Innovative Approaches for Dealing with Young People Appearing in the Children's Court of Victoria who are Charged with Sexual Offences

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Introduction

Some of the most, if not the most, difficult cases which come before the Children's Court are those in which allegations of sexual abuse are made. When the alleged perpetrator is a child,[1] provided the child is of or above 10 years of age[2] and has been charged with a sexual offence, the matter will be listed in the criminal division of the Children's Court. The court has jurisdiction to hear and determine all sexual offences committed by a child (as defined).[3] Since February 2009 such matters in the Melbourne Children's Court have been listed in the specialist Sexual Offences List.

There may be an overlap between those matters in the criminal division and those sexual abuse cases in the family division. The Australian Institute of Criminology noted '*The majority of reported sexual offences against children are family related*.'[4] Such cases will be listed in the family division when the Department of Health and Human Services (child protection) has issued a protection application arising out of protective concerns for a child due to an allegation of sexual abuse. The alleged perpetrator may be a child of any age or an adult.

The Criminal Justice Joint Inspection Report *Examining Multi-Agency Responses to Children and Young People who Sexually Offend* stated:

> *Children and young people who sexually offend form a very small proportion of the overall cohort of those who offend but the impact of their behaviour can be extremely damaging, and often affects other children and young people.*[5]

The specific challenges which apply in relation to sexual offences as compared with other types of offending were summarised in the Final Report of the Australian Institute of Criminology in respect of reforms introduced in the ACT:

- many more sexual offences take place than are reported;[6]
- sexual offences have a very high rate of attrition in the criminal justice system;[7]

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[1] The Court has jurisdiction when the person who is alleged to have committed an offence 'was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court.' (s.3 (CYFA).

[2] 'It is conclusively presumed that a child under 10 years of age cannot commit an offence.' (s.344 *Children Youth and Families Act 2005 (CYFA).)*

[3] In relation to the offences of rape and rape by compelling sexual penetration allegedly committed from 5/4/2018 and by an accused aged 16 years and over, the court is required to determine if there are exceptional circumstances. If so, the court is required to uplift the matter.

[4] Jessica Anderson, Kelly Richards & Katie Willis *Evaluation of the ACT Sexual Assault Reform Program Final Report 2012* www.aic.gov.au

[5] *The Criminal Justice Joint Investigation Report reviewed the agency responses in England and Wales*. February 2013. page 8. Refer also to *Child Sexual Abuse and Subsequent Offending and Victimisation : A 45 year follow-up* study James Ogloff, Margaret Cutajar, Emily Mann and Paul Mullen Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice No. 440 June 2012.

[6] *AIC Report Evaluation of the ACT Sexual Assault Reform Program (SARP)* at page 3. Refer to Nearne and Heenan 2003. The studies of Bouhours & Daly 2008 and Lievore indicate that most sexual offences are not reported to the police.

[7] AIC report page 2. Refer to Kelly Lovett and Regan 2005, Lievore 2003.

- sexual offences in particular with children have one of the highest rates of attrition;[8]
- children often delay reporting sexual offences (self blame, shame, threats by or fear of the offender and/or psychological effects of the abuse);[9]
- '… often police do not proceed with the investigation of an offence due to evidentiary difficulties.'[10] Examples cited: insufficient evidence, no offender identified, little prospect of conviction[11] (for example, due to the complainant having a mental illness, intellectual disability and/or 'repeat complainant');[12]
- '… conviction rates for sexual offences are typically lower than for other offence types;'[13]
- barriers to reporting sexual offences include 'personal barriers' and 'criminal justice system barriers.'[14]

The legislative amendments and innovations introduced in the Sexual Offences List seek to address the manner in which the criminal justice system responds to proceedings in respect of sexual offending.

This Paper describes the operation of the specialist list in the criminal division and the benefits which have flowed from the establishment of the List. To highlight the benefits, I have included a comparison of how matters would proceed at court prior to and since the Sexual Offences List was established.

1. Background – Law Reform – Sexual Offences

On 25 August 2004 the Victorian Law Reform Commission *The Sexual Offences: Final Report* was tabled in the Victorian Parliament. It made a number of recommendations with the ultimate objective being to improve the response of the criminal justice system in sexual assault cases.

The recommendations included:

- *better education and training for police, lawyers and judges;*
- *improved police responses to all complainants, but particularly indigenous and non-English speaking background people, children and people with a cognitive impairment;*
- *reducing the time taken to get to trial for children and people with a cognitive impairment;*
- *introducing a specialist approach to the listing of sexual offence cases in the Magistrates' Court;*
- *reducing the number of times children and people with a cognitive impairment must give the same evidence;*
- *tightening cross examination regulations and barring the accused from questioning the complainant or other vulnerable witnesses in person;*
- *making testimony by closed circuit television routine and allowing videotaped testimony for children and people with a cognitive impairment;*
- *restricting access to the complainant's counselling records;*

[8] AIC Report page 2. Refer to Eastwood Kift and Grace 2006.
[9] AIC Report page 3. Refer to Lewis 2006.
[10] AIC Report page 3. Refer to Borzycki 2007.
[11] AIC Report page 4. Refer to Kelly Lovett and Regan 2005
[12] AIC Report page 4. Refer to Kelly Lovett and Regan 2005.
[13] AIC Report page 5. Refer to Fitzgerald 2006.
[14] AIC Report page 3.

- *widening the definition of allowable evidence and who can give it;*
- *the establishment of a working party to examine potential responses to young sexual offenders.*

It was recognised that the Law Reform Commission considered that '*a combination of legal and cultural change would be required for law reform in relation to sexual offences to be effective.'*[15]

The Government's response was referred to as the 'Sexual Assault Reform Strategy' (SARS).

In the 2006/2007 State Budget, the Victorian Government 'allocated $34.2 million to transform the criminal justice system's response to sexual assault.'[16]

Legislation was introduced to change the way in which sexual assault matters proceeded in Victoria. The legislative reforms included:

- *Crimes (Sexual Offences)Act 2006*
- *Crimes (Sexual Offences) (Further Amendment) Act 2006*
- *Crimes Amendment (Rape) Act 2007*
- *Justice Legislation Amendment (Sex Offences Procedure) Act 2008*

As a result of these reforms major changes have been made to the procedure by which sexual offences proceed before the courts. The reforms include:

- the establishment of specialist Sexual Offence Lists in the Magistrates' and County Courts;
- the establishment of the Child Witness Service – in order for children and those people with a cognitive impairment to give their evidence at a remote location, that is, away from the Court and from the alleged offender. Their evidence is given via a video link;[17]
- children and people with a cognitive impairment are not cross examined at committal hearings;
- the prohibition upon complainants being cross examined in relation to their sexual histories unless the Court grants leave;
- the prohibition upon the accused personally cross examining a complainant;
- the exclusion of 'protected evidence' (confidential communications) without leave of the Court.

Amendments were made to the *Magistrates' Court Act 1989* [18] to establish a Sexual Offences List. The List was established in the Magistrates' Court in 2006.[19] Unlike the Magistrates' Court and the County Court, the Children's Court did not receive any funding pursuant to the SARS to establish a specialist list.

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[15] *Sexual Assault Reform Strategy Final Evaluation Report Success Works Pty Ltd (SARS Report)* January 2011 page 9.
[16] *SARS Final Report* page 7.
[17] *Written Exit Surveys conducted by the Child Witness Service (CWS) from 2009-2011* have indicated a high level of satisfaction with the CWS, for example, "Without this service, we could never have got through this bad experience." (Parent of a child under 12). (2009 Survey)
[18] Section 4R
[19] The List commenced as a Pilot in April 2006 and was formally established on 1/12/2006. Rural Sexual Offence Lists commenced on 1/7/2007.

However, in February 2009 the Melbourne Children's Court, criminal division, introduced a pilot specialist Sexual Offences List for children.

The Sexual Offences List was supported by the police prosecutors but due to the absence of any additional resources, a prosecutor could only be provided on the basis that the court would not list any criminal contested matters on the day the Sexual Offences List sits. The List was also supported by Victoria Legal Aid (VLA).

This Paper concentrates upon the establishment of the Sexual Offences List in the Children's Court. It is beyond the scope of this paper to consider the other recommendations and changes made to the criminal justice system or other innovations proposed in the literature.[20]

2. The Sexual Offences List

The List sits on a Friday every three weeks in a separate courtroom from the main criminal list. This facilitates a 'more respectful' approach to all concerned as sensitive information is raised regarding both the complainants and the accused.[21] Whenever possible, a maximum of 10 matters are listed per sitting.[22]

3. Provision of the police brief

My colleague Magistrate Belinda Wallington and I established the List. It included the introduction of a number of initiatives. The presiding magistrate is provided with the police brief in advance of the hearing which enables a thorough preparation of the case. This was an innovation introduced when the List was established as judicial officers do not otherwise have access to police briefs in the summary determination of offences before the court. In order for this to occur, the court has relied upon the co-operation of Victoria Police prosecutors and the support of VLA. The magistrates sitting in the List do not hear any matters which proceed to a contested hearing and to which they have had access to the police brief.

The following significant case management practices have developed in the List and were referred to in the Final SARS Report:

- *providing time to discuss matters with the prosecution and the defence practitioner in the presence of the informant and the accused;*
- *narrowing issues with the result that some witnesses may not be required;*
- *foreseeing any potential delays;*
- *ensuring the case proceeds when listed.*[23]

These practices have been able to occur due to the nature of the List. The smaller number of cases in the List as compared to a Mention Court List ensures there is time available for meaningful discussions to take place. The discussions do not only occur between the prosecutor and defence counsel. The magistrate sitting in the List

[20] For example, the application of restorative justice principles in group conferences for sexual assault matters. Australian Centre for the Study of Sexual Assault No.12 of 2011. Refer also to the article by Justice Neave, Court of Appeal Victoria and Chief Judge Rozenes, County Court of Victoria 'Providing Justice to Sex Assault Victims Takes More than Trials.' The Age 15 September 2011. The Department of Justice has prepared a draft Scoping Paper *Alternative Justice Models and Sexual Assault*.
[21] *SARS Final Report* Page 102.
[22] When the List was first established, the maximum number was 6.
[23] *SARS Final Report* Page 102.

is able to be more interventionist than would ordinarily be the case because they have read the police brief, can identify the issues in the case and will not be hearing any contested hearing.

4. Children's Court of Victoria Practice Directions Numbered 4, 5 and 6 of 2018 (including the Intermediary Pilot Program Guidelines).

The narrowing of issues was also assisted by the introduction of the Children's Court of Victoria Practice Direction No. 2 of 2009 which provided for the introduction of Form A.[24] This Practice Direction was revoked by Practice Direction No. 4 of 2018 which updated Form A. The Form A must be completed and filed before the date for a summary contested hearing is fixed. The Form requires details to be provided of issues in dispute and those matters not in dispute. The magistrate will peruse the completed Form A, seek clarification if necessary and may adjourn the matter for a special mention in order to ensure, as far as is possible, that the matter will be ready to proceed on the first day of the contest.

Prior to the List being established, it was not unusual for matters not to be ready to proceed on the first day of the contest. This was recognised as a major criticism of the court process. Complainants, often young children, would attend court to give their evidence only to be told that the matter was being adjourned and usually being adjourned for a period of some months. The co-ordinator at the Melbourne Children's Court has confirmed that since the introduction of the List there are fewer adjournment applications of sexual assault contests and that if a case is to be adjourned, the court is generally notified prior to the contest date; thus obviating the need for the complainant to unnecessarily attend the Child Witness Service.

5. Pre Proof Assessments – Diversionary Approach

Another innovation introduced when the List was established was the referral, in appropriate cases, of matters to the Children's Court Clinic for pre proof assessment and/or counselling[25] to be conducted. These matters include those in which the prosecution may have difficulties proving its case, for example, the complainant/s may be very young or have a disability and the prosecution would have difficulty adducing the evidence required to establish the offence, where the prosecution would or may experience difficulties proving the intent of the accused or sibling incest cases. In such cases, the referral is made on the understanding that the accused young person attend for the assessment and/or counselling and/or comply with any recommended treatment. Provided the young person complies, the prosecution will withdraw the charge/s. Such a process is not embarked upon without the consent of the prosecutor who will have ensured that the complainant/complainant's family agree or do not oppose the proposed course.

Lawyers for the accused agreed for their clients to participate in a pre proof assessment/counselling as the prosecution agreed not to seek access to the report provided to the court but to instead rely upon the judicial officer confirming that the young person attended for the assessment/counselling and confirming the clinician's recommendations. If this approach is adopted, it may mean that the matter is not

[24] Practice Direction No. 2 of 2009 Sexual Offences Summary Contest Listings dated 29 January 2009 commenced on 2 February 2009. It was revoked by Practice Direction No. 4 of 2018 dated 1 June 2018 which commenced on 4 June 2018.
[25] The counselling may be provided by a suitably qualified psychologist with whom the young person has already established a therapeutic relationship.

finalised for 12 months, for example, with perhaps a special mention after 6 months to assess the progress of the accused engaging in counselling. The charges would not be withdrawn until the counselling had concluded and there had been compliance with any other recommendations and any requirements of the court eg no further allegations of sexual offending.

This diversionary-type approach of the young person engaging in counselling and the withdrawal by the prosecution of the charges, bears some similarities to the effect of Therapeutic Treatment Orders (TTO) being made.

Despite those similarities, there are a number of significant differences. They include that a TTO can only be made in the family division of the court. However, in the Sexual Offences List the diversionary procedure may occur in cases in which there are not any family division proceedings. In addition, the other legislative requirements of Therapeutic Treatment Orders are not required to be met.[26] One requirement is that the order is '*necessary to ensure the child's access to, or at, an appropriate therapeutic treatment program*.'[27] Such a requirement penalises a parent who is responsible and acts protectively. That is not the situation in the cases in the List in which the approach I have described has been adopted. In fact the reverse is often the case. In those cases in which families have acted appropriately and sought counselling for their child, the prosecution would be in a stronger position to recommend to the complainant's family that this diversionary approach be adopted.

This approach bore a number of similarities to the subsequent introduction of s.354A CYFA which provides for voluntary participation in a therapeutic treatment program if the court is satisfied that the child has exhibited sexually abusive behaviours that would justify a referral to the Secretary under s. 349(2) CYFA and the court is satisfied that the child has attended and participated, is attending and participating or will attend and participate voluntarily in a therapeutic treatment program. If the court is satisfied that the criteria in s. 354A(4) CYFA has been met, the court must discharge the child without any further hearing of the criminal proceeding.

One of the benefits of this approach is that the young person undergoes treatment. In the long term it is hoped that this intervention may prevent young people from reoffending. Mr Phil Rich in his book *Understanding, Assessing and Rehabilitating Juvenile Sexual Offenders*[28] states:

> *"….. juvenile sex offenders are still children and remain open to corrective emotional and cognitive experiences that will help reframe their ideas and worldviews, address their emotional and behavioural difficulties and help them to engage pro socially and in ways that yield greater personal satisfaction and a sense of self efficacy."*

6. *Case Study*

One case in which this diversionary approach was adopted involved Peter[29] who was 15 years of age and had been charged with incest offences in respect of his younger brother aged nine. Over a 12 month period Peter engaged in 28 sessions of

[26] Section 248 CYFA
[27] Section 248(1)(b) CYFA
[28] Second Edition 2011 John Wiley and Sons Inc. page 256
[29] A pseudonym

assessment and counselling. This is an extract from the final report the Court received from the clinician which in my view exemplifies the diversionary approach of the court and the benefits which can be achieved for all involved:

"Following the last report provided, Peter, Jack and their parents participated in a family apology session on 10 November 2011 whereby Peter expressed an extremely heartfelt apology to his younger brother for the hurt he has caused him. He also talked about the following things with his brother and his parents:

- *an expression of understanding about the impact that this abuse has had on his brother and his parents and how he had betrayed the trust of his brother and his parents;*
- *a full acceptance of responsibility for his actions and an expression of remorse for his actions;*
- *every assurance that this would never occur again*
- *what he has learnt in counselling that has allowed him to be able to provide such reassurances;*
- *an acknowledgement that the role of the big brother is to protect his younger brother and this is the role he will take from now on.*

The session concluded the counselling of both Peter and Jack and thus CPS will conclude their involvement with this family following this court hearing on Friday. Counsellors have made it clear to the family that they are welcome to contact CPS or re-refer either boy for counselling in the future should the need arise."

7. The Benefits of the Sexual Offences List

A review of the benefits of the List discussed with the magistrates sitting in the List and key stakeholders - being the senior lawyer in charge of the Specialist Sex Offences Unit OPP, senior police prosecutor and senior solicitors with Victoria Legal Aid included as follows:

- better file management by both the prosecution and VLA, (including a continuity of representation);
- increased opportunity for matters to resolve;
- a greater certainty that contested hearings would commence on the listed date;
- an improved understanding by members of Victoria Police of Therapeutic Treatment Orders and
- specific legislative reforms were identified and now have been legislated, for example, regarding the extension of TTOs and the video recording of a complainant's evidence.

A number of the findings were consistent with the case management practices in the SARS Report, to which reference was previously made. [30]

It was also agreed and has been adopted by the court that due to the effectiveness of the List, all sexual offence matters which had been transferred to Melbourne from another court (including those in which a contest mention had already been conducted) would be listed in the Sexual Offences List, prior to being listed for a contested hearing.

[30] Refer to page 4.

8. A Comparison of the Process in Court of a Sexual Offence Matter Prior to and Post the Establishment of the Specialist List

In order to illustrate how the List operates, I thought it would be helpful to compare the way in which a sexual offence matter may have proceeded before the court prior to the List being established and how it is conducted in the List.

Prior to the List commencing, the sexual offence matters would be listed with any other criminal matters in a mention court list, that is, there may be driving offences, armed robberies and then the next file would relate to an accused who has been charged with rape. The court may be very crowded with people waiting for their cases to be called. If the accused is pleading guilty, then a summary would be read by the prosecutor. Prior to the summary being read the judicial officer would not know any of the details of the offence/s. If the complainant is in court, the prosecutor may have indicated this fact to the judicial officer or the judicial officer may have asked whether the complainant was in court. If that was the case, the complainant would be pointed out and everyone in court would look at him/her just as they would, the accused.

The facts of these cases are by their nature almost always extremely sensitive and intimate. The complainant may have completed a victim impact statement, which again often contains very personal information. In the general mention court, if the matter did not resolve, there would be a cursory examination by the judicial officer as to the number of witnesses required, the number of days for the contest, the nature of the issues in dispute and the matter would be listed for hearing.

When the Sexual Offences List was introduced, each sexual offence file was placed in a red manila folder. The files have now been specially printed to readily identify it is a sex offence matter. This meant that if for some reason the matter is first mentioned in the general mention court (for example, the accused is in custody and appears on a non Sexual Offences List day), the judicial officer is immediately aware that there are sexual offence/s alleged.

Proceedings in the Children's Court (including the Sexual Offences List) are conducted in open court. The List is conducted in courtroom 9 at Melbourne, which is a relatively small courtroom. Despite it not being a closed court, and whilst it is not always the case, the tendency is for the accused, any complainant and any support people who have attended, to remain outside the courtroom until their matter is called.[31]

One of the cases which was dealt with in the Sexual Offences List involved Tiffany,[32] a 13-year-old girl. She was at a music festival with her girlfriends. She had been drinking alcohol and was unstable on her feet. She saw two boys aged 16 and 17, one of whom she knew. She left her friends to speak to them. The boys assisted her to walk to a nearby playground. Whilst at the playground, the boys raped her. There was oral, anal and vaginal penetration. At times, both boys penetrated her at the same time. One of the boys in particular, subjected her to extremely humiliating and degrading acts of sexual violence. The matter was reported to the police and the boys were interviewed.

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[31] The Practice Directions during COVID-19 have resulted in proceedings being conducted on line.

[32] Tiffany is a pseudonym. I have changed some of the incidental facts to ensure confidentiality.

There were initial denials by both boys that anything had occurred. Telephone intercepts at the boys' homes recorded the boys discussing a false alibi. The telephone intercepts also included some incredibly offensive references as to what they had done and equally offensive comments about Tiffany. Tiffany and her mother attended court. Tiffany had completed a victim impact statement.

If the matter had proceeded as a plea of guilty in the general list, as I have indicated, the judicial officer would not have read the police brief. The summary would have been read in open court and it would be likely that the court would have been crowded. This has an impact not only on any complainant who is present but also on the accused. Tiffany would have heard the most appalling comments the boys had made about her and would have heard about them bragging as to what had occurred. Reference may also have been made to the impact on Tiffany as described in her Victim Impact Statement.

In the Sexual Offences List however, having had the benefit of reading the brief including the summary, it was agreed by consent that it was not necessary for that paragraph of the summary which was so offensive, to be read aloud; nevertheless I could have regard to those matters.[33] That could not have occurred if the judicial officer had not read the brief. It is impossible to imagine the impact on Tiffany had she been made aware of the comments which had been made and of which she was previously unaware.

The accused pleaded guilty on separate dates and were also sentenced on separate dates. The offender who performed the less major role apologised to the complainant in court. It was not just 'I'm sorry' but rather it was a much more heartfelt apology. In many cases complainants do not seek an apology and are critical of apologies being made in these circumstances. However, in this case Tiffany had sought an apology from him. It would be most doubtful that this result could have been achieved in a large mainstream courtroom.

Conclusion

It is generally accepted that the sexual assault reforms which have been introduced have improved the response of the criminal justice system in sexual offence cases. The introduction of specialist lists in the Magistrates' Court and County Court was one such reform. Despite the lack of funding, the Children's Court at Melbourne introduced its pilot specialist Sexual Offences List.

There are many views as to the effectiveness and relevance of court for complainants and accused in sexual offence matters. The innovations introduced in the Children's Court Sexual Offences List have been an attempt to break down the criminal justice barriers in these cases. The support of the prosecution and defence has been essential in these innovations being implemented. These initiatives, together with the introduction of the legislative reforms, have in my view significantly improved the response of the legal system in sexual offence matters.

Jennifer Bowles
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[33] The full written summary was placed on the court file and it was directed that it remain on the file.

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