

**LEGALLY ABUSED: THE CHILD SEXUAL ASSAULT
VICTIM IN THE ADULT CRIMINAL COURT**

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Introduction

There have been at least 9 reports¹ delivered to the SA and National Governments over the last 2 decades illustrating a multitude of problems facing children in South Australia who have been sexually abused. All of these reports focus **not** upon the abuse by the perpetrator but upon subsequent deficiencies in, and abuse by, "the system"; that same system that is charged with protecting children and delivering justice. In addition, three papers by Hood & Boltje (1996)², Boltje (1998)³ and most recently Eastwood & Patton (2002)⁴ have eloquently and rigorously described the multitude of hurdles facing children in adversarial courts. Their research speaks volumes and I applaud their ground breaking work.

In South Australia we now have the latest enquiry⁵ by Robyn Layton QC into the parlous predicament of abused children in our state. She has clearly confirmed in vivid detail the deficiencies of our current system of protecting children from violent and predatory adults. While working at Victim Support Service I have increasingly become concerned by evidence of the lack of justice for children. This, in turn has fueled my efforts to advocate for changes to the system. In order to gain a more accurate picture of what children and their families experience I have sought information from four sources:

- Victim self-reports about their experience – in my situation this translates to responding to the needs of child-allied parents. With the agreement of 2 child-allied parents I have included a case summary that represents their experiences in appropriately disguised format [Appendix E]. Because of time constraints I will not detail their experiences here however I commend their narrative to you as another means of understanding the issues for victims in this vexed area of crime.
- Statistics from Family and Youth Services (FAYS) & the Office of Crime Statistics and Research (OCSAR) in SA.
- Reports from professionals who are “court insiders” such as witness assistants and court supporters. And
- Transcripts of Trials

This paper will look at some trial transcripts, it will then comment on OCSAR’s statistics and the attrition rate of Child Sexual Abuse (CSA) cases as they proceed through the system; a critique of Chapter 15 of the Layton Review will then lead into a proposal for a new way forward in dealing with child sexual abuse in the courts.

Review of Transcripts

My focus in this presentation is the court process itself and I begin with a review of case transcripts from the criminal courts. Although I have had the dubious privilege of observing many criminal trials, the “closed court” in child sexual assault matters means that I, personally have never had first hand experience of actually sitting in court while a child is questioned by the judge, prosecutor and defence counsel.

I have analysed 18 cases where Rape, Unlawful Sexual Intercourse, Indecent Assault and Gross Indecency were taken to trial and where the child victim/witness was aged 15 years or less when she or he gave evidence. These cases spanned a 7¾ year period from July 1995 to April 2003. My intention was to look at 3 aspects of the trial:

1. The testing of a child to determine if she or he can give sworn evidence
2. The Prosecution examination
3. The Defence cross-examination

I hypothesized that:

1. Children would be asked questions in language that they could not be expected, fully to understand
2. That children would be verbally intimidated, especially by Defence Counsel

I was also interested in the use of Vulnerable Witness provisions; whether the cases were heard by Judge and Jury; whether children gave evidence under oath; how long the child was on the witness stand and the outcome of the trial.

Before proceeding to an analysis of the transcripts, I offer some comments about the process involved in identifying cases to review.

In preparing this paper I gained permission from the Chief Judge of the South Australian (SA) District Court, His Honour, Judge Terry Worthington to view transcripts of CSA matters that had gone to trial. Kevin Gleeson, the Supreme Court Clerk of Arraignment made this possible. I also gained permission from The Director of Public Prosecutions in SA, Mr. Paul Rofe QC to talk with a Witness Assistance Service staff member, namely Heidi Ehrat, about her general perception of the experience of children in court. I am indebted to these people and appreciate the trust they have placed in me.

Although these two courses of enquiry elicited some child specific experiences, what was even more illuminating was the 5 month process that brings me to today.

Having been unable to gain any case-specific information from the DPP, the Courts Administration Authority became my primary source of data. The problem was that the information storage and retrieval systems in place, were not capable of identifying the cases I needed. It was fortuitous that OCSAR had recently completed an analysis of CSA cases for the Layton Review and were able to identify a few pertinent cases. These were supplemented by drawing upon the recollections of some Judges and Crown Prosecutors.

I will now move to the results of the transcript review (see Appendices: A & B for details):

- The number of cases fitting my criteria were incredibly small (18) and I was astounded by the difficulty I had in identifying those cases. This points to a potentially serious data retrieval problem that I suspect traverses the entire Justice portfolio.
- There were 52 charges prosecuted: Rape =1, USI =30 of which 9 were Guilty, IA =18 of which 6 were Guilty and GI =3 of which 1 was Guilty.
- The outcomes for the 52 charges were: “Not Guilty”=35 (67%), “Guilty”=16 (31%) and “Nolle Prosequi”=1 (2%) This latter was where the child had started delivering her evidence-in-chief but after about half an hour, the trial was abandoned.
- Thirteen (13) trials were by judge and jury and five (5) were by judge alone. One trial by judge alone went to appeal and was re-tried with judge and jury with the result being an acquittal.
- All children but one were assessed as being able to give sworn evidence (oath or affirmation) and this process was relatively smooth.
- All children had access to CCTV except one who used a screen.

- Children were “on the Stand” between ½ an hour and 8 hours. The average being 2 hours 18 minutes.

One case in particular highlighted the rigidity of the legal process and symbolized, for me, the need for children to be protected from the criminal legal system.

The case is that of a 10 year old girl who spent approximately 8 hours in the witness stand over 3 days. Prior to this exchange between the Prosecutor and the child she had been crying intermittently for more than 1 hour as her examination-in-chief was proceeding.

Prosecutor: What happened when you were on the carpet
 Child: Well, I think he told me to lie down on the carpet and then when he put his mouth on my private, then I tried to push him away
 Prosecutor: Did anything happen when he had his mouth on your private when you were lying on the carpet
 Child: Yes
 Prosecutor: What happened
 Child: [CRYING] Do I have to say that one
 Prosecutor: Yes
 Child: I don't want to
 Prosecutor: Just try your best. Just tell [the Judge] what happened when he had his mouth on your private
 WITNESS PAUSES

Prosecutor: Can you say a little bit of what happened then
 Child: [CRYING]
 Prosecutor: Did [ACCUSED] do something when his mouth was on your private
 Child: Yes [CRYING]
 Prosecutor: Was that something that you liked or something that you didn't like
 Child: I didn't like
 Prosecutor: What part of his body did he use to do that something that you didn't like
 Child: His mouth [CRYING]
 Prosecutor: What did he do with his mouth that you didn't like
 Child: I don't want to say
 Prosecutor: Is there a reason you don't want to say
 Child: Yes
 Prosecutor: What's the reason you don't want to say
 Child: Because it is embarrassing and I don't want to say it

The next day she continues giving Prosecution evidence for another 1¾ hours and then after another hour of cross-examination there is this exchange between Defence Counsel and Judge while the child is out of the room.

Defence: She is at the point of exhaustion now
 Judge: She looks terrible

 Judge: I think we have just got to be realistic in a case like this, that we can't just hurry it, in fairness to your [Prosecution] case and also for the defence case. ... I think we should probably think about adjourning 'till Monday.

On Monday the child is back in court for another 2 hours. The accused was found “Not Guilty”.

Transcripts can be of assistance but they probably don't reflect the nuances in the exchanges that occur. Even so it was apparent that the Judge, the Prosecutor and the Defence were desperately trying to assist the child to give her evidence but were, ultimately, entirely un-equal to the task. They had been confounded by the rules of evidence and the protocols of court which had become the steel shackles of The Law. For the record, this child had, in her police statement, provided full and detailed evidence that left no doubt as to the veracity of her experiences.

I did find evidence of language use that was confusing for children. Judges, Prosecutors and Defence Counsel were all guilty of this.

Judge to Child: "What we are going to do is reconvene the courtroom in a few minutes and then the tipstaff will have you swear on the Bible to tell the truth..."

And in Cross examination of a 9 year old child:

Defence: You told us something about your father doing something while you were in the bath.

Child: Yes.

Defence: Are you telling the truth about that.

Child: Yes.

Defence: When do you say that happened in relation to the church

Child: In relation to the church?

Defence: Yes, in relation to what you say happened in the church. Was it before or after the church or don't you know.

Child: I don't know.

Defence: Have a think about it and try and help us. Do you say it was before or after the church.

Child: I think it was before or after

Defence: What do you say your dad did to you.

Child: What did he say?

Defence: What did he do. Tell us again what he did.

Child: In the bath?

Defence: Yes

The use of the phrase "in relation to the church" threw her completely, as has the juxtaposition of the words "you say your dad". Somehow she has been able to figure out, at the end, that the Defence has switched from the "church" and back to the "bath".

And to an eleven (11) year old:

Defence: So you were telling us that on the day you were sick, when you say [the accused] got into the shower with you, you did not go into the toilet after you got out of the shower and before you went to your mother's room.

Child: Can you please repeat that?

And to an eight (8) year old:

Defence: Has your mum ever told you what to say to anyone else. You disagreed with me when I asked you whether she has ever asked you or told you to say anything to anyone else; is that right.

Neither lawyers, prosecutors, defence lawyers, courts administration officers or judicial officers are *necessarily* formally trained in child development. This results in problems such as when a child answers a question literally as reported in *The Australian*⁶; "*Language of the Abused*" (1999):

Judge: Did the incident occur before or after Christmas?

Child: Yes

As noted in the article:

"This is not an incorrect response. Unless the incident happened on Christmas Day, the child is right".⁷

No doubt it did nothing to relieve the exasperation of the Judge ... or the confusion of the child.

Cross-examination of children by defence lawyers that are unscrupulous can result in a miscarriage of justice and the secondary abuse of the child. An example of this was aired on ABC Television in July 1999; in a programme entitled "Double Jeopardy". It represents a travesty of the justice process. An experienced wordsmith pits his entire arsenal against a seven-year old boy and brutalises him. The child was kept in the witness box for 5 hours. After the tape that reconstructs the cross examination is played to two District Court Judges they are appalled and describe it as a "truly disgraceful" cross examination and should have been stopped by the magistrate. Participants in the programme are asked by the interviewer "Would you let a child of yours go through [a trial]?" The responses were:

Lindy Powell (SA Law Society)

"No, never"

John Nicholson (NSW public defender)

"No, I don't think I would"

John Heslop (NSW Police)

"I think as a father, as it stands now, no"

John Reilly (Qld Police)

"As a father I would have an agonising decision"

Judge Robertson (Qld District Court)

"No, I certainly wouldn't"

Judge O'Sullivan (Qld District Court)

"It's time for a change. It's not time for hysteria, but it's definitely time for a change"

The profoundly staggering thing is that an influential defence lawyer commenting on the transcript disagreed with the two Judges and believed that the cross-examination was not "over the top".

Of course this occurred in another state - this could never happen in South Australia.

As it happens, I did not find evidence of abusive Defence Counsel, what I found was, in a way, more disturbing. I found that even with the best will in the world, as described above, children will still be abused in this adult, adversarial system. Clearly there are child appropriate ways in which a child's evidence can be adduced. It is done every week by Child Protection Services, Child Adolescent & Mental Health Services and Police. We need a court process that can accept evidence in this way or we must keep children out of the adult criminal court.

It is unsurprising that, in terms of preventing child sexual abuse we, as a community, have been spectacularly unsuccessful. A moment of reflection will confirm that the young members of our community that are subject to such abuse are singularly powerless. They have no economic power, no political power that can be given voice through organising; they are relatively helpless to protect themselves from harm. They have little control over their daily lives. It is through the lives of adults that the needs of young children are expressed ... and we have failed them.

What **is** surprising to me is that the plight of sexually abused children is not improved through rational debate and factual argument. Call me naïve but this reality has been a profound shock to me over the last 10 years of working at Victim Support Service. I was raised in a family that cherished reason, scientific rigour and a modicum of proof to back a position. You could, I believed, convince reasonable, rational people of a proposition if you laid out the evidence. This is clearly not the case with CSA.

Child Sexual Abuse Statistics – South Australia

The figures in Appendices C & D represent what I have termed "The Oz Twister"⁸ and graphically illustrate the attrition of CSA cases from FAYS Report to Court Outcome. The Oz Twister is a reference to the tumultuous experience of Dorothy and Toto on their journey from Kansas to the

Land of Oz. It must be acknowledged at the outset that there is no statistical link between the individual reports to FAYS, Police and Courts. The Twister uses State Government figures to enumerate the number of CSA matters that are dealt with by each section of the "System" in one year. These numbers change slightly over the years and I have included figures for 1998 and 2000 to illustrate this. Broadly speaking there are over 1,000 substantiated reports made to FAYS and only about 60 convictions. These figures do not take into consideration the unreported cases of CSA that may add more than 2,000 to the "substantiated reports" to FAYS.

My intention here is not to argue that there should be more perpetrators behind bars; my purpose is to show that most children never have access to the redress of court and that they are therefore devalued and discounted in our community. Even when they do get into court they are subject to an alien environment that conspires to prevent them telling their story in a way that empowers them.

The statistics that are produced by FAYS, SAPOL and Courts Administration are so limited that we can't answer basic questions like "*How many of the cases that were reported to FAYS in 2000 ended up going to court*". Currently, there is no tracking of individual cases through the system. You will be hearing later from Joy Wundersitz from OCSAR - SA about her team's efforts in extracting data. This information should be readily available to planners and public alike.

There are many, many people in our society who have experienced sexual abuse as a child. It is estimated that between 40,000⁹ and 284,000¹⁰ people who are alive in SA have been sexually abused in childhood and last year we added another 1,764¹¹ to that roll call. With so much experience within our community of this crime why are we so ineffectual in making a difference? As if to mock my naivete I discovered that in this enlightened state the protection of animals was legislated for in 1869¹² and 30 years later in 1899¹³ the protection of children was attended to.

Will the Layton Report improve the court experiences for children in South Australia?

The Layton Report, in chapter 15: *Children and the Courts*¹⁴, delivers fourteen recommendations that directly relate to the adult criminal court. They can be grouped into 8 categories:

1. Child's interview & evidence	Recommendations	91, 92 & 94
2. Child competence testing	Recommendation	93
3. Child friendly court	Recommendations	95, 97, 104 & 105
4. Education of legal profession	Recommendation	96
5. Use of Expert Opinion	Recommendation	98
6. Complicity of Accused	Recommendation	100
7. Diversion of Offender	Recommendation	102
8. Models for Prosecution	Recommendations	101 & 103

The Report has, in my opinion correctly identified many of the systemic, educational and procedural issues within the adult courts. In preparing the Victim Support Service submissions to the Layton Review we identified about 16 issues that needed attention. The Report dealt with all but three of them; these are:

1. Timely psychological treatment for victims conflicting with the risk of contaminating evidence.
2. The admissibility of hearsay evidence in CSA matters.
3. The need for suitable waiting facilities for child victims in the precincts of adult courts.

However the Layton Report, at Page 15.23, has carefully discounted the issue that is central to child victims of sexual assault when it states:

“... the inquisitorial approach is not recommended. Solutions need to be found which do not unnecessarily interfere with some of the fundamental underpinnings of our legal system.”¹⁵

If you have white-ants in your structural timbers and salt damp in your foundations – do you then simply nail and plaster over the top of the decay? If you are going to continue living in the house then probably you will make effective structural repairs. The Layton Report is recommending tinkering on the edges of a fatally flawed criminal legal system; it has not protected children from an adversarial process where the power imbalance is so overwhelming that most abused children don't even get into court and when they do the evidence they give is seldom enough to convict.

The three (3) reasons advanced for not recommending an Inquisitorial approach can be summarized in one aphorism: *Better the Devil you know than the Devil you don't*. The Inquisitorial System is dismissed because of “*history*” and “*long and solidly based foundation of a criminal onus of*”¹⁶. Is the Report arguing that the criminal convictions in an Inquisitorial System are somehow less safe than under the Adversarial? The point is that this issue has been side-stepped and not been subject to any close scrutiny.

A new system

I propose the thorough exploration of an **Inquisitorial System** where the rights of the accused are preserved in the context of a child-appropriate enquiry process conducted by a special judge alone. The judicial officer will call upon the expertise of people who are trained and accredited in the forensic questioning of children and the interpreting of their evidence. The finding of the judicial officer will be on the so-called Brigginslaw level of proof¹⁷ which is described as attaining a level of “Reasonable Satisfaction”. If the matter is proven then the accused is found guilty of a **criminal** offence. Further, and most importantly, that the judicial officer have access to a range of therapeutic, non-custodial and custodial options and a regime of incentives for offenders to engage in this process.

A variation on this approach is to remove child sexual abuse matters from the criminal jurisdiction and deal with the matter in an inquisitorial setting, with a lower level of proof but with no criminal conviction. I believe that this would send the wrong messages to the community that:

1. That sexually abusing a child is not a crime
2. That sexual abuse is not a violent, criminal act whereas physical assault is
3. That offenders will “get away” with their crimes
4. That the rights of offenders will always prevail over the rights of the victim

I maintain that retaining sexual assault of children in the criminal code will afford important protections to the particular children abused and, in the case of paedophiles, protections for future targets of abuse.

The concern that is voiced about lowering the level of proof is that the rights of the accused will be diminished. We currently decide upon a range of very important issues at a lower level of proof in the civil and family jurisdictions. So the issue is not that we cannot decide weighty matters appropriately at a lower level of proof. The argument appears to revolve around the potential “loss of liberty” that is consequent upon a finding against the accused. However if the goal of criminal conviction moves away from incarceration and more toward protection of the child and rehabilitation of the offender then the concern about incarceration remains only for the extra-familial and serial offender or the entirely untreatable individual. In cases such as this the criminal, inquisitorial court, having found the accused guilty on the balance of probabilities could then make an appropriate order, the breach of which results in automatic incarceration. The thread that runs through this approach is not only to protect a particular child but to promote behaviour change in abuse perpetrators and thereby protect future victims. Retaining the consequence of a criminal

conviction will also have implications for orders related to “suitability to work with children” and access to criminal injuries compensation.

Principles

The Principles for such a process can be found in a variety of documents including:

The NAPCAN Report to the Attorney General August 1995¹⁸

1. the system would encourage offenders to accept responsibility for their actions and seek treatment
2. a commitment to the safety and protection of children
3. acknowledge the need to foster a sense of justice in any child involved in the process, family members and the wider community
4. primary focus should be on determining where the truth lies
5. the system for ascertaining the truth should be strict enough to safeguard the rights of the accused, whilst being flexible enough to allow the true situation to become evident
6. the process will be conducted so as to minimise delays in finalising matters

Submission by Dr Annie Cossins to the NSW Standing Committee on Law and Justice¹⁹

1. minimise the risk of child sexual abuse in the community
2. minimise the secondary victimisation of child complainants
3. increase the reporting, prosecution and conviction rates of child sex offences
4. to develop a co-ordinated, integrated approach to the processing and management of child sexual assault cases by all agencies involved in the criminal justice process
5. to rehabilitate those convicted of child sex offences and thereby reduce the recidivism rate of offenders

Of particular interest to Victim Support Service SA is the intention to increase the reporting rate on CSA offences. If these reports are handled in ways that are governed by the above principles then child victims will have access, at the time of the report, to therapeutic services (if required) which, in the case of some male victims, may turn them from the path of becoming an abuser in later life, thus helping to break the abuse cycle. In addition to this, the adult perpetrators who are identified through increased reporting can also be assisted in gaining treatment; again, this will help to break the abuse cycle.

In summary

An adversarial prosecutor butts heads with an adversarial defence counsel in front of a judge who has been steeped in adversarial practice and now judges in an adversarial court administering an adversarial law created for an adversarial community by adversarial politicians.

The child is not an equal partner in this adult, legal world. **We** must take responsibility for getting that balance right.

The scales of justice are not simply weighing the guilt or innocence of an accused. They are also the crucibles in which our community measures its capacity to be just and fair to **all** its members - including our children.

Child Sexual Abuse Transcripts Data - July 1995 to April 2003
(South Australian Supreme & District Courts)

Trial No	Year	Age	Gender	Charge(s)	Verdict	Judge Jury	Sworn	CCTV Screen	“On” Stand (hours)
1	1995	10	F	USI	NG	J	Y	CCTV	8
				IA	NG				
2	1997	12	F	Rape	NG	J+J	Y	Screen	3
				USI	NG				
				IA	NG				
3a	1999	8	F	GI	NG	J+J	Y	CCTV	2¾
				USI	NG				
				USI→IA	NG				
				USI	NG				
3b	1999	8	F	USI	NG	J+J	Y	CCTV	2½
				USI	NG				
				USI	NG				
4	2000	12	F	IA	Nolle	J+J	Y	CCTV	½
5	2001	8	F	IA	NG	J+J	Y	CCTV	½
				IA	NG				
6	2001	11	M	IA	NG	J+J	Y	CCTV	1
7	2001	13	M	IA	G	J+J	Y	CCTV	1½
				USI	G				
				USI	G				
				USI	G				
				USI	G				
8	2002	12	F	IA	G	J+J	Y	CCTV	2¼
				IA	G				
				IA	G				
9	2002	9	F	USI	G	J+J	Y	CCTV	2¾
				USI	NG				
				IA	G				
				USI	NG				
10	2002	7	M	USI	NG	J+J	Y	CCTV	1¾
11	2002	10	M	USI	G	J	Y	CCTV	1½

Trial No	Year	Age	Gender	Charge(s)	Verdict	Judge Jury	Sworn	CCTV Screen	“On” Stand (hours)
12	2002 (rt) (t)	8	F	IA	NG	J+J (J)	N	CCTV	2¼ (1½)
				USI	NG				
				USI	NG				
13	2002	13	F	USI	NG	J+J	Y	CCTV	1¾
				USI	NG				
				USI	NG				
				USI	NG				
14	2002	11	F	USI	G	J	Y	CCTV	1½
				USI	NG				
				USI	G				
				USI	G				
15	2002	15	F	USI	NG	J+J	Y	CCTV	3
				USI	NG				
				IA	NG				
				IA	NG				
				GI	NG				
				IA	NG				
16	2002	11	F	USI	NG	J	Y	CCTV	1¼
17	2002	11	F	USI→IA	G	J+J	Y	CCTV	1¾
				GI	G				
				IA	NG				
18	2003	14	M	USI	NG	J	Y	CCTV	4

Charges

USI = Unlawful Sexual Intercourse

IA = Indecent Assault

GI = Gross Indecency

USI→IA = Reduction of charge to IA

Verdict

NG = Not Guilty

G = Guilty

Other

(rt) = Re-trial

(t) = Trial

CCTV = Closed Circuit Television

3a & 3b = Indicates two children giving evidence in the same trial

**Summary of Child Sexual Abuse Transcript Details
June 1995 to April 2003**

Trials & Children

Total of Trials = 18

Total of Children = 19

Age

- Age Range = 7 years to 15 years
- Average age = 10¾ years

Gender

- Female = 14
- Male = 5

Charges	N° of Trials	N° of Charges	Guilty	Not Guilty	Nolle
Rape		1	0	1	0
Unlawful Sexual Intercourse		30	9	21	0
Indecent Assault		18	6	11	1
Gross Indecency		3	1	2	0
Total		52 100%	16 31%	35 67%	1 2%

Source of Verdict

Judge alone (Trials)	5	8	4 (2)	4 (3)	0
Judge + Jury (Trials)	13	44	12 (4)	31 (8)	1 (1)

Sworn

- 18 out of 19

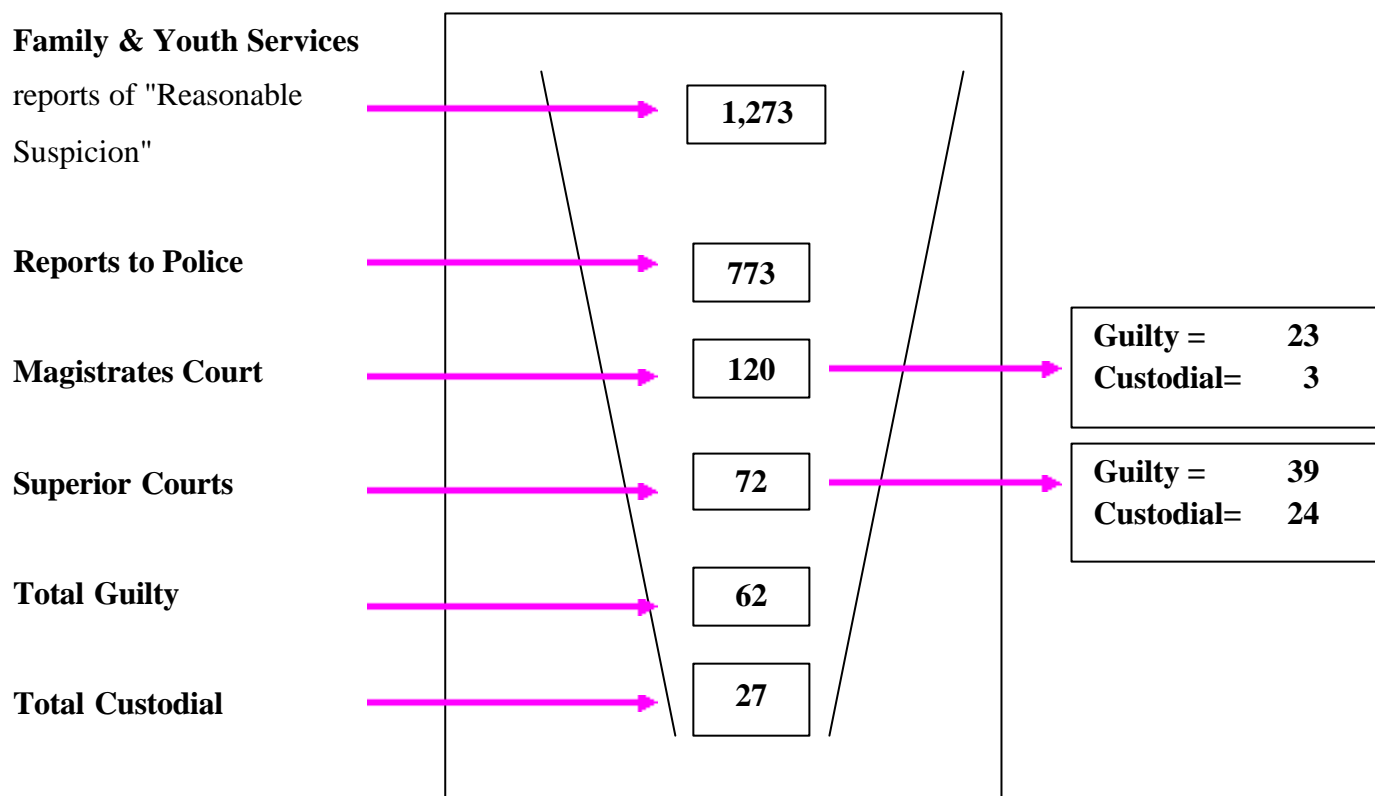
Vulnerable Witness Facilities

- CCTV = 18
- Screen = 1

Time as Sworn Witness (excludes major breaks such as lunch, overnight and weekends)

- Ranged from 30 minutes to 8 hours
- Average time was 2 hours 18 minutes

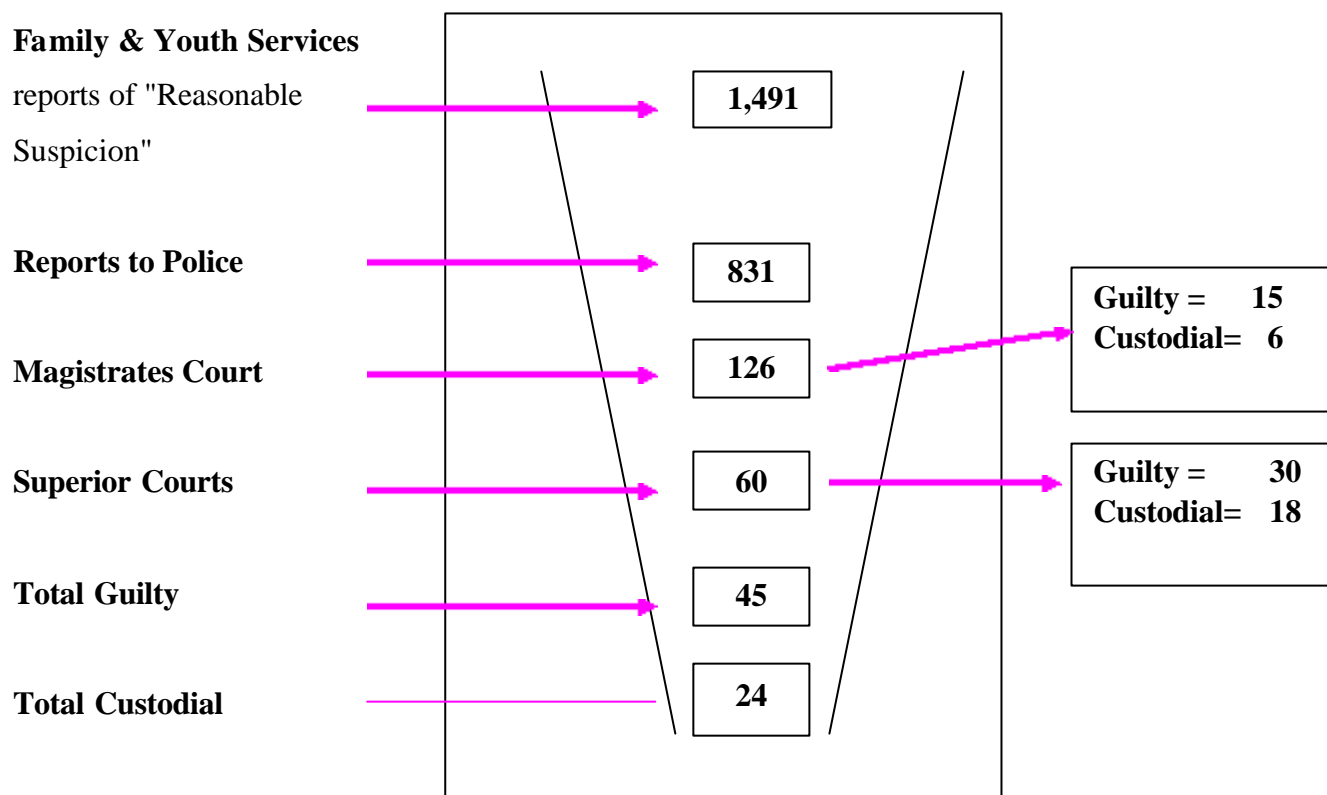
"The Oz Twister"
Child Sexual Abuse in South Australia 1998



These figures are gained from Government produced documents. They represent individual events within 3 separate sections of the bureaucracy (Welfare, Police and Courts Administration). Figures that are publicly available do not enable the tracking of discreet cases as they are dealt with by the welfare and criminal legal system. I present these figures as a snapshot of what happened in 1998. The figures are similar for previous years. These figures do not take into consideration the very large number of unreported cases of sexual abuse of children.

"The Oz Twister"

Child Sexual Abuse in South Australia 2000



These figures are gained from Government produced documents. They represent individual events within 3 separate sections of the bureaucracy (Welfare, Police and Courts Administration). Figures that are publicly available do not enable the tracking of discreet cases as they are dealt with by the welfare and criminal legal system. I present these figures as a snapshot of what happened in 2000. The figures are similar for previous years. These figures do not take into consideration the very large number of unreported cases of sexual abuse of children.

On Tuesday, Danny and forensic officers attended at Jenni's home and gathered forensic specimens from the two boys. He and his female colleague also took initial details from the boys. It was 10 days before an investigative interview with the Hospital-based Child Protection Service could be arranged²². Stephen's statement was video taped. He drew graphic images of what he had experienced and what he had witnessed occurring to his big brother. Matthew's evidence was also taped however his disclosures were very limited in detail.

Matthew wanted the Investigating Police Officer with him when he spoke but this was not permitted²³. Matthew had seen all the women in his life crying as a result of what they heard so when he realised that a female counsellor was going to interview him he clammed-up. Jenni was not permitted to be with either child and was not informed about the process of the interview or the outcomes²⁴.

Garry's control over his sons consisted of threats to kill the other brother, kill their pet puppy and to kill their mother. He also played on their loss of trust and isolation by saying that their "real father" had left them because they were so bad and that their mother would do the same if they talked about what happened. These threats were never revealed to Jenni.²⁵

12 days after disclosure Garry was charged. He was released to return home on Bail of \$1,000. He was required to stay away from the children and places where they are likely to be (school, home and local supermarket). He began stalking the family and writing letters to extended family members that denigrated Jenni. These letters were ultimately collected up by Jenni and passed on to the prosecutor. They were never used in the court case or in a restraint order application.²⁶

DPP - proofing

Proofing occurred at the office of the Director of Public Prosecutions.

Matthew had not disclosed details of the abuse by the time of proofing. He asked his Mum "*if I talk will it help the judge send him (offender) to jail?*". He decided to talk in brief detail about the 4 years of sexual abuse by his father in the presence of the prosecutor and the police officer. The charges against the accused were almost immediately upgraded from indecent assault to unlawful sexual intercourse with a child under 12 years. A second statement was taken but disclosures were still limited.

Jenni was strongly advised not to talk to her children about the case²⁷. This has proved one of the most difficult injunctions for her to accept. It had the effect of weakening her link with her children. Because Jenni was unable to discuss issues that they deemed important, the boys generalized this to other areas of their life and increasingly relied upon others for information and support. Jenni was also incensed that DPP would advise her children what to do and say in relation to the case without informing her of these instructions.

To make matters worse Jenni was advised by an officer of the crown: "*You don't own your children you just look after them*". Jenni regarded this as extremely offensive and its impact was redoubled in the highly charged environment of a child sexual abuse investigation.²⁸

Jenni described an overwhelming sense that prosecutors and police and other professionals that she came in contact with were "*...doing a job that they have done a hundred times before but they are not telling me what is going on now and what to expect in the future. They don't seem to realise that every promised date and every promised phone call is awaited with bated breath*". The sense of marginalisation and feeling irrelevant was summed up as: "*the prosecutor said to me: you are not an issue for us – you deal with it in your way*"²⁹.

Pre-trial

Garry continued his routine of harassing and threatening the family; reports were made to the police but his bail was not estreated. He had an illegal semi-automatic assault rifle which he threatened to use. Jenni and her children moved house on the advice of the police, however Garry had a friend in SAPOL and with his help he located their new address and their silent number. The harassment resumed.³⁰

Jenni's request for a restraint order was refused due to the currency of Garry's bail conditions. If he is found not guilty then his bail conditions lapse and the family have no "protection" from the accused. An application for a restraint order more than a year after the crime was also rejected.

A trial date was set but a week before it was to start the Judge was unavoidably detained on another trial. The date was vacated and another arranged. The new date also had to be changed because the CCTV equipment was not available.³¹

12 months after being charged, Garry was arraigned and pleaded not guilty in the District Court. Jenni was in court to witness this.

She noted that Garry had a lawyer acting for him but that she and her children had no-one watching out for their interests. She also realised with horror that Garry had access to all the witness statements from the Prosecution case ... she had none. Not only that but she was not pro-actively informed of developments in the case or of pending court dates. She had to continually ring for details³².

During Court

The video tapes made by Child Protection Service and the Police were never shown to Garry and were ruled inadmissible in court³³.

An application by Defence Counsel for "severance" of the trials of Matthew and Stephen was successful³⁴. This is where there are allegations made by two complainants about two separate events and where the presentation of these facts in the same trial could be unfair to the accused. Matthew's trial was first. He was permitted to give his evidence by CCTV. Garry had elected to be tried by Jury. When called to the witness stand to give his evidence-in-chief Matthew found he had difficulty remembering details. He felt under pressure and wished that he had never said anything about the abuse. When it came to his cross-examination his years of disrupted schooling began to take their toll. He was easily confused by the words used by the Defence Counsel but was too embarrassed to expose his lack of knowledge. The questions were fired at him in rapid succession and he remembers a feeling of panic rise within him³⁵.

Jenni meanwhile had been excluded from the court (as she was to give evidence) and had little idea of what was happening to her son. On a few occasions, when the court door was opened, she could hear him crying. She knew that Garry would be in the court room the whole time and it galled her to think that he could be there but she, whose life he had poisoned, could not be.

Stephen also gave evidence but his father declined the opportunity to take the witness stand. This is his right and no negative implication can be ascribed to his decision. Unfortunately Matthew's testimony was so shaky that the Jury returned a majority verdict of "Not Guilty".

Stephen's trial was to begin 4 weeks later. Both Stephen and Matthew began having severe nightmares, wetting their beds and becoming increasingly fearful. Jenni became so alarmed by the change in her children that, in consultation with her boys, she informed the DPP that they could not continue with the case. Although attempts were made to dissuade her, the responsibility for the

future well-being of her children weighed heavily upon her. The DPP entered a Nolle Prosequi (no further action at this time) on the charges.

Post Court

Garry walked out of the court and within a week he had indicated his intention to resume the Family Court ordered contact with his boys³⁶.

Consequences

Neither boy had received therapeutic counselling until after the trial. Jenni's attempts to engage them in counselling were rebuffed by both boys. They said they were fine.

Although academically bright, Matthew left school at 16 and attended TAFE. He dropped out 2 weeks before the end of the course. He was diagnosed with clinical depression and was medicated with Zoloft. It took him 1½ years to wean himself off it. He tried going "cold turkey" and ended up almost walking in front of a car. Matthew attempted suicide, he ran away from home and was also nearly killed in a vehicle accident in which he was the (un-licenced) driver. He finds it difficult to make friendships and is confused about his sexuality. Now aged 20 he has just started his first job in a fast food outlet.

Stephen has remained at home but his anger has been explosive. At 14 years he was suspended from school briefly for assaulting a male teacher. He is able to talk with Jenni about his sense of outrage toward his father and the court. He suffers from debilitating migraines and has difficulty concentrating for study purposes. He has experimented with illicit drugs and Jenni believes he could be dependent. He has stated that even today he can sit in a room with other people and yet feel as though he is not there.

Endnotes

References

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- ¹⁰ Estimate derived from Fergusson, D.M. & Mullen, P.E. (1999) *Childhood Sexual Abuse: An Evidence Based Perspective*. Chapter 2
- ¹¹ South Australian Government (2003) Family and Youth Services, Field Services Division *Child Sexual Abuse Notifications 1998 - 2002*
- ¹² South Australian Government, *Police Act 1869* Section 67 – Cruelty to animals. Conviction = £5 fine or 2 months imprisonment.
- ¹³ South Australian Government *Children’s Protection Act 1899*
- ¹⁴ South Australian Government (2003) *Our Best Investment – a state plan to protect and advance the interests of children* Pg. 15.1
- ¹⁵ South Australian Government (2003) *Our Best Investment – a state plan to protect and advance the interests of children* Pg. 15.23
- ¹⁶ Ibid
- ¹⁷ The Law Report; Radio National; May 2000
- ¹⁸ National Association For The Prevention Of Child Abuse And Neglect (1995)- *Letter to the SA Attorney General*
- ¹⁹ Cossins A. Submission to the NSW Standing Committee on Law and Justice (2002) *Inquiry into Child Sexual Assault Matters*

Case Note Commentary

- ²⁰ Children displaying signs of trauma need immediate attention. Delays for follow-up counselling in South Australia are currently running at 3 months to 18 months.
- ²¹ Contemporaneous Sexual assault of an adult is dealt with on a 24 hour basis; this should also be available for children (and their potentially distressed parent/s).
- ²² A 10 day delay is distressing for the family and leaves the accused unable to be questioned at a time that is closest to the abuse. In this case also the delay meant that certain items of clothing that were discussed in the CPS interview had to be retrieved from the house 1½ weeks after the abuse.
- ²³ When a bond is developed with a child (e.g. by a Police Officer) it is in the best interests of the child to provide that supportive person at CPS Interview. This is especially important because of the enforced breach of bond between allied-parent and their child due to the alleged risks of “coercion” and

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- ²⁴ The mother could have been of great assistance in helping investigators determine the source of the reluctance to tell the story.
- ²⁵ How can a parent help their child heal if they are not told the source of their fears? She has a duty of care to her sons which she is being prevented from discharging by a system that colludes in silence.
- ²⁶ One of the most common complaints by crime victims is that once they have made their statement to police it is very difficult to gain any form of effective protection from an harassing or abusive accused. Proving the breach of a bail condition is problematic because the police require objective proof.
- ²⁷ Realistically, young children are going to have a host of questions they want answers to. Their normal source of information is their closest parent. It is ludicrous to deny them access to this source of information. Belief by others and validation of their needs are key factors in a child's recovery from trauma. The silence of an otherwise supportive parent can be interpreted as lack of belief and validation and could cause further psychological injury.
- ²⁸ Comments that may have some legalistic meaning do not translate well in an environment where a caring parent is struggling to cope with her own sense of guilt and distress, the distress of her children and the threat of an accused who is indicating that he can look after the children better than she can (as stated in his letters to the family).
- ²⁹ As enunciated in the S.A. Victims of Crime Principles, information is absolutely critical to people who are embarking on a journey of fear. We need to have confidence in the people to whom we have entrusted our lives. We do not need to feel further alienated and irrelevant.
- ³⁰ Families need practical, direct action to minimize or neutralize risk.
- ³¹ Delays only serve to add to the problem of recall for a child. These delays may have been unavoidable but at the least they tend to point to insufficient resources to perform the job or possibly that CSA cases are not seen as a high priority.
- ³² As long as child victims are un-represented in court they are never going to gain the rights accorded an accused.
- ³³ If done to the standard required by the Memorandum of Good Practice (UK) all such video tapes should be shown to an accused and be admissible in court.
- ³⁴ The move for "severance" occurred very close to the trial date. It would be preferable to have this decided months before any trial. This action, to a victim, is like suddenly changing the rules.
- ³⁵ The interests of justice are not served by having panic stricken witnesses.
- ³⁶ The acquittal on criminal charges can leave the Family Court with no option but to continue existing "contact" and other orders.