative evidence in relation to another child, must give evidence in the trial of the other child without making reference to his/her own direct experience.

So while judicial authority counsels careful consideration in regard to separate trials, if inquiry reveals no real chance that connected complainants had agreed to concoct their allegations (and there is no additional evidence pertinent to only some of the complainants as in *Harvey*), running the trials together may well be justified.

Admissions Less Likely

In the general run of criminal cases, accused persons are as likely to plead guilty (if not at the outset, then at some stage in the prosecution) as they are to do the opposite. This is not so in the great majority of sexual offences involving children, where the allegations are stridently and strenuously denied throughout.

The reason for this is doubtless the far greater shame and opprobrium attaching to offences of this kind.

The response of the press to the exceptional sexual case where an accused does plead guilty has the unfortunate effect of discouraging others so to do. In 1996 I was involved in the case of a man charged with a large number of sexual assaults on children he had been babysitting. A search warrant executed by police had uncovered a photographic record of the way he drugged the children and arranged their bodies in sexual poses. Parts of his own body were visible interfering with the children in many of the photographs.

The evidence against him was unassailable and a guilty plea was entered. Photographs of the prisoner were obtained from victims and appeared on television and in the newspaper and he was described in the most vitriolic terms. His own self-deprecating, and to give him his due, remorseful, sentiments were used against him. Although some publicity of such matters can serve an educative purpose, the level of publicity was disturbing and the likelihood of guilty pleas in the foreseeable future was further diminished.

The result is that children alleging sexual assault are almost always required to give evidence in court and suffer the often cruel ordeal of cross-examination whereas in other types of crime the mere presence of the civilian witnesses prepared to give their evidence is regularly productive of a plea of guilty on the morning of the trial. There is always a chance, with children alleging sexual assault, that they will not be able to muster the resources necessary to give their version of events, maintain it when challenged and continue to be composed throughout searching cross-examination about areas of their lives (some of which may do them no credit) with which the accused is well acquainted because of the association between them. Sexual assault trials remain the only trials where a broad-ranging and sustained attack on the major witness' credit is inevitable.

Much more is done now to assist children to feel prepared for their experience in court but the degree of impact and credibility of a child's evidence at trial remains a much greater variable

than any which exist in the general run of criminal matters.

Warnings to Juries About the Evidence of Children in Sexual Assault Matters

A characteristic of child sexual assault cases is the unlikelihood of there being any evidence supporting the allegation by the child. The offences occur in secret, in circumstances in which the offender is unlikely to be disturbed. As Beazley JA remarked in *R v Harvey*:

...it might be thought that a person intending to touch a young child in the manner claimed here would not do so in such a way that he would be observed by other children.

As for adult eyewitnesses, they are rarer still.

Complaints which are unsupported by other evidence, particularly where they are made by children, are still on somewhat shaky ground. Although corroboration is not required and the old requirement that a warning be given to a jury as to reliance on uncorroborated evidence has been dispensed with, the reality is that a warning that a jury should "scrutinise the evidence of the child with great care" (from *R v Murray* (1987) 11 NSWLR 12) is almost invariably given.

The status of the warning in the context of the *Evidence Act 1995* (section 164) received some attention in the case of *R v RMM* (*Unreported, CCA, 19.8.96*) in which Mahoney P stated:

[This does] not mean that the absence of corroboration in the case of a sexual offence against a young person where the only evidence of substance is that of a young person is not of importance. The provisions remove any requirement that, for a conviction, there must be corroboration or a warning of its absence. But, in my opinion, where such a charge is made upon the uncorroborated evidence of a young

person, the Court will bear firmly in mind both the possibility of error or misstatement in evidence generally and, in particular, in the evidence of such a witness who is both a complainant and a young person.

I do not mean that the Court should assume that there is necessary or inherent weakness in the evidence of every young girl of 11-12 years. Views have differed as to the reliability of the evidence of children of various ages. Differing views have been expressed as to whether such children are apt to be truthful or untruthful, accurate or inaccurate...But, in my opinion, a judge or jury called upon to determine whether the uncorroborated evidence of a young complainant is to be accepted as proving a serious charge of this kind will consider carefully whether the particular child is likely to be both accurate and truthful.

That juries should consider evidence carefully is self-evident. There should be no need to remind them. As most of us have been children, and many of us have more recent experience of them, it seems strange that they must be regarded as such rare and peculiar specimens.

To describe these cases as “word against word” is to confer an equality which does not exist. Judges do not ordinarily warn juries about relying on the evidence of accused persons (where they give any). So juries, I apprehend, often feel the judge is trying to convey a message about his/her perception of the credibility of the child’s evidence when in fact she/he is merely reciting a routine direction.

These are four areas which contribute to the much greater difficulty in securing a conviction of cases of this type. There are numerous others. The need for adequate time for prosecutors to be prepared (with the witness/es) for the specific factual circumstances in each case cannot be overemphasised.

5



Defence of Alleged Paedophiles: Why do we need to bother?

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There is as well, the feeling that the one word “pedophilia” is a black hole that contains too many things. For it can mean, on the one hand, the repeated penetration of an eight month old girl whose bowl function is thereafter forever deranged or, on the other hand, giving oral sex on Mardi Gras night to a young man in rouge and feathers who upon constabulary interruption proves to be seventeen years and eight months old. It can also cover the boarding school romance of a lonely boy and a sensitive teacher who opens his mind, while no doubt behaving improperly, to music, art and life’s possibilities (Ellis 1996).

Part I

Is a Criminal Trial the Answer?

Hollow Water is a small village of some six hundred people, most of whom are Aborigines, on the east shore of Lake Winnipeg, in the province of Manitoba, Canada (Ross 1996). That community’s Holistic Circle Healing Program (CHCH) team estimates that 80 per cent of the population of that community, male and female alike, have been the victims of sexual abuse, most often at the hands of extended family members and usually for long periods of time (Ross 1996, p. 39). By comparison the 1984 Badgley Commission on Sexual Offences against Children (Canada) conducted a comprehensive study of child sexual abuse throughout the whole of Canada and found that one-third of females and one-fifth of males had been victimised by a

sexual offence. If one included non-contact offences (for example, exhibitionism) the rates rose to 53 per cent for females and 31 per cent for males. The Hollow Water CHCH also estimate that 50 per cent of the community’s population, male and female, has at one time sexually abused someone else (Ross 1996, p. 39).

In the past decade the focus in Hollow Water has been on addressing the vast problem of sexual abuse, and with some significant success. Bearing in mind the catch-cry of this Conference: **Paedophilia: Policy and Prevention** (emphasis added) it is worth looking at their policies to see if they have any relevance to the contribution those of us who are called upon to defend alleged paedophiles can make to “Prevention”.

In 1993, the Hollow Water CHCH drafted a “Position Paper on Incarceration”. While earlier they had apparently supported incarceration in serious cases they abandoned this support for using gaol in cases which had been felt to be “too serious” for a strictly healing approach. On reflection they felt the courts approach to evaluating the “seriousness” of the offence was over-simplistic (for example, “only” fondling vs actual intercourse; daughter vs nephew; one victim vs four victims) and were not valid from an experiential viewpoint (Ross 1996, p. 38). “Secondly they recognised that incarceration was based on, and motivated by, a mixture of feelings of anger, revenge,

guilt and shame on our part, and around our personal victimisation issues, rather than the healthy resolution of the victimisation we were trying to address.” (Ross 1996, p. 38). The Hollow Water community preferred to put its resources into a Holistic Circle Healing Program.

Of the 48 cases dealt with by the Hollow Water CHCH only five have failed to enter into — and stay with — the program (Ross 1996, p. 34). It would seem that these five went to gaol. Of the forty-three who completed the program only two repeated their crimes, one re-offending at an early stage, the second reoffending when the program was in its infancy. Since that re-offending he completed the formal healing program, and is now a valued member of the CHCH team! (Ross 1996, p. 36).

The CHCH protocol embraces all of the participants. It requires full disclosure of abuse, protecting the child, confronting the victimiser, assisting the (non-offending) spouse, assisting the families of all concerned.

Australian Sexual Assault Rates High

In Australia a recent study showed that 20 per cent of Australian women suffered sexual abuse as a child and 35 per cent complained of sexual abuse or experience that was unwanted and distressing during childhood (*Sydney Morning Herald*, 20 January 1997). If to that figure was added the figures of sexual abuse of boys, and adult women, the percentage of the Australian population who had suffered some form of sexual abuse could be, greater than 20 per cent.

Just a moment’s reflection would show that the number of offenders in Australia must also be staggering if 20 per cent of the female population has had unwelcome sexual abuse involving genital contact before the age of 18 years and 35 per cent complaining of some abuse or unwanted experience. It follows that the abusers must also number a significant percentage of the population. The report observed that on average the victimisers were 24 years older than the child and 98 per cent were men (ibid).

Crime Equals Punishment — But Does It Work?

The limitation of the criminal justice system as an agent for social change is not something which

seems to attract much comment in public media. Perhaps our notions are pre-set by politicians who promote the “Law and Order” debate, the retributive view of criminal justice and the allied notion that safety for society can only be achieved by locking up all offenders — preferably forever, but certainly for longer than in the past. The limitation of criminal advocacy is that social issues are dealt with on a case by case basis, each case having the potential to focus on a different issue. Such a limitation makes the criminal justice system a poor agent of social change. The accused is either busily contesting whether he¹ is a social deviant at all by contesting his guilt, or alternatively explaining by way of mitigation to a plea of guilty, that his social deviance is explainable, or a one off situation that is unlikely to happen again.

Perhaps it is time, at least in some areas of “criminal behaviour” to have a good hard look at whether the present format of the criminal advocacy system suits the needs of the 21st century. The criminal trial is a procedure that has been used pretty well unchanged in its basic concepts, aims and format since the 17th century. If the fundamental purpose of the administration of criminal law is to protect society by preserving the “Queen’s peace” then so far as sexual assaults of children is concerned, if 20 per cent of our young girls are growing up molested, notwithstanding 300 years of criminal trials, it is time to admit there may be some significant failings in the system. A system which focuses on the exorcism and ex-communication of all publicly known sexual deviants may not be the best means of preserving the Queen’s peace or protecting

¹ The male gender has been used throughout for the accused or victimiser.

society — or even of exposing the unknown deviants.

Crime Does Not Always Equal Punishment

It would be legitimate to believe, particularly after listening to politicians at election time, that the state will be ruthless in its pursuit and punishment of criminals. Yet there has been an inconsistency by governments in their treatment of crime and criminals. All known crime is not punished — particularly, it seems, when it is engaged in by those in the executive or legislative arm of government, or the executive arm of government perceives an advantage to it in not prosecuting or punishing an offender.

Even when admittedly gross “aberrant” behaviour is present, and the offenders identifiable, government does not always require that the offender be tried or punished through the criminal justice system, for example, the Wood Royal Commission’s amnesty for corrupt police officers; South African Truth and Reconciliation Commission; Chilean Truth Commission, New Zealand Family Group Conference, and the Albury-Wagga adaptation of that scheme; the NSW Pretrial Diversion Scheme for Sexual Offenders, and the Community Holistic Circle Healing Program in Manitoba are all recent examples of a dealing with “criminal” behaviour other than through the traditional trial and sentencing process. Daily in our courts we encounter police informers who have been given an indemnity from prosecution. On one view of it, an indemnity is partially enshrined in statute for wrongdoers who are prepared or compelled to testify in court (*See Evidence Act 1995*, s. 128).

Tim Anderson (*Sydney Morning Herald*, 16 March 1995) makes the point that most crime is undetected; indeed, much unreported, particularly in sexual assaults, and more particularly in child sexual assaults where estimates are as low as 10 per cent (*Sydney Morning Herald*, 20 January 1997). Research seems to have established that those coming before the criminal justice system for offences are but the tip of the iceberg of those responsible for aberrant behaviour in the community. What is the sense of it when only a small fraction of those responsible for breaches of the criminal law find themselves publicly

denounced and cast out from the community, while the significantly larger balance are free to continue their unlawful conduct because they remain undetected by investigators, and unidentified and uncriticised by the courts?

The Criminal Trial Process — As An Instrument of Social Value

Can the Queen’s peace be preserved and society more effectively protected than the present method allows? Is there any real advantage in pursuing the alternative scenario advocated by the politicians of simply “upping the ante”?

The criminal trial is a poor vehicle for getting to the truth of a matter. Particularly is this true for child sexual assault cases. Firstly, the aim of the criminal trial is not so much about “truth” as determining whether the available and admissible evidence establishes the guilt of an accused beyond reasonable doubt. Secondly, the nature of the complaint and the age of the principal witness impact to make the child sexual assault trial a fairly unreliable vehicle for establishing real guilt. Consequently views may range from “Child abuse is a relatively safe crime for the offender...Convictions are notoriously difficult and costly to obtain” (Herlihy 1992, pp. 16 & 17; *see also* Victorian Parliamentary Crime Prevention Committee 1992, p. 126) — to “In fact of course, some children — young and old — do lie about sexual abuse as many actual cases in the courts have shown...In other cases, the evidence of a child, although not found to be deliberately untruthful, may be found to be inconsistent and unreliable” (Gibbs 1992, p. 3 & p. 7). Views range so widely, because many actual offenders have been found “Not guilty” and many falsely charged have been found “Guilty”.

Moreover, the criminal trial of an alleged sexual abuser is an appalling vehicle for resolving the complex family

dysfunctional dynamics thrown up by the allegations and (if the allegations are well founded) by the aberrant conduct itself. Damage done to the victim physically and psychologically by the incident(s) no doubt varies from extreme and traumatic to something much less. Psychological damage done to the victim by a contested court case can also range from the extreme and traumatic to something much less. The child's experience of court may well cause feelings of betrayal, stigmatisation, powerlessness Winefield 1992, p. 23). "System 'abuse' may also arise through excessive professional zeal, repeated interviews, or physical examinations and family breakdowns" (Winefield 1992, p. 23).

The attached Victim Impact Statement is a not unexceptional account of the disintegration of a family arising as much from the trauma of the criminal proceedings as from the abusive conduct complained of. When the damage from the court proceedings occurs to someone already badly bruised from the incident(s), one has to wonder if there is not a better way.

When the personal agenda of a third party (for example, estranged partner) is the driving force, particularly in the case of false accusations, the "system abuse" that may be caused to the child is wanton and inexcusable.

Paedophilia — Medical or Criminal — Treatment or Gaol

The Macquarie Dictionary defines "paedophilia" *n. Med.* Sexual attraction in an adult towards children [PAEDO- + -PHILIA].

The dictionary has "paedophilia" catalogued with a medical label suggesting the entry is limited in its usage as a medical term. There is no doubt paedophilia is a medical/psychiatric condition (Bluglass & Bowden 1990; Clark 1992, pp. 31-4).

The essential features of the disorder from the medical perspective is recurrent, intense, sexual urges and sexually arousing fantasies of at least six months' duration involving sexual activity with a pre-pubescent child (DSM, 3rd edn). The person will have acted on these urges, or is markedly distressed by them. The age of the person is arbitrarily set at 16 years or older and at least 5 years older than the child (ibid.).

As with so much in the criminal justice system the gap between criminal conduct and a medical condition is blurred (for example, mental illness, diminished responsibility, anti-social personality disorder, addiction, automatism). While the condition of paedophilia may be a medical/psychiatric one, the conduct it produces has been labelled criminal. This raises issues about whether society is better served by dealing with the conduct solely by criminal sanctions which punish the conduct, or dealing with the condition solely through programs which address the cause and treat the condition with a view to curing or containing it, or some combination of the two.

Apart from the fact that the court and prison system could not cope, a 100 per cent degree of efficiency in arrest and prosecution that saw every person who committed the criminal offence of sexual assault, or the sexual assault of a child would be an unmitigated social disaster. Society would revert to the structure of the convict colony days as the percentage of punished and incarcerated exploded.

Paedophiles come from all ranks. Sex offenders come from every occupation and socioeconomic level (*Sydney Morning Herald*, 25 February 1997, p. 11). Paedophiles aren't seedy-looking men in trench coats. It's a disease, it can afflict anybody — doctors, lawyers, even Nobel laureates (Parliament of Victoria 1995, p. 122). Bob Ellis (Ellis 1996) nominated Socrates, Michaelangelo, Leonardo, Shakespeare, Marlowe, Byron, Strachey, Noel Coward, Rattigan, Islerwood, Auden, Chaplin, Waugh, Greene, Tennessee Williams, Errol Flynn, Brendan Behan, Frank Thring, Donald Friend, Stuart Challender, Peter Allen and J.F. Kennedy as having taken underage partners at some time. To that list was recently added Nobel scientist Daniel Carlton Gajdusek (*Sydney Morning Herald*, 25 February 1997).

Notwithstanding this list of prominent citizens there is a need to remember the overwhelming number of cases of sexual assault against young children which occur within the family setting. Families are destroyed by incarceration, frequently in situations where the family unit could be saved, and the various members of the family, including the victim would welcome the survival of the family unit (See, for example, *R v J* 45 ALR 331).

Is the present method of presenting all sexual offenders without discrimination to the courts for determining guilt and punishment the best option?

Non-Punitive Disposition No Weak Way Out

A non-punitive disposition is not necessarily a weak solution. A common feature of the non-punitive systems noted above appears to require an admission of guilt by the offender at an early stage, and full disclosure of his involvement in the criminal conduct. Another feature appears to be the voluntary choice by the offender of an alternative disposition procedure to the sentencing procedure. It also appears that the victim can play a significant part in some non-sentencing dispositions. In any treatment program there must be a capacity for the victim to be supported throughout the process, the offender likewise must be supported throughout. The alternative disposition procedure appears to place demands upon the offender, and sometimes his family/supporters which are directed towards healing, reconciliation and prevention. It also appears to place demands upon the victim (and this may be a criticism of it), at least to the extent of requiring the victim to recognise that the offender is a human who while he may have some reasons to explain or account for the aberrant behaviour, is to be considered as being worthy and capable of being reconciled with the victim and other family members.

The Hollow Water model has a "Healing Contract" which is designed by all the parties involved in, or personally touched by, the offence. It requires that they each "sign on" to bring certain changes or additions to their relationships with all others. Such contracts are

never expected to last for less than two years, given the challenges of bringing true healing in the context of sexual abuse. One is still being enforced six years after its creation (Ross 1996, p. 33).

This community healing takes place outside the normal criminal justice process - although links to the system are maintained. When someone alleges that they have been abused, the CHCH assessment team evaluates the complaint as quickly as possible. If it appears to be valid, the team swings into action...After selecting two team members to make the initial confrontation with the victimiser (instead of the police, but with full police backup if necessary), other team members "[fan] out" to be with all the others who would be affected by the disclosure. That [means] that the nonoffending spouse, brothers and sisters, grandmothers and grandfathers, aunts and uncles — everyone affected — would have a helper at their side to explain what had been alleged, the processes that were to be followed and the help that might be made available to everyone. No-one would be left either in the dark or in their own painful isolation.

The victimiser is approached by two members of the team at a time and place most likely to permit the best atmosphere for honesty and progress. They communicate the allegations and listen to the response. They do not expect immediate acknowledgment, for their own experience with sexual abuse has taught them to expect denials, minimisations, victim blaming, hostile manipulations and the like. When they tell the victimiser that criminal charges are about to be laid, they also say that they are available to accompany him or her through the criminal justice process as long as sincere efforts are being made to accept responsibility and go through the healing process. If that is not agreeable, the victimizer is on his own.

Of the forty-eight cases dealt with through to the spring of 1996, only five have failed to enter into — and stay with — the program.

The victimizer is then accompanied to the police station where he or she is formally charged and asked to provide a statement. While that statement would probably not be admissible in court, it is seen as a first step in the long process of accepting responsibility. The team then requires the victimiser to enter a guilty plea to the charges in court as quickly as possible.

The team then asks the court to delay sentencing for as long as possible. Experience has taught that they need a great deal of time to work with the victim, the offender, the families of each and the community as a whole before they can provide the court with a realistic assessment of the challenges and possibilities each case presents (Ross 1996, pp. 33-4).

Selection Criteria

It is not suggested that every person coming before the courts be offered a non-punitive disposition of his matter.

The overwhelming number of child sexual assault cases occur within the family setting, coming from either near relative or extended family. Without more that scenario suggests that in many of these cases non-punitive dispositions may well resolve more satisfactorily than does the criminal justice system the dynamics leading to child abuse.

Another significant group of child sexual abuse comes from peer group adolescents. Much of their sexual activity against other children comes from exploratory sexual experience by adolescents who are entering puberty or are recently post pubescent. Given the general absence of any rigorous prosecution of this group it would appear society is more willing to tolerate their behaviour. Nevertheless, non-punitive disposition may well assist the more persistent or deviant of this group to resolve sexual problems before they become entrenched in anti-social behaviour. The Victorian

Parliament's Crime Prevention Committee found that a significant percentage of sex offenders were adolescents. While there were two competing views ("They will grow out of it" vs "Dominant patterns of sexual behaviour usually have their beginnings in adolescence") the Committee observed "It is at this point in the offending cycle that change was still possible and that it was with children and adolescents that the cycle could be broken" (Parliament of Victoria 1995, p. 253).

First offenders, not falling within either of the above groups may also provide suitable candidates for non-punitive disposition.

However, the serial or multiple child sexual offenders who have displayed a deep seated and systematic predatory abuse of children are a "horse of another colour". Even if they were amenable to treatment through a program, the question of whether they should be offered one would no doubt depend upon the extent of the anti-social behaviour reflected in the ambit of the allegations made against them.

Sex offenders with deviant sexual preferences, including sadism, history of violence and substance abuse related to violence have a poorer prognosis in treatment than others (*see Solicitor General, Canada 1990*).

The pre-trial diversion program set up in NSW in 1987 set the criteria for selection by excluding those:

- who pleaded "Not guilty";
- whose offence involved acts of violence to the victim or a third party;
- who were not a parent or in a parent relationship;
- who were under 18 years of age;
- who had a prior conviction for sexual offence;
- who had been offered a place in the diversion program on a previous occasion (Goodwin 1988).

The NSW pretrial diversion program also required the offender to be assessed as suitable and agree to comply with program

requirements for a period of two years (Goodwin 1988).

Treatment Programs — Need for Resources and Research

The approach to treatment programs needs to be hard-headed. Initially, there is a need to be selective so as to offer programs to the more suitable candidates. However, there should also be research into the methods of selection to guarantee the candidates offered programs are the candidates who will most benefit. There is a need to monitor specific and general trends through ongoing evaluation assessments of the non-punitive programs. There needs to be research into better methods of treatment. The Canadian approach suggests there is no single cause of sexual offending. There are many factors which may contribute to the individual's sexual offending, consequently there are various demonstrated treatment approaches that are useful in addressing these factors. No approach offers total success, but some approaches have shown some success (Parliament of Victoria 1995).

There is an onus on treatment providers to make the prospect of treatment attractive. Such non-punitive options may share much in common with addiction treatment centres such as Odyssey House — using the long adjournment, with the potential of retributive sentencing in the absence of progress. Nothing motivates like self-interest.

It is critical where treatment has been institutionally based that there be a continuity of treatment from the institution to the community. Greater coordination between the various competing agencies (DOCS, police, probation and parole, hospitals, community based organisations, churches) involved in the treatment of sex offenders is also essential (*see generally* Solicitor General Canada 1990; *see also* Ross 1996).

Experience shows that there are not enough experts to meet the demand for programs. Goodwin (1988) on the criteria in 1987 a possible 112 out of 1048 defendants would have been eligible to participate in the pretrial diversion program, yet there were only places for 22 per cent of them because of limited resources. Similar problems were experienced by the

Canadians: “No single individual can manage a case of child abuse. It is far too complex. It requires a team approach.” (Evidence accepted by the Victorian Parliamentary Crime Prevention Committee 1995, p. 128, *see also* Solicitor General Canada 1990).

Whether paedophilia is primarily a medical problem or not, the governments of Australia should, through special grants to universities and otherwise, develop special research schemes to determine the causes of this sexual abnormality and improve methods of treatment (*see* Canada 1958). Medical science and behavioural sciences in particular should be encouraged to play a major role in the research of paedophilia and the treatment of those suffering from it, with particular emphasis on those who manifest the condition through sexual abuse of children.

Non-punitive dispositions of child sexual assault cases where appropriate would have beneficial impacts including:

- greater likelihood of disclosure by victims — because family unit may survive;
- greater likelihood of disclosure by victimiser — because of treatment option preferred to punitive option; and family unit may survive;
- increased reporting rates of child sexual offences (Goodwin 1988);
- increased admissions of guilt (Goodwin 1988);
- punishment not an effective deterrent for certain classes of offender and other forms of treatment may be more effective (Goodwin 1988);
- the criminal trial process offers little protection for the victim — and may increase or present its own separate trauma for the victim (Winefield 1992, p. 23);
- places emphasis on rehabilitation and prevention of repetitive acts of child sexual abuse (Goodwin 1988).

Treatment Offers Gains for Community

Figures on the successful outcome of treatment seem to fluctuate wildly. Canadians found that child molesters tended to have a low recidivism rate (14 per cent), although those offending against boys were higher at 40 per cent (Solicitor General 1990). Another study suggested behavioural treatments all had roughly the same result and reported a success rate of 70-80 per cent (Clark 1992). The New Zealand Justice Department produced figures which suggested 67 per cent of untreated prisoners re-offended, whereas only 30 per cent of the treated group were reconvicted, with a reduction of 40 per cent in the seriousness of the re-offence after treatment (Parliament of Victoria 1990, pp. 230-1). A Massachusetts study claimed 40 per cent recidivism for untreated sex offenders and 25 per cent for treated sex offenders (Goodwin 1988). But whatever the figures, it seems clear that double digit percentages of offenders are less likely to be recidivists if offered treatment.

Given the financial costs incurred in apprehension, investigation, trial, incarceration, appeal and parole, insofar as the offender is concerned, and social services, victim's compensation, hospital, medical, counselling expenses so far as the victim is concerned, on any view there must be a substantial cost-benefit in the treatment of those child sexual victimisers who are made non recidivists — perhaps totalling hundreds of thousands of dollars per offender. It goes without saying that the physical, and emotional devastation of potential victims saved is even more important. The plan advocated here has as a fundamental plank, greater support services to victims and other family members than is current practice. Cost benefits from lack of recidivism should not be seen as a means of saving money for government — but as a means of freeing government money for child victim services.

Courts' Role Essential

The ultimate decision as to whether to offer a non-punitive disposition to an offender must be made by the court. In determining whether to grant an application for a non-punitive disposition, the court would need to take into

consideration *inter alia*: the nature and seriousness of the offence; the past criminal history of the offender; whether the offender has acknowledged to a sufficient degree (regardless of whether the evidence would be admissible in a trial or not (Goodwin 1988)) his role and involvement in the offence; the genuineness of his willingness to participate in the program; the attitude of the victim to the offender's undertaking the program; the foreseeable duration of the program; the attitude of the offender's spouse/family (if there are such) to the offender's undertaking the program; the willingness of other participants to become involved in the program; the management, aims and syllabus of the program; the nature of support available to the offender to assist him complete the program; the availability of resources to all parties who would be involved in the program; the safety and welfare of the victim and others; the likelihood of reoffending; and the length of adjournment needed to evaluate accurately whether real progress is possible.

PART II

Defending at Trial — Allegations of Paedophilia

The primary focus of the criminal trial is (or at least for defence counsel should be) to guarantee that the accused gets a fair trial. A fair trial as measured from the defence counsel's perspective is to obtain every legitimate forensic advantage possible for the accused, even if that be at the expense of the victim, or of the prosecution to air evidence which is prejudicial to the accused.

As with most crime, the techniques of defence arise out of the circumstances in which the alleged crime was set. The most frequently encountered characteristics of sexual offences which make them distinct from other types of offences include the fact that the sexual offences are often committed in private with no other eye witness

accounts to corroborate the complainant's account. The absence of other eye witnesses entitles defence counsel to seek a "Liberato" (159 CLR 507 at 515) direction reminding the jury, that even if they don't believe the defendant, they still must ask themselves are they satisfied beyond reasonable doubt on the account of the complainant.

There was a common law rule that a warning should be given that it is unsafe to convict anyone of a sexual offence on the uncorroborated evidence of the person upon whom the offence was said to have been committed. Although the obligation to give such a direction has now been abolished by statute (*see Evidence Act 1995* s.164), defence counsel are still entitled to seek such a direction, and most do.

The great majority of sexual offences against children are committed in private by lone offenders who may go to great lengths to ensure the activity is carried out in secret and remains a secret between the offender and victim. Consequently, the offence is often not reported immediately, leaving the complainant open to criticism, on the issue of whether the offence occurred at all, and on issues related to the complainant's ability to recall details accurately. Delay in reporting the offence means the crime scene affords little or no forensic corroboration. Sometimes there may be issues of identification of the perpetrator — although less so if a family member is said to be involved. Frequently a lone offender may select the same victim for repeated offences, with the result that one episode may "telescope" into others thereby producing an inaccurate or insecure account from the complainant. With children the account given is usually inadequately or inarticulately voiced, usually to persons who have an emotional investment in the child or the issue, with a consequent risk of contamination by questioning which is specifically focused and/or leading.

Defence counsel's duty requires him/her to cross-examine the complainant. Opinions differ as to the tone and mood the cross-examiner should set. Different complainants will require different approaches — but where an accused has pleaded not guilty, and the complainant maintains the allegations, the duty of the defence advocate is clear — he/she must challenge the

complainant's version. The best advocates are fearless advocates — but fearlessness does not necessarily require outrage, indignation, or rough-house tactics in cross-examination. What is required is that the defence case be put firmly and frankly, so that the complainant has an opportunity of answering it, and the jury are in no doubt about where the defendant is coming from.

Complainant's Credit Fundamental

At the end of the day, the realities are that the prosecution will only succeed if the complainant is believed beyond reasonable doubt. The more material the defence have on the complainant the greater the scope of the cross-examiner to attack his/her credit. Much of that material may come from instructions — but the legal team must do its own research. Intelligent use of the subpoena should produce material which may demonstrate inconsistency in the complainant's account or otherwise undermine the complainant's credit. Material to be subpoenaed could include:

- DOCS file on complainant;
- DOCS file on complainant's associates;
- hospital files, including social work and medical files (they will have a history of the complainant);
- school file — including counsellors' reports and education progress reports before, during and after the relevant period of alleged abuse;
- DPP and Victim Support person — all notes and/or recordings of conferences, diagrams, between the complainant and officers of the DPP;
- police — all notes and/or recordings of conferences with complainant and all notes and/or recordings of conferences with accused;
- forensic laboratories/scientists (if an issue), all notes, working papers relating to their investigations and used in forming an opinion.

TV Monitor or Not

The court may on the application of the prosecution permit the complainant child to give evidence by means of closed-circuit television (s405D *Crimes Act 1900*). The prevailing wisdom seems to suggest that such a course is more detrimental to the victim than the accused because juries are in some way de-sensitised, and that evidence given via television monitors is less convincing than evidence given personally in the presence of the jury (Victorian Parliamentary Crime Prevention Committee Report 1995, p. 199). The child hidden, or at least partially hidden by the TV cameras, while full-framing the child, may seem less vulnerable, and more remote to the jury. The complainant may be distracted by the TV camera. It is very difficult to look down the lens of a camera, in which case it becomes impossible for the jury to make any eye contact with the child.

Sometimes a complainant will choose to give evidence in the courtroom. Then eye contact between the complainant and the accused is important from the defence viewpoint. Defence counsel, when instructed that the complaint is untrue, is entitled to invite the client to confront with eye contact a complainant, who on the defence version is being untruthful. While an accused is normally entitled to confront his accusers, the delicacy in this instance however, is to recognise the tensions between confronting an untruthful witness, and the abuse of power by an adult over child. It does appear that such eye contact can be stressful for the child, they can see it as intimidating and traumatic (*ibid*, p. 201). However, it is also well known that liars often have difficulty maintaining eye contact when they are telling untruths.

Pre-Trial Questioning of the Child Often the Issue

Questioning of a child (*see* Gibbs 1992, pp. 3-15) or children is a real minefield. If there is a multiplicity of interviews regarding an alleged sexual abuse, that fact alone may cause problems because “There will be a tendency for each interrogator, however careful, to influence the child’s beliefs and answers by the way he [sic] frames his questions, by the verbal or other

indications of his approval or disapproval, even by the mere circumstance of the interrogation taking place.” (Cox J. in H. 44 A Crim R. 345 at 348-9.)

In 1987 in Cleveland, England, 125 children were removed from their homes because, after questioning, they were assessed as having been sexually abused. Subsequently 97 were returned upon the basis that the initial assessments had been invalid. In the enquiry that subsequently followed Dame Elizabeth Butler-Sloss recommended the following guidelines: (Cmd 412, paras. 12.58-12.64.)

- the undesirability of calling them “discovery” interviews, which precluded the notion that sexual abuse might not have occurred;
- all interviews may be undertaken only by those with some training, experience and aptitude for talking with children;
- the need to approach each interview with an open mind;
- the style of the interview should be open-ended questions to support and encourage the child in free recall;
- there should where possible be only one and not more than two interviews for the purpose of evaluation and the interview should not be too long;
- the interview should go at the pace of the child and not of the adult;
- the setting for the interview must be suitable and sympathetic;
- it must be accepted at the end of the interview the child may have given no information to support the suggestion of sexual abuse and the position will remain unclear;
- there must be careful recording of the interview and what the child says whether or not there is a video recording (*see also* Victorian Parliamentary Crime Prevention Committee 1995);

- it must be recognised that the use of facilitative techniques may create difficulties in subsequent court proceedings;
- the great importance of adequate training for all those engaged in this work;
- in certain circumstances it may be appropriate to use the special skills of a “facilitated” interview. That type of interview should be treated as a second stage. The interviewer must be conscious of the limits and strengths of the techniques employed. In such cases the interview should only be conducted by those with special skills and specific training.

To those could be added the following (Winefield 1992, p. 26):

- the interviewer should learn and use the child’s terms for body parts because children may well not speak up when they do not understand;
- it is desirable to avoid yes/no type questions;
- the interviewer should strive for an egalitarian relationship with the child as this may facilitate a more accurate account coming from the child than in circumstances where the child remains in awe or afraid of the interviewer;
- the interviewer should refrain from reaching a conclusion early on and then shaping all subsequent questions around that hypothesis.

The use of dolls which are “anatomically correct” can also be subject to criticism. Firstly, they may not really be anatomically correct — but in any event “It would not be surprising were some children (whether they had been abused or not) to show interest in the genitalia of the dolls. That might be particularly so if the penis of a doll is disproportionate in size or in an erect state.” (Gibbs 1992, citing *H v H (Minors)* 3 WLR 933 at 967, 1989.)

Defence lawyers can be expected to examine in detail the questioning procedure(s) used to obtain the prosecution evidence. To the extent that it fails to meet the criteria above, the credit of at least the complainant, and possibly the investigators will become an issue in the trial.

As earlier stated it is not uncommon for a young complainant to delay in reporting sexual assault, especially when the victimiser is known to the child.

Not all sexual assaults on children are unwelcome by the victim. For whatever reason a child may accept, be ambivalent towards or welcome a sexual encounter with an adult, perhaps years later to complain of it, perhaps never complain of it.

While the trial judge is required to instruct the jury that delay in complaining does not necessarily indicate the allegation is false (*Crimes Act* s.405B(2)) he should also direct the jury that it should take the delay into account in evaluating the complainant’s evidence (*R v Davies* (1985) 3 NSWLR 276).

However, delay can affect the credit of the complainant in another way. Often victims are forced to recall events that are not only painful, but are also way back in memory (Victorian Crime Prevention Committee Report 1995, p. 190). Whatever delay there was in reporting the offence is added to by court delays. Although the DPP in this State has a policy of giving priority to child sexual assault cases, delays of 18 months to 2 years are not unknown. Such delay must impact upon the victim’s capacity (remember the victim may only be 7 or 8-years-old) to recall accurately details of the alleged encounter(s). The defence lawyer should highlight the delay factor to the jury as one of his strongest arguments.

There are occasions when the delay is not measured in months, but decades. A number of complainants have caused sexual assault charges to be brought after a passage of time that seems inordinate. Such delay raises questions about the absence of complaint, the reality of the incident and the question of whether the memory always existed or has been “retrieved” or “recovered”. Where the complainant’s memory has been “recovered” through the assistance of a third party, defence advocates must not only question the validity of the

Delay — An Issue in the Trial

procedure by which the memory was recovered, but the very notion of what “memory” is (*see* Loftus 1991, pp. 14-30).

Multiple Charges — Separate Trials?

While different cases will call for different tactics, the generally perceived wisdom among defence lawyers is to keep it simple and the prejudice to a minimum. Most usually this is achieved by having as few charges on the indictment as possible.

Consideration will need to be given to severance where there are:

- multiple accused (relatively uncommon in child sexual assault cases);
- multiple victims *see*, for example, *Hoch v R* (1989) 165 CLR 292);
- multiple allegations, same victim (likely outcome is no severance) *R v Chamilos*; unreported NSW CCA 24-10-85; *R v Zappala* unreported NSW CCA 4.11.91; *R v Wickham* unreported NSW CCA 17.12.91).

Where an accused is tried jointly with other accused, or in respect of multiple victims or in respect of multiple allegations against the same victim, he is entitled to clear directions from the trial judge that highlights the jury’s obligation to give separate and discreet consideration to each charge, and that there must be evidence referable to that charge which satisfies the jury beyond reasonable doubt of guilt before it can convict.

Old Offences — Recent Amendments

Over the past twenty-five years the legislature has created a plethora of sexual offence charges. From a starting base of thirteen or so different categories of sexual offences most of which were gender specific² the legislature has made

² Rape; (s.63 *Crimes Act 1900*); assault with intent to commit rape (s.65 *Crimes Act 1900*); illicit carnal connection by false pretense etc.(s.66 *Crimes Act 1900*); carnal knowledge of girl under ten years (s.67 *Crimes Act 1900*); attempt or assault with intent to carnally know girl under ten (s. 68 *Crimes Act 1900*); carnal knowledge of girl aged between 10 years to 16 years (s. 71 *Crimes Act 1900*); carnal knowledge of an idiot (sic) (s.72A *Crimes Act 1900*), carnal knowledge or attempted carnal knowledge by school teacher, father or step-father

most of the offences non-gender specific, and structured the sexual assaults so that what may have previously been acts of indecency are now sexual intercourse. Sexual assault may also become aggravated. The changes started in 1981, there were further changes in 1985 and again in 1987. Defence counsel must do the research to establish whether the charges contained on the indictment accurately reflect the law as it was when the offences were alleged to have occurred. The trend of the changes has been to increase penalties for acts which once were regarded as less heinous.

Statute Barred?

There was a statutory limitation of 12 months for the prosecution of an accused who allegedly had carnal knowledge of a girl aged between 14 and 16 years (s.78 *Crimes Act*). There were amendments to that statute in 1981 and 1985; it was repealed in 1992.

Incest offences cannot be prosecuted without the sanction of the Attorney-General (s.78F *Crimes Act 1900*). However, the Director of Public Prosecutions may sanction such prosecutions (Government Gazette no. 117 of 10 July 1987). Arguably that is a function he must exercise personally, and the simple filing of an indictment would not amount to such a sanction.

Homosexual intercourse offences where the accused was under 18 years at the time of the alleged offence cannot be prosecuted without the sanction of the Attorney-General (s.78T *Crimes Act 1900*). The Director of Public Prosecutions may sanction such prosecutions (Government Gazette no. 117 of 10 July 1987). Again it would seem that is

(s.73;74 *Crimes Act 1900*); indecent assault of female (s.76 *Crimes Act 1900*); incest (s.78A *Crimes Act 1900*); committing or attempting the abominable crime of buggery (s.79 80 *Crimes Act 1900*); indecent assault upon a male (s.81 *Crimes Act 1900*); male soliciting in public place (s.81B *Crimes Act 1900*).

a function the Director must exercise personally.

Plea of Guilty

It should not be forgotten that many child sexual offenders acknowledge their offences and plead guilty. Defence advocates should be astute enough to see whether the prosecution is prepared to consider making a favourable disposition so far as charges on the indictment are concerned. Frequently the informant will have over-charged at the Local Court committal stage. Often the complainant and the family will be well satisfied if the victimiser pleads guilty to something less than what the allegations would carry as charges. Anger and a thirst for retribution are not always the only emotions experienced by the complainant.

Defence counsel should then negotiate with the prosecution on the agreed facts, if such agreement is possible. Too many advocates are prepared to permit the police Facts Sheet to go to the judge unchallenged. It should be remembered it is the acceptance of the Crown's allegations and not the making of them, which determines the ambit of the adverse facts on which the sentencing judge is entitled to act in the absence of evidence (*Lovelock v R* 19 ALR 327). Again, it is best to settle the agreed facts with the prosecution prior to the presentment of the indictment. If it is not possible to settle upon an agreed set of facts, the defence must be prepared to go into evidence.

Finally, the client should be assessed by a suitably qualified expert: psychiatrist, social worker, psychologist to see if there is some explanation available which will mitigate the offence. Equally importantly, the question of whether the client presents as a continuing or lingering danger (Veen [No.2] 164 CLR 465 @ 473-7) must be addressed in evidence in some way, usually within the assessment of the above expert.

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Appendix

VICTIM IMPACT REPORT CHILD SEXUAL ASSAULT COUNSELLING SERVICE

Victims's Name XXX

I am a child sexual assault counsellor employed by the XXX Women's Centre. I have been employed in this position for eight years. I have a Bachelor of Arts Degree (Psychology major), an Associate Diploma of Social Welfare, A Diploma of Social Sciences and a Master of Letters Degree (Psychology). The focus of my Masters thesis was Post-traumatic Stress Disorder in children. I am registered as an Intern Psychologist with the NSW Psychologists' Registration board and am an Associate Member of the Australian Psychological Society. I have also completed numerous short courses in the area of child sexual assault. I am familiar with the literature on child sexual assault and associated psychological disorders.

Impact of the Assault

Assessment with the Post-traumatic Stress Reaction Index for Children indicates that XXX qualifies for a diagnosis of Post-traumatic Stress Disorder (moderate to severe) as a result of the violent sexual assault perpetrated upon her by XXX. Post-traumatic Stress Disorder as defined by the Diagnostic and Statistical Manual, 3rd edition-revised (American Psychiatric Association, 1987) is a disorder with symptom criteria ordered into three symptom groups; re-experiencing the trauma, persistent avoidance of stimuli associated with the trauma, and symptoms of increased arousal. XXX symptoms with regard to these criteria are discussed below.

In addition to Post-traumatic Stress Disorder, XXX has demonstrated significant symptoms of Reactive Depression.

Impact on the Family

It is noteworthy that the sexual assault of this young girl has had a massive impact upon her whole family system. Mother was convinced by the perpetrator that XXX lied about the allegations, and has effectively abandoned her daughter. XXX mother testified as a witness for the defence. Currently XXX is in temporary foster care, having, at best, very limited access to her mother and siblings. Siblings have also turned against her. For example, her four-year-old brother has told XXX that she is really bad because she lied and sent Daddy to jail. As a result, this thirteen-year-old girl not only has the issues of the rape itself to deal with, she also has to come to terms with the effective loss of her whole family

Impact from the Court

XXX found the process of giving evidence at two different district court hearings extremely difficult and stressful. It was enormously difficult for her to be in the same room as XXX and psychologically distressing to go over the intimate details of the assault in front of two different juries.

Because XXX mother had been convinced by XXX denials and falsification about the assault. And his insistence that XXX was lying about the allegations, she not only did not offer any support to her daughter, but also acted as a witness for the defence. XXX found her mother's actions extremely traumatising. She felt betrayed, abandoned and unloved by her mother. Additionally, XXX was in constant fear that her mother may commit suicide. XXX is very aware of the fact that her father had killed himself when she was small, and the fear that her mother may do the same was the primary reason she had kept knowledge of the assault from her mother for so long.

Post-Traumatic Stress Disorder Symptomatology

Re-experiencing the Trauma

XXX suffers from frequent “flashbacks” wherein she re-experiences the intensity of emotions, particularly fear, that she felt at the time of the assault. These flashbacks appear to be triggered by seeing men who resemble the perpetrator XXX, for example, one of her teachers at school bears some resemblance to XXX with the consequence that being in close proximity to him had caused XXX to become intensely distressed and disruptive. This difficulty was eventually dealt with via the Principal intervention and XXX transfer from the teacher’s class.

Additionally, XXX has frequent nightmares about the assault and of XXX coming to ‘get her’. XXX also suffers from nightmares wherein the central theme appears to XXX that she is being abandoned by her mother. Not surprisingly XXX avoids going to sleep for as long as possible.

XXX also thinks about the assault and its aftermath frequently. Thoughts about the assault intrude upon her when she is supposed to be doing other things such as her schoolwork. XXX has little or no control at this point regarding these intrusive memories and finds herself “Just sitting there” becoming intensely upset and angry. Not surprisingly, schoolwork has shown a marked deterioration since the assault. Once a good student, she is now only just scraping by, and is regarded as difficult by her teachers.

Persistent Avoidance of Stimuli Associated with the Trauma of Psychological Numbing

Since the assault, XXX has become distrustful of all men. She finds herself becoming highly anxious and distressed near men and subsequently avoids contact with them wherever possible. This avoidance of men also includes her foster-father. While XXX believes him to be a good man who would not harm her, she is constantly on guard to avoid being alone or in close proximity to him. XXX also shows a phobia of hotels and people drinking alcohol. Clearly she associates such situations with the assault.

In the counselling process, XXX has talked about the physical scarring that she has as a result of the assault. XXX has fears that this scarring means that she is not “normal” and may not be able to have children when she is older. Despite addressing these fears with her, the permanency of the scars continue to emphasise to her that she is physically “marked” by the assault. Effectively she feels different from other girls and something of a “freak”.

XXX like many victims of severe trauma, also suffers from a restricted range of affect and frequent mood swings. Although XXX attempts to put on a happy face at times, she generally feels either highly anxious, severely depressed or very angry. XXX has made it clear on a number of occasions that she would rather be angry than anxious or depressed. Consequently she will often deliberately switch into “anger mode” when she feels that things are getting on top of her. However, this does not bode well for her in many situations, particularly at school. XXX self-esteem is also disturbingly low. She sees herself as a “bad kid” and finds it impossible to identify anything positive about herself.

Symptoms of Increased Arousal

XXX often has great difficulty in getting to sleep (as noted above), and has difficulties in concentrating on her schoolwork. Central to both these difficulties is the high frequency of intrusive thoughts and feelings about the assault. The persistence of these intrusive thoughts and feelings, combined with her general misery, has meant XXX has great difficulty in maintaining a focus on necessary activities.

Another symptom that falls within this category is that of psychogenic illnesses. Since the assault XXX has suffered from frequent severe headaches. At times these have occurred on a

daily basis (for example, during the court hearings). However, even when things appear to be going relatively well, XXX is still subjected to these headaches on at least a weekly basis.

Since the assault XXX has also developed an exaggerated startle response. Basically, XXX is no longer able to inhibit her startle response, reacting severely to “ordinary” events like sudden noises or people coming up from behind her. This indicator of severe traumatisation is a neurophysiological change in response to everyday incidents. Associated with this symptom is that of hypervigilance. XXX is unable to relax, feeling herself constantly on the alert. Essentially she no longer feels safe in her world and is carrying a partially sub-conscious expectation that she will be re-assaulted at any given moment.

Reactive Depression

Not surprisingly, XXX has suffered from considerable depression since the assault. Once a normally bright, happy young girl, XXX now feels “down” and distressed nearly all of the time. XXX has said that she feels that all of the good things have gone out of her life and she finds it hard to believe that anything will get better. She is frequently tearful, but feels guilty for showing her distress because it “upsets everybody else”. Instead she prefers to get angry, as then she feels less vulnerable and fragile. At the current time XXX is in temporary foster care but is expressing a wish to return home to her mother and siblings. However her mother’s continual vulnerability in XXX manipulations has resulted in XXX being rejected from her mother’s house. This situation, which shows little sign of abating, is aggravating XXX depression further. In effect she has lost her family and must go through a process of grieving for them.

Prognosis

XXX continues to be profoundly distressed by the assault and demonstrates symptoms consistent with a diagnosis of Post-traumatic Stress Disorder (moderate severe). Additionally, she is suffering from Reactive Depression which is aggravated by her mother’s rejection of her as a result of XXX manipulations and lies. At this point, no real abatement of her symptoms have been evidenced. Her loss of a normal childhood, including the loss of her family, cannot be under-estimated. The severity of the assault, and her mother’s inability to support her daughter does not augur well for recovery. Given these circumstances, prognosis at this time must be considered poor.

Child Sexual Assault Counsellor.

6



The Role of the Courts

JUSTICE FRANK VINCENT

No question arises concerning whether or not the courts should regard themselves as subject to an obligation to fulfil an educative role with respect to the sexual or physical abuse of children. Each pronouncement of legal principle, each determination with respect to the procedure adopted at the investigative or trial level, each ruling concerning the admissibility or otherwise of evidence in proceedings in which such conduct is alleged to have occurred, each charge or instruction to a jury, each assessment of the credibility or reliability of adults or children involved, each finding as to what has been established in a specific case, each assessment of the relative significance of the occurrence under consideration, and, ultimately, the disposition in each individual case, provides instruction to those involved and those who become acquainted with what has transpired.

At one level, the situation is no different in relation to the work of the courts in this area than any other. It is an integral part of their role to uphold publicly the values of the society which establishes them and which they purport to represent. Their proceedings are conducted for the most part in public. Judicial utterances and judgments are recorded and often widely reported or misreported, as the case may be, in the media. The penalties, for example, that are imposed for particular behaviours are frequently said (to some extent at least) to constitute public manifestations of the commitment of society to its stated values and the determination of our community to endeavour to reduce the incidence of the particular behaviour to the maximum extent possible.

There are clear educative purposes underlying all of these aspects of the work of the courts. Even when judges or magistrates are being teasingly facetious by asking counsel, for instance, in a case involving football clubs, to identify the team colours of two long established senior clubs, their words may be unintentionally and perhaps damagingly instructive to the minds of those who function in the “real world”. Members of the judiciary must therefore be very careful when exercising their various functions to ensure that their decisions and utterances which will be taken seriously by the community do not educate in what could be appropriately called “the wrong way”.

A number of propositions flow from this fairly obvious point. However, the one to which I propose to direct attention in the present context is that, simply put, judges and magistrates must themselves be sufficiently well informed to be able to understand and articulate the issues which arise before them with respect to paedophilic abuse if they are to avoid this problem. It is apparent to me as the Chairperson of an Adult Parole Board that this is sometimes not the situation. I still encounter cases, for instance, where the claimed precocity of a quite young child, who usually has been subjected to earlier abuse, appears to have been accepted as a mitigating factor affecting both the culpability of an adult perpetrator

and the likely impact of the abuse. There is a regrettable lack of understanding displayed on some occasions by judges who then are quite dismayed by the strength of the reactions to their statements.

It is doubtful that more than a small proportion of the judiciary would have much familiarity with the insights gained through the techniques employed by other disciplines in this area or would have read extensively on the subject. I do not wish to appear to be unduly critical of the efforts of the judiciary generally to deal with these issues, nor to undervalue the benefit of the experience which many judges and magistrates possess. Rather I am concerned to emphasise the limitations on the extent of the assistance which exposure to the legal system provides when it is unsupported by other training. That system has tended to be both self-instructive and self-evaluative; the attitudes and mythologies of one period being converted into entrenched principles which direct its operations in another. Understandably, as community attitudes have changed and its level of knowledge and awareness have increased in a number of different areas, the community has become much less accepting of the appropriateness of many of the procedures that have been developed and the assumptions which underpin them.

It must also be borne in mind that until relatively recently, paedophilic abuse was seldom raised as an issue and I suspect that few would have appreciated either its incidence in the community or the damage which has been occasioned to so many victims over the years of silence. Although the courts did encounter some cases, they were not presented with the kinds of problems that are still emerging as the silence has broken.

As a matter of personal admission, I should add that when some years ago now I began to hear from prisoners what seemed to me at the time to be a surprisingly large number of references to sexual abuse being perpetrated upon them in orphanages or other institutions or by family members, I had initial reservations concerning their bonafides. It simply did not seem to be at all likely that so many had been offended against in this fashion. However, when we, and I am here referring to the Parole Board of which I am the Chairperson, began to

investigate in the cases where it was possible to do so, the early histories of individuals who had been placed into homes or institutions of one kind or another, and the backgrounds of those who have come into contact with the system as street kids, a very sad picture emerged. Frequently, indications of abuse were present in old reports from one agency or another which appear to have been ignored. Sometimes, where specific complaints had been made, for one reason or another they were apparently not pursued. The overwhelming impression which slowly developed was that there was a longstanding problem of serious sexual abuse of children in our society and that the immense damage, social, personal and economic which this type of behaviour has occasioned, had been masked by silence and ignorance. That damage was, in the context in which we were operating, manifested by alcoholism, drug abuse, anti-social behaviour and attitudes, inability to form and maintain relationships and, broadly, the self-destructive behaviour so directly associated with lack of self-esteem.

I wonder whether, even now and in spite of the considerable attention given to the problem over recent times that the longterm nature of the harm occasioned by such abuse is widely recognised.

There can be little room for surprise therefore that members of the judiciary have from time to time expressed themselves in ways which have been perceived as inappropriate, insensitive or offensive by those who are concerned about the incidence of the sexual abuse of children in our society. This is not simply a matter of the employment of unfortunate language but rather a reflection of the lack of appreciation by the judges or magistrates concerned of the assumptions, misconceptions and sometimes prejudices underlying their handling of the problems with which they are confronted. To the victims of sexual abuse this language is seriously alarming as it suggests that their real situation will not be

appreciated and that there is unlikely to be full recognition of the significance of what has occurred. Whilst they may well experience a sense of frustration and regard themselves as being bereft of any real recourse as a consequence, those who are responsible for such abuse would be justified in feeling more confident that they are unlikely to be called to account for what they do or have done. Both groups are, in a sense, informed or educated through the activities of the courts, but in what I have already called “the wrong way”.

Obviously, an aware judiciary instead of contributing to and reinforcing these negative images can assist in the development of confidence that allegations of paedophilic behaviour will be dealt with in a careful, principled and informed fashion with proper attention and respect being given to the rights of all involved.

I have no doubt that the courts could, if they perform their educative role properly, do much to dispel some of the myths that still abound in our community and make a significant contribution to the reduction of abusive behaviour in our society. The judiciary will, in my opinion, need to do more to educate itself if these objectives are to be achieved.

7



The Source of all Our Discontents

CHRIS PUPLOCK

*Thou shalt not suffer a witch to live.
Exodus 22: 18*

This paper begins with an examination of paedophilia and issues of public education and looks in some detail at the spotlight that has been thrown on that unacceptable abuse of the young as revealed by way of official inquisition.

After two years of inquiries into police corruption including an examination of the alleged protection of paedophiles by the police, the Wood Royal Commission has come to an end. The inquiry sat for 365 hearing days, heard 630 witnesses and provided the tabloid press in particular with at least a page a day of often sensational news.

The costs of the inquiry have been high: more than A\$100 million in costs to the taxpayer according to a report in *The Weekend Australian* of 15-16 March 1996. The same report notes that more than ten people involved in some way with the Commission have committed suicide including police, school headmasters and alleged paedophiles.

In October last year the paedophile-related terms of reference were extended to cover the adequacy of laws against paedophilia, penalties and whether government agencies and police had done enough to protect children from sexual abuse.

The Royal Commissioner's final report is due in 1997. In that report he will make recommendations arising from his inquiries into various matters related to paedophilia. He will do so after considering a total of 44,811 pages of transcript generated from both the police corruption and paedophile hearings.

The expectations aroused by his inquiries have been immense. He will require the wisdom — and political skills — of Solomon to produce a report the recommendations of which will be sufficiently acceptable to be implemented. The record of Royal Commissions in such regards is not impressive.

Yet the public appetite — or at least the media's perception of the public's appetite — for some corrective action weeding out paedophilia from both public and private life and better protecting children against sexual abuse demands satisfaction.

What else could you expect with headlines for example in *The Daily Telegraph* such as "Evil network preys on the young" (21 August 1996) or "Silence of police appalling" (*The Daily Telegraph*, 11 December 1996) or "State ward put in care of paedophile" (*The Daily Telegraph*, 21 August 1996) or "Police visited boy brothel: ex-lawyer" (*The Australian*, 20 August 1996) or — in what I regard as the most telling and apt headline of all "Sexual hysteria" (*The Sydney Morning Herald*, 9 December 1996).

"Sexual hysteria" by reporter Richard Guillart began:

Reports of child sexual assault generate much social anxiety. But is there really widespread corruption of innocence or

are we experiencing a backlash against the permissive society?

Guillart examined allegations of children as sexual molesters, with a report from the NSW Child Protection Council which

urged the State Government to establish facilities for treating young sex offenders, saying sexual abuse by children under 10 and juveniles aged 10 to 18 was a "significant" problem.

The reality of child sexual assault on other children, Guillart finds, is rather at a distance from the social hysteria that has developed around the subject. There are few studies of the matter. One British study in 1991, for example, contradicting the premise of the NSW Child Protection Council comments, found that only 1 per cent of such alleged offenders were under 12.

Another report Guillart quotes:

circulating among NSW Government Departments is a document called "Organised Sadistic Abuse: Current knowledge, controversies and treatment issues". Prepared by the Department for Women, the 49-page draft document asserts that organised groups of Australian paedophiles are using "mind control techniques" to brainwash women and children into participating in "heinous activities"... In November last, during her speech to Parliament about paedophile networks, Labor MP Franca Arena cited the report and urged her fellow Parliamentarians to read it.

Guillart quotes the concerns of experts like Dr Diana Kenny, Associate Professor of psychology at the University of Sydney, at the way these sorts of alarmist theories can take off without having any foundation in fact. She is reported as saying:

You look at some of this literature and it's just shot through with flaws, but it takes five years arguing in the learned journals for it to be debunked.

The "sexual hysteria" we have seen develop out of the Royal Commission — but by no means confined to it — in the past eighteen months bears considerable historical parallel which is not, to our credit as a rational and enlightened society.

A similar hysteria was at the heart of the witch-crazes in Europe of the Reformation and Counter-Reformation. As the great British historian, Hugh Trevor-Roper put it thirty years ago in his landmark work, *The European Witch-craze of the 16th and 17th Centuries* (1967, Penguin):

...So firmly had the mythology of Satan's kingdom been established in the declining Middle Ages that in the first centuries of "modern" Europe — to use a conventional notation of the time — it became the standard form in which the otherwise undefined fears of the society became crystallised. Just as psychopathic individuals in those years centred their separate fantasies.....on the Devil, and thus gave an apparent objective identity to their subjective experiences, so societies in fear articulated their collective neuroses about the same obsessive figure, and found a scapegoat for their fears in his agents, the witches.....Thus the mythology created its own evidence, and effective disproof became ever more difficult. In times of prosperity the whole subject might be ignored except on a village level, but in times of fear men do not think clearly: they retreat to fixed positions, fixed prejudices. So social struggle, political conspiracy, conventional hysteria, private hallucination were all interpreted in the light of a mythology which, by now, had been extended to interpret them all, and the craze was renewed.

While the media in Australia of late have shown a highly voyeuristic fascination with paedophilia — however loosely defined — a similar fixation with paedophile folk demons and a moral panic is evident in other countries as well. The preoccupations of the American media with the strange life and sexual abuse in death of six-year-old beauty queen Jo Beth Benet recently is but one example.

Even that most august of journals *The Guardian Weekly* (23 March 1997) reported:

200 French paedophiles held linked to a child pornography ring French police said...some of the 5,000 video cassettes they seized featured footage of babies submitted to sexual acts. Police in Nice, who spearheaded the five-month nation-wide police operation, said that among those detained were five school teachers, two head teachers, members of the judiciary and a television journalist.....The Nice police were at pains to point out that the detained adults - apprehended in almost every French departement - were from all social backgrounds. They were mostly married men.

We are equally familiar with the appalling scandals which have rocked the political, police and judicial establishments in Belgium over exactly the same issue.

Two points emerge as of some relevance here. The first is the implication of heterosexual men in positions of contact, responsibility and authority over children in a conspiracy and secondly the implication that some conspiracy involving men of considerable power and influence within French and Belgian society to suppress all knowledge of these activities. Again need one unduly emphasise the parallels with the current paedophile concerns in our own society?

What little rigorous academic research has been done in either Australia or other Anglophone countries confirms that paedophilia — that is sexual abuse of pre-pubescent children — is overwhelmingly committed by heterosexual men, men who identify themselves as heterosexual whether their abuse is of girls or boys; that overwhelmingly paedophile abuse is, however, upon young girls and it is committed by men within the family or immediate social constellation of the children — most typically by foster or stepfathers, uncles, a neighbour who might be friends of the child's parents and so on. The paedophile is more likely friend than stranger, more likely heterosexual than homosexual; the victim more likely female than male.

One might give pause thus to reflect upon the observations of the noted English anthropologist, Sir Edmund Leach in the BBC Reith Lectures in 1967 (reported in *The Listener*,

30 November 1967) when he said: “Far from being the basis of the good society, the family with its narrow privacy and tawdry secrets, is the source of all our discontents”.

It appeared to take the most extraordinary line of questioning of adult gay men who admitted sex with teenagers close to the age of majority (some of them lying about their ages) in the NSW Royal Commission and subsequent uproar throughout the gay and lesbian communities before the Commission remembered and recognised those central salient facts - a matter I shall return to in a moment.

The same edition of *The Guardian Weekly* referred to earlier, reports on the latest “UK paedophile ring” with a story detailing lawyers demands for a public inquiry into abuse by staff at children’s homes in northwest England based on claims that “a paedophile network as well organised as the Mafia could be at work in the UK”.

The solicitor leading the group according to the report

agreed the homes were more strictly controlled now than when the abuse took place in the 1960s, '70s and '80s, but said it was important to study the methodology of the paedophile. “He is not a man in a dirty mac who looks like a child abuser. He looks like you and me.” He claimed that children’s organisations such as the NSPCC and the Children’s Society were anxious about the question of a paedophile network at work in Britain. “They believe it is as well organised as the Mafia.” He said nobody knew how much pressure there was within members of the paedophile fraternity not to give evidence against one (an)other. “My belief is that it won’t be long before someone in prison talks. Their conscience will get the better of them”.

Again, as was the case with the NSW Royal Commission, it appeared for some

time that the Commission was unable to discover any widespread paedophile conspiracy currently operating in this State. Instead the Commission, in a loss of professional and inquisitorial focus, spent an inordinate amount of time on what might or might not have happened twenty years ago at Castello's nightclub!

There is, and should be, no sympathy whatsoever for paedophilia properly defined, within the gay and lesbian communities. That should be quite clear to anyone with even the slightest informed understanding or contact with that community. Paedophilia is no more condoned there than it might be amongst any responsible group.

A sensational focus by both the Commission and the media on the alleged evils of individuals such as Robert Dunn or Phillip Bell and on under-age sex by other men with 16 or 17-year-olds — at a time in this State when adult homosexual activity was illegal among all men of any age, has however had dire consequences for present day law-abiding men who happen to be gay. It is reported that four of these men have committed suicide. In three of the cases, the boys they had sex with were over 16 (*The Weekend Australian*, 21-22 December 1996). I make the point of alleged evils for these men have yet to be put before a court to answer their accusers, although whether there is any prospect of their ever getting a genuinely fair trial given the reporting in the media, remains a moot point.

The informed and vigorous protest of a group drawn from the gay and lesbian community called Commission Watch seems thankfully to have returned the Commission to its senses and an appropriate focus on the sexual abuse of young and defenceless children.

Paedophilia and homosexuality are *not* the same thing. The Commissioner will bear a heavy burden when making such recommendations as impact on aspects of homosexual behaviour (for example in relation to the much needed reform of the age of consent) with the suspicions still high in the gay and lesbian communities that he has confused and failed, especially in the public mind, to distinguish the two.

The damage lives on. The vilification of gay men as a consequence of the Commission's early inappropriate attentions still is occurring to a disturbing degree. Recently I was told of a gay

couple, both defence force professionals, who found they had been publicly vilified as paedophiles in a leaflet — one of 3000 leaflets stuffed into neighbourhood letterboxes by an unnamed moral vigilante. They are not paedophiles. There is no evidence to back the slanders against them. In the current witchcraze atmosphere how do they clear their names? That example is by no means isolated or the worst of which I have been informed.

Indeed I understand the police in their re-found vigour in targeting under-age homosexual sex where one partner might be — or might have been up to twenty years ago — 16 or 17, are contributing to the hysteria.

There are some serious questions to be asked about the use of police resources in relation to investigating allegations of such behaviour going back over two decades and of the methods used in these investigations, especially in relation to the questioning of prostitutes, and the claims made that such people are being induced to give evidence about potential sexual offences in return for not being proceeded against on charges such as those related to drug use.

The distribution of unproven allegations masquerading as fact in paedophile registers as has been the case recently in both New Zealand and Australia gives further cause for concern. Let there be no mistake: the exploitation of children by sexual abusers cannot be countenanced. Nor can the shocking failure of so many government departments and agencies entrusted with a duty of care to protect the interests of children against neglect and malign predators. In a significant, although relatively small, number of provable occasions those predators have been revealed as operating from within the bureaucracy of care itself — profiting from a system that seems rather to prefer cover-up

and official indifference to focused and effective action in order to remedy abuse.

These horrifying examples of abuse, however, cannot justify the wholesale pillorying of innocent individuals. Allegations made in the lurid media spotlight arising from the day's activities of the Commission whilst in session must be proved in court.

I draw a distinction between the still to be properly and fairly tested allegations of paedophilia brought against individuals arising from proceedings in the Commission and the *systemic* failures that have to me too clearly already been proven through evidence in that same Commission.

On the question of the law and discrimination, I note the quite bizarre and differential application of the laws of consent. As the Commission has demonstrated, an unequal age of consent for heterosexual and homosexual males results in persecution of gay males for activities which, when they occur between adult men and teenage girls, go without comment. This is manifestly unjust. It is a sad reflection on the State Parliament of the day that when it decriminalised homosexual behaviour, it intended originally to equalise the age of consent provisions, but was frightened out of so doing by the extreme moral crusaders who were still even resisting the decriminalisation provisions.

In December 1996, the Standing Committee of Attorneys-General released the *Model Criminal Code Discussion Paper on Sexual Offences*, a paper that recommends a uniform age of consent across Australia — 16 for both heterosexual and homosexual sex. In all States and Territories, except the ACT and South Australia, it is higher for homosexual sex than heterosexual sex. In Tasmania the most recent amendments to law have set a uniform age at 17 years.

There is no good reason why there should be a discriminatory age of consent. The Reverend Fred Nile has been quick to condemn that Standing Committee's recommendations saying it was "an open invitation to paedophiles to come out of the woodwork" (*The Weekend Australian*, 21-22 December 1996).

This on all the evidence is a gross distortion of the truth and out of step with moderate, perhaps even conservative opinion.

To quote a senior official of the Federal Attorney-General's Department:

The fact is that this committee is made up of logical, hard-nosed lawyers, and we couldn't come up with any reason to justify a different age for males and females, heterosexuals and homosexuals (The Weekend Australian, 21-22 December 1996).

The fear of paedophilia has produced a number of schemes to register paedophiles. Such registers contain many dangers. Not least of which is that people accused, for no good and provable reason, of child molestation once named have few practical remedies with which to retrieve a ruined reputation. On the other hand such registers are often ineffective in keeping track of even convicted child sex offenders and thus cannot be relied upon with any degree of positive and certain effect.

I note in this context the suggestion in *The Sunday Telegraph* (30 March 1997) that communities be notified when sex offenders move into the area under "tough new laws being examined by the State Government". Such laws are often referred to as Megan's Laws.

They are based on the horrors experienced by 7-year-old Megan Kanka who was raped and murdered by a neighbour in suburban New Jersey, USA, in July 1994. The predator who strangled Megan had been already twice convicted of child sexual assault. In prison he had refused treatment for his behaviour. On release he had set up home with two other men similarly convicted. They had chosen to live in a suburb where the streets were crowded with many young children.

Megan's Law has been passed in many States and is also now federal law in the United States. It requires the notification to local communities of the address and identity of those convicted of child sex

offences for the rest of their lives, either upon conviction or when they move into a new area.

Critics claim the law pillories convicted child sex offenders for the remainder of their lives even after they have completed their prison sentence. Its constitutionality is currently under review before the United States Supreme Court.

In this respect I should note a recent report (*Sydney Morning Herald*, 8 March 1997) of how such laws can operate. In one case a 90-year-old, convicted of lewd conduct in 1944, after police found him touching another man's knee in a parked car, was subject to such community notification. In another case a 65-year-old man with a lewd conduct conviction involving himself and a fellow sailor in 1956 was so cited.

The matter of discrimination against people with criminal records, which is prohibited (with some specific exceptions) under anti-discrimination law in some Australian jurisdictions, is of concern to the NSW Anti-Discrimination Board. Again it is an issue which illustrates the difficulties in finding an appropriate balance between the rights of an individual to privacy and that of the community to know.

In mid March this year, State and Territory governments agreed to help each other vet applications for teaching positions in an effort to prevent paedophilia and other forms of child abuse in schools (*The Sydney Morning Herald*, 15 March 1997). Under the agreement according to press reports,

no centralised database of offending teachers will be established, but States will provide their confidential classification of suspect teachers to each other on request...Education systems seeking to employ teachers will develop lists of potential employees who will then be vetted by every State against its own list of suspect teachers...Each employer would maintain information about people who had a criminal record of a sexual offence against a child, a person subject to allegation who had been placed on a list "not to be employed", or medically retired lists. A "mechanism would also be developed to allow non-government schools to check potential new teachers against records held in other States".
(**Emphasis added**)

Similar provisions for vetting of potential offenders against children, older people and others in institutional care are also being developed in relation to employment in the NSW health service as part of the proposed Health Services Bill 1997.

Will these measures be effective in constraining paedophiles within the education or health care systems? Is this simply another example of the witchcraze, whose primary satisfaction lies in slaking the emotional anxieties of those otherwise incapable of developing effective measures which will address, contain and eliminate the child sex abuse problem?

The Anti-Discrimination Board has expressed its concern to the NSW Health Minister in relation to these matters, fearful of the over-reaction to some of the matters placed before the Police Royal Commission.

The potential for witchhunt abuse arising out of both the education and health systems policies are manifest. Knowledge of a spent conviction may have little relevance in effecting protection of children against risk of abuse, especially if that conviction is not related directly to such offences. More certainly it removes the incentive to rehabilitation by such offenders and makes more likely driving them into disguising their unpleasant past. As with Megan's Law, understandable public outrage can create almost as many excesses as those it intends to reduce.

Meanwhile one must acknowledge the concerns of those such as the inaugural holder of my present office, as NSW Commissioner of Equal Opportunities, Geoff Cahill who was quoted recently as saying that:

powerful, secretive figures were working to bury the issue of paedophilia after the closure of the Wood Royal Commission
(*The Sun-Herald*, 23 March 1997).

Mr Cahill represented 11 victims of paedophilia who gave information to the Royal Commission. He claims abusers in high places remain unexposed. The report states, in shades of Frank Moorhouse's *The Everlasting Secret Family*:

Paedophilia is endemic in this State.....The top end of town now feels the blowtorch. As the Commission winds down, there is a very real concern that this issue will dissolve into political oblivion. There are powerful, clandestine influences seeking to achieve this end. He talked also of prominent men from various professions including doctors and lawyers and sporting associations involved in procurement networks and who "shared children around".

Why were these networks not brought to account in the Wood Royal Commission? Do they exist or are they the manifestation simply of the imaginative concerns Professor Hugh Trevor-Roper outlined in my comments at the beginning of this address?

I share Geoff Cahill's concern that the systemic abuse, revealed in agencies with a duty of care to protect children against any form of abuse, will be allowed to continue after the Wood Royal Commission's final reports are gathering dust in our libraries. His latter concern remains, at least in my mind, a very open question.

Some good already has come from the Wood Royal Commission in provoking institutional re-examination and reform — the establishment of a revamped NSW Police Service Child Protection Policy Unit not least amongst them. The process of reform the Royal Commission has spurred is encouraging. Simplistic solutions, however, to a complex and ugly problem, do little to assure children of lives properly free from abuse.

I end on a note of historical paradox — and perhaps of grim humour for it was said that

The notorious (English) witchfinder, Matthew Hopkins travelled through the eastern counties in the 1640s to hunt out witches, and is said to have hanged 60 in one year in Essex alone. In 1647 (however) he was tested by his own methods; when cast into the river, he

floated and so was hanged as a wizard. (Brewer's Dictionary of Phrase and Fable)

Is there a warning, or at the very least a lesson in there somewhere?

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8



Young Men, Sexuality and Sexual Offending (Risk Management and Public Education)

PATRICK TIDMARSH

Public education, in this context, is about informing people of what will best protect children and minimise the extent of sexual offending against them. It is our view at the Male Adolescent Program for Positive Sexuality (MAPPS) that this should entail information as to the nature of adolescents' sexual offending behaviour, the dissemination of this information across all agencies who come into contact with children and young people. It requires interagency cooperation to provide adequate and appropriate responses to sexual offending, and the provision of intervention programs for adolescent sexual offenders of different age groups and developmental abilities. Furthermore, the information gathered by treatment programs should be used to develop preventative and protective strategies that can be taught to parents and young people.

Every year in Australia adolescents perpetrate a vast number of sexual offences against children, women and men within our communities. Estimates place the number of offences committed by adolescents as high as 20 per cent of all sexual offences. When one takes into account that young people have most access to other young people, it is hardly surprising that most of these offences are against children. With relatively few of these young offenders reaching the treatment programs currently provided, we can safely assume that there are factors preventing these young people from getting the help and challenge they need. These factors rely most particularly on the minimisation of young

people's sexual offending behaviour, and a subsequent reluctance to intervene.

It is abundantly clear that young people who commit sexual offences do not follow the pattern of other young offenders, who tend to "grow out of it" when they reach adulthood. Adolescent sexual offenders tend rather to "grow into it". With statistics showing various, but always high, levels of adult sexual offenders who began in childhood or adolescence, the need for intervention at the earliest opportunity is paramount.

Young people at MAPPS might come from any community in Victoria, from any socioeconomic or ethnic group, and with widely varying levels of ability. They also come with widely differing experiences of childhood, from the brutalised and neglected to the comfortable and affluent. They develop their own distorted thinking to justify their behaviour, they draw on attitudes and beliefs that are in common currency in the adult world. These include myths about some children being sexually aware and promiscuous, that there are "good girls" and "bad girls", that women often say "no" when they mean "yes", and so on. They also draw on the belief that men are more powerful than women and that

they need to exercise their power as males in order to be successful. Without challenge to these attitudes, beliefs and myths, the context in which sexual offending takes place will mitigate against a comprehensive policy of early intervention.

Attitudes of Risk

There are many factors that differentiate the attitudes and behaviour of sexually abusive adolescents from those who are either “experimenting” or being inappropriate: age difference, degree of coercion and force used, the understanding of other parties, the persistence of the behaviour, and an inability to take direction away from inappropriate behaviours are just some of the criteria that can be used in assessment of risk. We are progressively better able to define which children and adolescents will pose a risk with their sexual behaviour. We are also better able to predict what they will do next if we do not intervene.

All sexual offenders develop distorted thinking to justify their behaviour. Although analysis of risk encompasses a wide variety of factors, it may be argued that it is in the offender’s distorted thinking that his risk is crystallised. The more the thinking has developed into a belief system, the more entrenched the behaviour and the more difficult the intervention. It is important to note here that very few adolescent offenders at MAPPs claim that they did not know they could get into trouble for the behaviour. However, many say that they did not think it was “wrong”.

Adolescent sexual offenders are unlikely to have developed an exclusive and established pattern of offending. They are likely to be opportunistic in their offending, and to develop other areas of offending interest if denied access to their preferred target group. They are also, through the very nature of adolescence, in the process of development into adulthood, and have little idea how they wish to see themselves as adults. Many of them will express a strong desire not to spend their adult lives as sexual offenders. This can be a strong motivating factor in the process of change, particularly if treatment programs can help adolescents develop a non-offending picture of their future in which they can believe.

Community Attitudes and Responses

It is perhaps with the parents of our clients that most myths and misconceptions about adolescent sexual offending become apparent. During parents’ information nights it is always the information about the deliberateness of the behaviour, and the planning involved, that leaves most parents stunned. Most had wanted to believe, as we all would, that the behaviour was a temporary aberration that can be corrected with a little education and some consequences.

Many parents continue to blame the victims or their families, or refuse to recognise, as one family did at MAPPs, the power and knowledge gap between a child of thirteen and a child of five, convinced that the behaviour can be passed off as a game of “doctors and nurses” with a “promiscuous” girl.

After the phase of denial and minimisation, if the behaviour is to be taken seriously, it is often the case that the young person is then seen as an “offender”, who is treated as a “problem” and dealt with in a punitive framework. Whilst clear boundaries and consequences are an essential component of any treatment, punishment is rarely sufficient. Any adolescent sexual offender confronted by aggression, hostility or mere punishment will respond with deviousness, manipulation and resentment, and will use the experience to reinforce his offending behaviour. In effect, it is our children they will take it out on.

Most adolescent sexual offenders, when confronted with sex offender specialists for assessment, will resist the process in a number of ways. Their methods might range from violence and threats, through superficial compliance, to total silence. It is always emphasised in such circumstances that their behaviour will have consequences, and will serve only to delay the process of change. It is the persistence and clarity of the

interviewing approach that enables young people to engage in the process. The approach is founded on knowledge of what is most likely to have happened, and persistent suggestion of possibilities that the young person is required to clarify. Most young people later describe a sense of relief at worker's "knowledge", and feeling that they were at last at a place in which they could address their behaviour.

Adolescent sexual offenders must be supervised and monitored as thoroughly as possible, for significant periods of time, until they have demonstrated change in a managed environment. It should be assumed that they are unlikely to change their behaviour without significant incentive, which can only develop over a lengthy time period. Most adolescent sexual offenders, for example, continue to be aroused to fantasies of offending many months into the treatment process.

Appropriate responses to adolescent sexual offending must begin with an understanding of the behaviour, a desire not to minimise or rationalise it, and a commitment to positive strategies to encourage and demand change from the young people themselves. Change should be seen as a relatively lengthy process that needs to be thoroughly supervised and monitored.

The Benefits of Intervention

The primary benefit of access to adolescent sexual offenders within a treatment framework is information. During the relatively short period that such treatment programs have been running our understanding of offenders' behaviour has increased considerably, with many benefits flowing from this knowledge. Knowledge about adolescent sexual offenders and the risks they pose is crucial for many other agencies and professionals, and such knowledge would be difficult to access outside the treatment environment. It is unlikely, for example, that offenders would disclose other victims and offences, in the full knowledge that they will be reported and undergo further prosecution, if they were not doing so in an environment that supported such a move, both to help victims and facilitate change. It is unlikely that a family could face the reality of their child's behaviour outside the framework of an intervention program.

In the relatively short period that MAPPS has operated, we have provided information and training to a very wide variety of people and organisations, each of whom has a different need to understand adolescent sexual offending behaviour. These include the families of the offenders themselves, the case managers and protective workers involved, the youth officers of institutions, cottage parents, accommodation and support workers, secure unit staff, community policing squads, detectives, magistrates and judges, psychologists and psychiatrists, social workers, teachers, and so on.

The vital and common thread in all of these training programs is the identification and monitoring of sexually inappropriate and offending behaviour by children and adolescents.

The training and information provided may be working with denial, treatment elements, interviewing, offender profiles, "aware cultures", managing community risk, developing specialist placements for sexual offenders in care, and many more.

Overall, it is the information provided on the offenders themselves that should provide the catalyst for a unified approach to early intervention strategies across all agencies involved with sexual offending and young people. Information, training, and interagency cooperation are the key to risk reduction in our communities.

Risk Management Measures

There are four key areas to the management of risk. The first involves the development of awareness about adolescent sexual offending behaviour so that key agencies and individuals are able to identify the signs of concerning and offending behaviour. The behaviour must then be confronted and the young person placed in an environment in

which he is challenged to disclose and change his behaviour.

The second area involves the development, in all organisations involved with young people, of “aware cultures” that make the hiding of offending behaviour as hard as possible. All organisations would therefore need to be trained in interviewing and screening staff, ongoing discussion and monitoring amongst staff teams, the development of protocols to determine problematic behaviours, and the development of appropriate strategies for dealing with problem behaviours in adults or adolescents, staff or clients.

The third area involves the development of systemic interagency cooperation through all stages of disclosure, investigation, prosecution, court outcome, treatment process, case management and accommodation, family involvement and long-term follow-up. Whilst there may be a number of different agencies involved, a shared understanding of adolescent sexual offending, and consistent protocols between agencies would better minimise community risks and facilitate change.

Finally, some focus needs to be given to the differing needs of rural communities, and solutions found to regional funding, staffing and cross-agency issues. MAPPS is currently working on three schemes in different parts of country Victoria, with different issues and solutions needed for each region. One of the projects has already resulted in a successful pilot program in a large rural region of Victoria.

Conclusion

It is absolutely vital for communities to realise that they have a significant problem with adolescent sexual offending, regardless of their situation, cultural mix, socio-economic status or any other factor. Furthermore, they must realise that all responses need to be seen within a risk management framework, rather than with unrealistic expectations of change.

We must all address our attitudes to this behaviour and ask whether in some ways we actually facilitate offending through the messages we give young people about masculinity, sexuality, and abusive behaviour. Finally, it cannot be stated strongly enough that there are many solutions we can implement that will

reduce the incidence of sexual offending within our communities. The key to successful risk reduction is the information we can obtain about offenders and a commitment to intervening in their behaviour in the most effective ways possible.

9



Treatment for Paedophiles; Treatment for Sex Offenders

MICHAEL EDWARDS

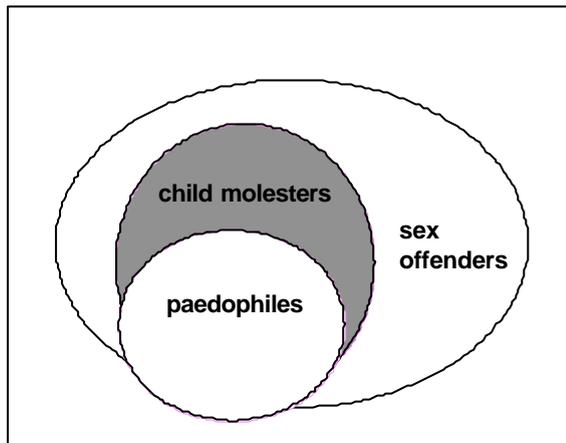
Treatment for a sex offender requires a long time to deliver. Effective treatment is rarely provided without a legal mandate and the mandate must also include behavioural supervision for a long time. Treatment for sex offenders is primarily a forensic issue and not first a mental health issue. Each of these postulates may seem egregious, particularly to the liberal minded listener who is normally mindful of the tendency for certain moral agendas to encroach upon civil liberties. The strong popular reaction to sexual violence and the perspicuous use of the fears underlying these reactions are typical examples of such agendas as Roger West recently illustrated so well in an article in the press (*Sydney Morning Herald*, 8 March 1997). Each of these postulates can be demonstrated to have a sound though not certain base in published research.

For the sake of clarity the term paedophile is used here to mean a person for whom the act or fantasy of the act of sexual contact with pre-pubertal children is the repeatedly preferred method of achieving sexual excitement. More simply stated a paedophile is one whose erotic preference is for pre-pubertal children. This is not the use of the word often found in the press and in current debate. A friend recently complained to me that my usage of the term paedophile was not the common usage, which had much more the sense of any person who has sexual contact with a minor. He argued that this latter sense was acquiring a legal or at least socio-legal meaning. No doubt he would see this conference as confirmation of his views.

A paedophile in the sense in which I will use the term, might not be a sex offender, at least not yet; he/she may not yet have acted out sexually with a child, but he/she may also be in recovery and be leading what may amount to a celibate life. This point becomes a very important issue in the treatment of paedophiles and one which carries the hope on which treatment is founded — both for the paedophile and the treatment providers.

There are many sex offenders who do not show this exclusive and preferred arousal pattern either in behaviour or in response to phallometric measurement (Freund & Kuban 1992; 1993, Freund & Watson 1992, Socarides 1991, Marshall & Eccles 1991, Barbaree & Marshall 1989, Abel et al. 1987). There are also different types of paedophiles though perhaps the term has become so widely and variously used that it now requires qualifiers such as “genuine paraphilic pedophile” even within technical and clinical literature (Johnston 1996). The term “paedophile” is thus not coextensive with sex offender, which is a notion defined by social and legal processes and, although there is considerable overlap, the tendency to confuse or conflate them is not without impact on therapeutic concerns. This impact is in most respects negative.

Figure 1: *The place of paedophilia in sex offending*



Common usage depicts paedophiles as serial and recidivist sex offenders. Their offences become the focus of almost all our popular concern about sexual violence but most of those who assault children are serial offenders. The distinction between incest and paedophilic offenders for instance, cuts across the serial offender description. Incest offenders are, however, mostly serial offenders yet their recidivism has been contained within one family unit. They are frequently not considered paedophiles in the strict sense of the erotic preference implied by paedophilia yet just as frequently their stories tell us that their assaults began when their child victims were prepubescent (Abel et al. 1987). They are usually distinguished from other groups of child molesters by the age of their victims and their apparent erotic interest in adults. Their arousal pattern appears hebephilic (erotic preference for pubescent or post pubescent youth) but perhaps there is not as much cause for reliance on erotic preference as we once thought. On what basis could we treat sex offenders and paedophiles in the same way or differently? If arousal pattern is the crucial issue it might be advisable to assist paedophiles to be celibate and non paedophilic sex offenders to enhance their appropriate sexual behaviour and fantasies.

There are also different types of paedophiles. They may be classified by their erotic preference: homosexual, heterosexual and non discriminating paedophiles; homosexual, heterosexual and non discriminating hebephiles;

ephebephiles (sexual preference is pubescent or post pubescent boys) or polymorphous perverse (having a variety of deviant sexual interests). They may also be classified by features of their erotic fantasy: consenting, coercive and violent (Proulx et al. 1997); or according to their social competence, contact with children, level of physical injury done to the child and degree of fixation (Prentky & Knight 1990).

Since it has proven difficult to make early and reliable differentiations between child molesters and paedophiles, it might be also be a pertinent question to ask whether it matters to distinguish paedophiles from incest offenders or from other sex offenders except in the narrow confines of clinical treatment or research. Certainly, in the context of the management of the sexual aggressor it seems a fairly useless distinction.

Very, very few paedophiles present for treatment in correctional settings who are not also sex offenders. Very little has been published on the differences, if there are any, between those paedophiles who present for treatment outside the criminal justice system and those whom the criminal justice system obliges to seek it. Of course many of those who seek treatment do so privately with the external motivation of family, church or similar authority to assist them. Many eventually reveal criminal acts but there are still some who appear to have their own difficulties with their fantasies and fear acting on them. These cannot be considered sex offenders in any sense of the word but more importantly they have a motivation for treatment that is singularly lacking in the sex offenders I have met and in that respect they are quite different individuals.

Sex Offender Treatment Issues

Many sex offenders do not want treatment. When Langevin and colleagues asked sex offenders (37 "paedophiles", 20 rapists and 30 incest offenders) what treatment they saw as necessary, only half of them

considered treatment desirable or necessary, and of those who considered it important, the required therapy goals were more often to improve social relationships via individual psychotherapy with a male therapist and social skills training. One of the two ways in which the three groups differed was an artefact of their marital status (desire for marital counselling); the other was that no incest offenders thought tranquillisers important. (Other findings included: incest offenders were older, less often had a criminal record and had fewer current charges but were less well educated than “paedophiles”). Overall fewer than 2 in 5 considered treatment of their “anomalous sexual behaviour” a problem with more (56.3 per cent) “paedophiles” nominating anomalous sexual behaviour as a problem than either of the other two groups (Langevin et al. 1988). Clinicians treating sex offenders will find this result thoroughly consistent with their experience (Freeman-Longo & Honey-Knopp 1992).

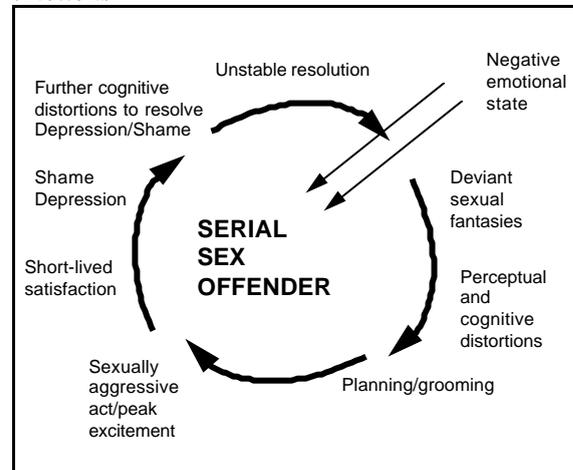
There are important relationship issues to be dealt with in good sex offender treatment and this aspect of treatment alone is quite complex. Ward et al. (1997) determined twelve categories or issues in the social and intimate relationships of sex offenders and with them attempted to distinguish child molesters and rapists from each other and from other violent and non violent offenders. The issues were:

- relationship commitment;
- evaluation of the partner;
- trust;
- self-disclosure;
- expression of affection;
- sexual satisfaction;
- support received;
- support given;
- mutual empathy;
- conflict resolution;
- autonomy; and
- sensitivity to rejection.

Child molesters were more sensitive to rejection, less satisfied with their sexual relationships, more committed to their relationships but more likely to lack empathy. These results confirm the complexity of the social skills and intimacy problems of child

molesters. However, the study also showed that sex offenders were not consistently different from any other group. Their emotional and social problems were also shared by violent (non sexual) offenders. When providing these elements of treatment it is essential that the relationship issues are contextualised. The relationship problems are a product of the behaviour which supports or facilitates the offences and not the other way around; the offences do not arise out of the relationship problems. We seem to fall foul of this logical fallacy too often and it is a dangerous mistake to make.

Figure 2. *Serial sex offenders: The cycle of emotions*



Some paedophilic offenders who want treatment want to have their desires, fantasies or urges removed by external means. The significant issue in these cases is usually the client’s belief that he is powerless before these urges. The client’s belief is sometimes matched by the clinician’s confidence in the use of hormonal or other chemical treatments. Both share unwarranted confidence. No single variable accounts for sexual aggression. Treatment must address more than one factor to be effective. Research consistently points to negative emotional states (necessary but neither sufficient nor distinguishing), deviant sexual fantasies (necessary but not sufficient and not distinguishing), distorted

perception and thinking and some form of grooming or planning of the aggressive act (McKibben et al. 1994) as features of sexual aggression.

Each of these factors need to be addressed in an effective course of treatment. For the last decade and a half there has been clear indication that a relapse prevention component is also necessary. Increasing the potency of inhibitions which have been weakened by repeated fantasising or action and, above all, helping the sex offenders to find some way to genuinely respect him/herself are also factors which must be included in good treatment. The latter invariably takes much time and involves awakening a sense of guilt which is more genuine than is mostly shown in court.

Marshall (1996a) describes the treatment of sex offenders in a penal setting. Length of treatment varies more in accord with the length of the sentence and severity of risk to the community than with conditions *per se*. Risk estimates and length of sentence do not always correlate. Marshall (1996b), in emphasising the centrality of enhancing self-esteem in the treatment of sex offenders, registers concern to set a definite end to therapeutic intervention about a year after the release of most sex offenders. Remaining too long in treatment may not only be unproductive and therefore too expensive (Marshall 1994 review of *Kia Marama*) but may also undermine self-confidence and efficacy.

There are clear tensions between the concerns expressed by Marshall and the findings of Broadhurst and Maller (1992). The latter conducted long-term research on the recidivism of Western Australian sex offenders showing that recurrence of offending is less likely during the period of parole supervision than after and that the rates of recidivism are still rising fifteen years after release. These findings (Broadhurst and Maller 1992) require replication with samples of treated and untreated offenders so that Marshall's concerns could be examined.

Yet beyond the principal issues of treatment effectiveness and community safety there is also a further issue centring on the relationship between therapist and forensic client. Much of what has been written about the relationship between therapist and client has come from consideration of the needs of self-referred clients.

In this context the exclusivity and confidentiality of the therapeutic relationship have obvious meaning.

Many treatment providers find that offender clients want to finish quickly or to withdraw when the work becomes confronting or begins to challenge more personal issues than social skills. On the other hand therapists working in other clinical areas would regard the attendance of a "client" under the mandate of a court at best a complication in the motivation and at worst an obstacle to the progress of the "client" (Langevin & Lang 1985). Some find ways of developing the offender's motivation (de Shazer 1988). Others argue that the presence of society in the therapeutic alliance formed with the client is essential to the process of therapy not just a means of maintaining compliance with a treatment or supervision regime (Wheldon 1994). The presence of an audience is a critical feature in the treatment of sex offenders and one which marks it off from other forms of treatment. Although the term "audience" may come from a particular theoretical model, the requirement for a wider audience than the therapist stems from the therapeutic task itself.

A different relationship holds if the client is an offender. Wheldon (1994) argues that psychotherapy with offenders requires three parties because society is interested and because some harm has been done to it. The client is there not just because he/she has a disorder but also because there has been an assault on the social order. In the case of a sex offender — keeping the sex offender and the paedophile separate for the moment — it is important to hold the victim's experience clearly in view within the treatment of the offender. Much of the treatment of the offender entails enabling him/her to perceive the victim as another person; to develop empathy with her/him;

to be able to take the perspective of the victim.

As with any form of therapeutic treatment there is need to enter the private world of the offender in order to connect them with the real social world and the world of the victim. It is also important to enter the offender's private world to understand the distortions in his perception and thinking. Neither cognitive restructuring nor the development of strategies for avoiding high risk situations could work without a detailed picture of the cues which operate for the offender.

Where should treatment for sex offenders take place?

Is prison a suitable environment in which to carry out treatment for sex offenders? It is probably the safest environment from the perspective of victim and community safety. The safety afforded may be of little value if it does not last because treatment rendered there is ineffective. The risk entailed in providing treatment in prisons is that such treatment can become continuous with and indistinguishable from the processes of condemnation and judgment which are the proper province of the court. This is a process which severely hampers work with the offender. The ways in which this risk can be realised include the use of legal language.

The therapist is of course not the only one who might carry the language (and ideas) of the law into therapy. Offenders do this quite commonly both by way of rationalisation and in some instances even on advice from their legal counsel to deny the offences or to say only what was acknowledged in court. Along with this language come the concerns of the watchdogs of the law. Civil liberties need to be carefully considered wherever treatment is provided within a penal setting. Glaser (1988) also mentions diversion of scarce forensic psychiatric resources away from the care of the chronically ill or elderly if the courts were to insist on treatment for all sex offenders.

Facilities for treatment are not often available in prisons. This is an obstacle which may be overcome in NSW and has been overcome in other jurisdictions but it will require the sustained support of the rest of the community to maintain adequate facilities. The

climate of hatred and vilification within the inmate population makes it easier for sex offenders to avoid being noticed and so also avoid treatment. The same climate of fear and hatred outside the prison walls makes for either dangerously unrealistic expectations for the outcomes of sex offender programs or never ending difficulties in providing adequate facilities to deliver treatment. A precondition for treatment is that prison managers can identify them openly and encourage them to participate in rehabilitative activities. The same precondition holds for the management of the offenders in the community. Nothing will be possible if all the energies of the managers and their staff are consumed in preserving the safety of their clients or assisting them to hide. Good treatment begins with the creation of a milieu in which the prison community calls the sex offender to account and does so with respect and authority. Such a milieu would mirror the concern of the community and would be genuinely multi modal. The currents easily observed in the recent public debate about paedophilia limit the effectiveness of treatment. It seems we either hound the offenders or neglect them. Neither course is a safe option for the community. Neither course is an effective approach to treatment or management.

Treatment for sex offenders — even paedophilic sex offenders — belongs in the correctional system. There are several disadvantages to locating treatment facilities within hospitals. It is true to say that paedophilia is a psychological disturbance which may and usually does cause some suffering to the paedophile (quite apart from the suffering which the paedophile will cause others if he is an offender). Focusing on the paedophilia without seeing the sex offending will be counterproductive.

There are genuine problems in making liberties contingent on participation in treatment programs or on successful treatment but they are often other than we

think. The major issues are, however, practical ones such as motivation, compliance, alliance and a therapeutic relationship in which change can be facilitated. Whether therapy becomes a condition of release does not seem to bother us too much when considering drink driving, drug related offences, etc. The real issue for release is containment of risk. The real civil liberties issue is the confusion of a psychological or psychiatric condition with crime.

The legal process (in the broadest sense) defines the sex offender. It also defines the offence(s) — as it ought. When the offender comes to treatment — whether or not he/she is self-referred or comes under a court order — he/she brings also the language, concepts and even the experiences of the legal process. Responsibility comes to be defined as it is in the law; attention, sometimes exclusive attention, is paid to the index offence(s) rather than the history and full context of these actions.

Here again the treatment of sex offenders is different from other forms of therapy. Sex offenders, like other offenders, often register questioning as a search for an opportunity to blame.

It may be argued that therapy is for this reason not the right word for intervention with sex offenders. The term “treatment” might be preferred. Those who provide this treatment will attest to the necessity of regarding their interventions as therapy. They work to build a relationship with a client in order to facilitate change in the person. This requires understanding of the way the client perceives his/her world. None of the elements of this process can be omitted from the intervention without jeopardising it.

The therapeutic nature of sex offender treatment must be preserved else the efforts of the community to deal with this problem effectively but humanely will be undermined by the false expectations which can arise from short, cookbook style programs. This form of treatment can be carried out inside a prison and in many ways is more suitably done there than in facilities which emphasise the individual mental health issues. However, the relationship between the legal and therapeutic processes still require considerable attention. Integration of treatment and sentencing is important for effective

management of sex offenders. The sentencing process needs to be better informed about treatment and the requirements for effective treatment. Perhaps, as David Indemauro's (1996) proposals for disentangling rehabilitation from sentencing suggest, the role of offender responsibility needs more attention. The notion has implications both for the sex offender and for the community which demands he/she accept responsibility. The offender needs to belong to a community to which he/she can be responsible. The community has to be prepared both to accept his/her responsible behaviour and to provide the means by which genuine responsibility can be demanded.

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10



Implications for Privacy Laws

NIGEL WATERS

This paper will consider the emergence of both official and unofficial registers which aim to identify sex offenders and their efficacy as a tool for prevention. It will outline the case for careful consideration of the civil liberties and privacy rights not only of suspected and convicted sex offenders and those listed on such registers, but also of their families and associates. The risk of unfair, and even unlawful discrimination or persecution are compounded by the uncertain and inconsistent definitions of paedophilia. The application of existing and proposed privacy, anti-discrimination and spent convictions laws to both official and unofficial registers will be discussed.

A Serious Problem

As we are all too well aware, the issue of child protection, with a specific focus on child sexual abuse, has been firmly placed on the agenda and quite rightly so. Undeniably, sexual offences, particularly those committed against society's most vulnerable, are abhorrent and are deserving of society's condemnation. Children are amongst the most vulnerable members of our society and require protection. Accordingly, it is both a challenge for, and the responsibility of, policy makers at all levels within our community to develop effective responses to ensure that offences such as these do not occur. That there is a demonstrated need for a conference such as this is a sad indication that paedophilia is a serious problem for our society; it does, however, signal a readiness to take positive steps in assessing in a mature way how we, as a community should respond.

In considering ways of addressing the problem, it is vital that we approach the issue with a sense of balance which can sometimes be difficult, given the emotions that are evoked at the horror of sexual offences. The prevention of child abuse is a problematic issue, requiring difficult judgments to be made in assessing the risk posed by certain individuals to children. Clearly the interest in protecting children is the paramount concern. As a society we cannot afford to make rash policy decisions based on hysteria, without focussing on whether the solutions we are proposing to the problem are proportionate and effective and without consideration of other consequences. Policy responses must also give careful consideration to *all* interests involved. We need to ask some important questions — are the methods we are taking going to be effective; will they reduce the incidence of child abuse; do they achieve the aims of prevention? Any approach to the problem needs to deal honestly with these questions.

The Public's Right to Know?

My comments have been primarily stimulated by the emergence of a particular style of response to the issue, which is to publicly identify those who have a history of an offence of this nature. This view takes as its rationale that the community should arm itself with this information, that everyone has a right to know that an offender is living in their community and that with this

knowledge, the community is therefore better able to afford protection to children.

This response is not specific to the Australian environment. Around the world, similar community initiated approaches to the issue are being embraced and even endorsed through the legislature. In the United States we have seen the genesis of what has been referred to as “an unusually ferocious piece of legislation born of parental emotion” (*Sydney Morning Herald*, 4 February 1997). This legislation, dubbed Megan’s Law in memory of the victim of a paedophile offender, requires the public notification of the identity and address of any convicted sex offender who is living in the community, for life, so that communities may know the threat and take steps to defend themselves. A federal Megan’s Law was signed by US President Clinton requiring each State to write its own and it appears that most States now have such a law.

This response has come from an understandable sense of helplessness and fear in the community for the protection of children, and an anger and outrage at the perceived lack of action by governments and the criminal justice system on this issue. These emotions and concerns are quite understandable and there is clearly an urgent need to address what appear to be major failures in the way authorities have made use (or not) of existing information available to them. But whether the public notice response — as we have seen in Australia in the form of a widely available unofficial index of convicted and suspected sex offenders (Coddington, D. 1997, *The Australian Paedophile and Sex Offender Index*) — is appropriate, is another question.

In seeking to minimise the risk of children being abused there is clearly a need for relevant authorities to know whether someone has a prior conviction for a relevant offence. All privacy laws recognise the need to balance public interests. The public interest in the enforcement of the criminal law and in public safety is universally recognised as one such public interest which outweighs to a certain degree an individual’s right to privacy. This balance is also expressly addressed in Commonwealth and State legislation which allow a person to “live down” an old minor conviction by lawfully withholding

such information (known as spent conviction schemes). However, all these schemes acknowledge that there are some circumstances where this right is not justified and where information about a prior conviction should be made known. Specifically, all such schemes in Australia require that where an individual is seeking a position which would place them in the care or supervision of minors, all convictions for offences of a sexual nature or offences of violence must be disclosed.

The point is that information should be handled appropriately and with a view to ensuring that it is used to achieve effective solutions to the problem. Regardless of whether information is on the public record or not, it should be used and disclosed in ways which are proportionate to the need. Sensitive information such as criminal conviction history is always at risk of being misused with serious implications for those who are the subject of such information. The appropriate use of information can mean the difference between effective, targeted and justified scrutiny of those who may pose a serious risk to children, and unfair scrutiny, persecution and discrimination.

Rights of offenders

The question which is at the centre of the debate is — should convicted and suspected sex offenders have any civil liberties and rights to privacy?

The answer, in a civilised society, must surely be yes. The rights of those offenders who have served court imposed sentences, while they are certainly diminished, are not extinguished completely. Many within the community would disagree. They argue unequivocally that in committing their offences, these types of offenders have infringed on the freedoms and rights of their victims and in so doing, have forfeited any rights enjoyed by other members of the community. This view sits uncomfortably with concepts which are fundamental to our system of justice and our commitment to

human rights. We have democratically established institutions which attempt to achieve the delicate balance between crime and punishment, restitution and rehabilitation. In a number of ways, unofficial registers such as *The Australian Paedophile and Sex Offender Index* fundamentally challenge these notions. So, to a lesser extent, would some of the more draconian proposals for official registers and vetting systems.

The Australian Paedophile and Sex Offender Index, in particular, undermines the principle of rehabilitation which is an important objective of our justice system. We have established a system where a judgment about an appropriate sentence is made after deliberation by an experienced public official and often after consideration of evidence by a fully informed jury made up of members of the community. Once any sentence imposed has been completed, our justice system says that a person should have the opportunity to reintegrate back into the community. Information about the offence is still on the public record and is available to be taken into account in sentencing decisions should the person reoffend. This information is also available through official systems where criminal history checks are conducted in circumstances where such information is deemed relevant, for example, where persons are being employed in positions of trust with children.

The availability of information about convicted offenders more widely within the community can operate to extend the punishment already received by the offender. The result being that a person who has served his/her sentence is doubly punished and can be subjected potentially to a lifetime of persecution, victimisation and possible violence.

Public release of the identities and whereabouts of convicted offenders also places their families at risk of being stigmatised and persecuted and effectively punished for a crime purely by association. In some cases, this prospect may also deter victims from coming forward if the perpetrator is within the family.

Existing Commitments

Australia has signified through its commitment to international conventions that unfair discrimination on the basis of criminal record in employment and occupation is an infringement of

all Australians' human rights. The federal *Human Rights and Equal Opportunity Commission Act 1986* puts into effect Australia's commitment to ILO Convention No.111, the Discrimination (Employment and Occupation) Convention 1958. However, these rights are also balanced by Australia's commitment to the Convention for the Rights of the Child, 1990, which notes that all actions and decisions concerning children need to take into account the best interests of the child (Article 3, Convention on the Rights of the Child, ratified by Australia in December 1990).

The concept of rehabilitation and the notion of reintegration has been signalled by governments as being important to our concept of justice, not least through the spent conviction schemes referred to earlier.

Many people with a criminal record subsequently establish themselves as respectable members of the community. While I defer to experts as to comparative rates of recidivism, I cannot believe that there are not many examples of successful rehabilitation of sex offenders. Spent conviction schemes are designed to give people a chance to live down a minor criminal conviction. The concept of spent conviction laws is linked to a value which has considerable influence in our society: that people who do wrong should be given a second chance because they have the capacity to reform their ways.

A further justification for establishing spent conviction schemes is the fair administration of justice. The law prescribes a punishment to be imposed for the commission of an offence and once that has been served the offender has paid his or her "dues" to society. When society is satisfied that the person is not likely to re-offend, it should relieve that person of the stigmatising effect of his or her criminal conviction. Otherwise, the punishment in

effect extends beyond that imposed by the court and the system does not meet its fundamental objective of making the punishment just.

Of course, any judgment about the likelihood of an individual re-offending carries an element of risk. There will, inevitably, be tragic incidents arising from official misjudgments — such as that apparently made in the New Jersey case which led to the first Megan’s Law. But as in so many areas of public policy, risk cannot be entirely eliminated without unacceptably draconian measures.

Spent conviction legislation should not be seen as a sign that governments are “going soft” on criminals but as a method of ensuring that the punishment suffered by an individual with criminal convictions is fair and just and in accordance with the law. As mentioned earlier, these schemes recognise that the existence of any prior sexual offence or any offence against a child, is relevant and should be made known but only in specific circumstances such as where the individual is seeking positions which involve the care or supervision of minors. In circumstances other than these, information about minor convictions is protected. It is important to note that convictions for most serious offences are not protected by spent convictions schemes. The threshold varies between jurisdictions but most convictions for serious sexual offences or offences against children would not receive any protection and offenders would continue to have to disclose such convictions in any context.

It should be noted that the Privacy Commissioner has a statutory function under the Commonwealth Spent Conviction Scheme which includes handling complaints about breaches and advising the Attorney-General about exemptions (Part VIIC *Crimes Act 1914*, Cth).

The wide availability of information about previous offences may also be prejudicial to a fair trial. Our justice system has determined that the guilt or innocence of an individual should be determined by the merits of the case. Any history of prior offending is deemed relevant at the sentencing stage. It is a fundamental principle that a fair trial would be prejudiced by widespread knowledge, flowing through to jurors, of any previous crimes committed by the accused.

Definitional Issues

The risk of unfair, or even unlawful discrimination or persecution are compounded by the uncertain and inconsistent definitions of paedophilia. What range of acts are considered to fall within this definition? At what age should certain acts be considered to be an offence against a young person? These questions are further confused by the inconsistency between jurisdictions in the age of consent and a differing age of consent for consenting heterosexual activity compared with consenting homosexual activity. The lack of clarity on these definitional questions can lead to an inappropriate inclusion of activity within the definition of paedophilia and subsequent labelling and stigmatisation of individuals. These problematic questions have remained unresolved for some time in official responses. They are even less likely to be taken into account in unofficial registers or in popular grassroots reactions.

Effectiveness and Dangers

Apart from the abovementioned civil liberties and privacy concerns raised by unofficial registers such as *The Australian Paedophile and Sex Offender Index*, we need to ask how effective these efforts are in achieving the goal of prevention. The book only lists those offenders whose names were not suppressed by the courts and while steps were taken to check court records to the highest appellate level to establish the final decision of the courts in relation to conviction and sentence, there still remain questions of completeness and accuracy. There are also individuals included who are unnamed due to the unavailability of appeal details, but they are still identified by age, occupation and location. There are serious implications of such limited information for

both the community and for individuals. Where, for example, an entry lists a particular offence by, say, a taxi driver, aged 45 who lives in suburb X, this could lead to community paranoia and stereotyping of particular occupations. There is also the potential for mistaken identity, particularly where there are several people with the same or similar names living in the same geographic area.

Other concerns are that the effect of such publication may be to force paedophiles underground, to change their identities and their location. Such publications could be also used by paedophiles themselves as a source of contacts, thereby facilitating the very thing it is trying to prevent. Another danger is that approaches such as these can encourage a vigilante mentality and action, encouraging members of the community to take the law into their own hands. It is not enough to assume as the author does that the community will act responsibly with this information and draw appropriate conclusions. History, regrettably, suggests otherwise.

These community approaches also raise questions of “where to from here?” How long before we see other books appear which seek to publicly identify other classes of people who may be perceived to pose a threat such as drug addicts, bankrupts, murderers, thieves or homosexuals? Some of these classes may not have committed any unlawful activity.

A Preferred Approach

Privacy advocates agree that information about the conviction history of sex offenders is relevant in minimising the risk of child abuse, and is important in making assessments about the risk posed by certain individuals to children. Yet I caution about the dangers of accepting approaches which do not take into account *all* the interests involved.

It is generally better to let such a sensitive balance to be struck by the authorities after careful thought. There is clearly a need for appropriate tracking of persons who have been convicted of offences against children and this will necessarily involve some form of register. Translating this to a scheme that is workable and fair is a difficult challenge. The development of official registers will give an opportunity for resolving some of the issues to do with specific

definitions, assuring the currency of information, and ensuring that those who have access do so only on the basis of a need to know, where the information is relevant to the specific circumstance.

Official Registers

Currently there are moves underway to implement a national register of suspected and convicted paedophiles. This register is being developed by the Australian Bureau of Criminal Intelligence following in-principle approval from Australasian Police Ministers Council last year. While I have argued against the emergence of unofficial registers and support the handling of information about these offences by institutions which are accountable, I note that official registers are still not free from concern. The notion of a register of allegations is of particular concern given that it opens the door for decisions to be made based on unsubstantiated claims. I understand that a threshold approach is being considered by the ABCI to ensure that information of this kind is only released where it meets criteria which strongly points to the a propensity to offend. I have been given to understand too that appeals mechanisms will be put in place giving individuals rights to challenge their inclusion in a register.

Conclusion

There are difficult issues to be resolved in relation to official registers of sexual offenders, but at least a thoughtful approach such as that currently being taken to the proposal for a national index should ensure appropriate use of information with consideration for all interests. The result should be the aim we all share — the more effective protection of children.

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Paedophiles are, in the main, sex offenders who can be neighbours and relatives, social workers, child care workers and teachers, church leaders, politicians, judges and doctors. They may be well educated or not; rich or poor; married or unmarried; employed or unemployed.

The above quotation from the Introduction to *Paedophilia: Policy and Prevention* illustrates the enormous difficulties faced by the community in tackling the problem of paedophilia.

This collection of papers from an Australian Institute of Criminology conference held in Sydney in April 1997 summarises the issues relating to detection and reporting; investigation, prosecution and defence; public education; treating of offenders; and implications for civil liberties. It forms the basis of informed public policy decision making.

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