The Prosecution of Child Sex Offences: To Specialise or Not – That is the Question.

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[PLEASE NOTE – THIS IS A COMPILATION OF TWO MUCH MORE COMPREHENSIVE PAPERS ON THE ISSUE OF SPECIALISATION WHICH ARE AVAILABLE FROM THE AUTHOR ON REQUEST.]

In 1999, I established the National Child Sexual Assault Reform Committee which is a nationwide body that has been examining all aspects of reform in relation to the prosecution of child sex offences around Australia. This committee has argued that specific reform to the child sexual assault trial is required for the following six policy reasons:

- the relatively high incidence of child sexual abuse in the Australian community (Fleming, 1997; Dunne, Purdie, Cook, Boyle, and Najman, 2003)[1] and the much highter incidence of child sexual abuse in Aboriginal communities;
- the difficulties associated with detection and the high rate of underreporting;
- the high attrition rate of cases once they are reported;
- the relatively low conviction rate for the small proportion of cases that go to trial;
- the long delays between charging and trial outcome;
- the re-traumatisation suffered by victims as a result of delays and the trial process; and
- the documented recidivism of offenders.

As things currently stand, in Australia the vast majority of offenders remain undetected – of those who are reported, most never face trial (sometimes because the complainant does not wish to proceed) and of those that go to trial, most are acquitted. This means that the

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1 Fleming (1997) reported that only 10% of Australian women who said they had been sexually abused as children ever reported the abuse to police, a doctor or a community agency. Mazza, Dennerstein and Ryan (1996) reported that only 9% of female patients in Australia who had been sexually abused as adults or children reported the abuse to their doctor.

majority of offenders are free to continue their behaviour unless we are to accept that every case that does not proceed and every acquittal is a false complaint by the child in question. This explanation, which has no empirical evidence to support it, is an unsatisfactory and problematic way to understand the problem of CSA in the Australian community. Yet this idea of false complaint permeates the child sexual assault trial. **[2mins]**

After years of research, my national committee has come to the conclusion that the adversarial system is not designed to deal with the uniqueness of child sex offences. Rather than being a process that aims to protect the victim (or other children) from future abuse, the adversarial system has a well documented history of transforming a child sexual assault trial into an inquiry about the credibility of the complainant. Decisions to prosecute are largely influenced, therefore, by the difficulties in securing a conviction, which means that prosecutors will only run those cases that have the highest chances of success. Although few cases go to trial, the difficulties in securing convictions have a feedback effect on decisions to investigate and to prosecute. What happens at trial therefore has a significant effect on cases further up the line. Because of this, my committee has argued that what is needed is a package of reforms, with the central element of that package being a specialist court for prosecuting all sex offences.

However, in making out the case for specialisation, it is necessary to ask what we want to achieve by prosecuting child sex offences. For example, a child protection register has now been implemented in most jurisdictions in Australia for the registration of sex offenders and is based on the principle of prevention. The adversarial trial, on the other hand, is based on the fair trial principle and the aim of preventing defendants from wrongful conviction. Whilst this is a desirable goal irrespective of the crime being prosecuted, the protections for the accused in a child sexual assault trial are weighted in favour of acquittal, not protection of children from sexual abuse. This means that the focus of reform measures has to deal with the prosecution process *and* outcomes rather than merely the implementation of measures that protect the child from the rigours of the

adversarial system which has been the focus of reform in all Australian jurisdictions for more than a decade.

The challenge in devising an alternative model for prosecuting child sex offences, therefore, involves (i) consideration of the safety of the victim and other children in an offender's community, (ii) increasing disposition times for child sexual assault cases, (iii) increasing the conviction rate for child sex offences, (iv) the imposition of custodial sentences and the length of such sentences, (v) the rehabilitation of offenders through the establishment of specialised treatment programs, and (vi) the need to link custodial sentences with treatment.

There is comprehensive data from overseas specialist sex offences and family violence courts that a move towards specialisation has a dramatic impact on reducing delays, increasing the number of cases that go to trial and increasing conviction rates.

Specialisation in overseas jurisdictions, such as South Africa and Canada, means much more than merely introducing technology to enable complainants to give evidence outside the courtroom and involves not just specially designated courtrooms but key systemic changes which have produced cultural change within the courtroom. The key feature that has been found to bring about this cultural change is the specialisation of personnel: that is, prosecutors and judges who have undergone specialist training in relation to child development issues and the dynamics of sexual assault. **[6 mins]**

The best example of specialisation and its effects are the Family Violence Courts of Manitoba, Canada, mostly because of the comprehensive data that has been recorded over a 15 year period since the court's establishment. The FVCs prosecute all forms of family violence including child sexual abuse. When they were first introduced, specialisation was particularly focused at the "front end" by creating specialist prosecutors and specialised victim services. In relation to child abuse cases, the key components of this specialised system were:

(i) a child abuse investigation unit within the Winnipeg Police Service;

(ii) two victim support programs: the Women's Advocacy Program and the Child Abuse Victim Witness Program within the Department of Justice;

(i) a specialised unit in the prosecutor's office with designated Crown attorneys who exclusively prosecute family violence matters (including child sexual assault) from bail hearings to trial;

(ii) specially designated courtrooms and dockets for intake, screening court and trials;

(iii) a child friendly courtroom that is used for child abuse prosecutions;

(iv) initially fourteen designated judges were assigned to the Family Violence Courts but with a rapid increase in the caseload, all provincial court judges now rotate through the designated courts.

In Manitoba, specialisation of prosecutors means that the same prosecutor stays with a case from start to finish and a specialist unit of prosecutors has built up an environment of expertise and support that guards against burnout. Staff from the specialist unit believe that prosecutors have a particular advantage over defence counsel because specialisation increases the expertise of Crown prosecutors which has a flow-on effect on the quality of the Crown's case.

Specialisation at the judicial level initially created a group of judges who were in a position to make consistent decisions in relation to the laws of evidence, the prevention of abusive cross-examination practices which, together with specialist prosecutors, created significant cultural change within the courtroom.

The key finding from the Family Violence Courts in Manitoba is that *outcomes* change significantly with specialisation (Ursel and Gorkoff, 2001). In relation to the prosecution of child sexual assault cases in the Family Violence Courts these outcomes include:

(i) a significantly higher conviction rate compared with the National Data for Canada[2] (Ursel and Gorkoff, 2001: 88);

[2] In the Winnipeg Family Violence Court between 1992-1997, there were 604 child sexual abuse cases. 186 cases were stayed whilst 416 proceeded to court. Of those, fifty eight percent (242) resulted in a guilty plea and 42 per cent (174) proceeded to trial. The trial outcomes were: 3 per cent discharged; 13 per cent dismissed; 37 per cent found not guilty and 49 per cent found guilty (Ursel and Gorkoff, 2001:

(ii) a higher percentage of offenders convicted of child sexual abuse in Winnipeg received a jail sentence (63 per cent) compared to 54 per cent of offenders nationwide;

(iii) guilty verdicts dramatically increased the likelihood of a jail sentence (80 per cent) compared to guilty pleas (63 per cent);

(iv) a dramatic increase in the length of sentence with the Winnipeg Family Violence Court sentencing 37 per cent of convicted offenders to two years or more, compared with the National Data which showed that only 6 per cent of convicted offenders of child sexual abuse were sentenced to two years or more;

(v) the introduction of mandatory treatment programs which are linked to sentencing;

(vi) comparisons with data on physical child abuse cases showed that the Winnipeg Family Violence Court treated *sexual abuse* more seriously in terms of stay rates (lower for sexual abuse cases), cases going to trial, guilty verdicts, incarceration and length of sentence. **[9 mins]**

It is notable that these outcomes have been achieved without the type of vulnerable witness protections that we have in Australia, suggesting that vulnerable witness protections, of themselves, are not likely to have a demonstrable impact on court outcomes. Indeed, a recent British study (Hamlyn *et al*, 2004) showed that there was no impact on conviction rates with the introduction of vulnerable witness protections.

In Australia, what exactly would specialisation involve? A specialist court based on the adversarial model to meet the objectives that I mentioned at the beginning of my talk could include the following features.

- specialist listing arrangements and screening process to identify cases that fall within the sex offences category;
- case management to reduce delays and arrange pre-trial matters;
- designated courtrooms equipped with state-of-the-art CCTV facilities;

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87). Overall, the conviction rate was 54 per cent (when guilty pleas and guilty verdicts are combined) compared with 46 per cent for the National Data. This conviction rate has remained relatively constant since 1997 (Ursel, 2004).

- the introduction of legislation which makes mandatory the pre-recording of a child's evidence-in-chief, cross-examination and re-examination;
- otherwise, mandatory use of CCTV for adult complainants and where pre-recording for children is not possible;
- a remote room located outside the court precinct with a waiting room (and play area for child complainants); or separate access to CCTV rooms and the court to prevent victim intimidation;
- creation of a core group of specialist judges who have sufficient experience in conducting criminal matters (particularly sexual assault trials) and are trained in child development issues, the special problems confronted by Aboriginal complainants and complainants with cognitive disabilities;
- rotation of specialist judges through the sex offences court to minimise burnout;
- establishment of a specialist prosecutorial unit within the ODPP with prosecutors undergoing the same training as judges;
- appointment of one prosecutor to each case so that continuity is maintained from committal proceedings through to sentencing;
- on-going training programs for prosecutors/judges including counselling support services to prevent burn-out and high staff turnover;
- exemption of adult complainants from giving evidence at committal hearings (as is already the case in NSW for child complainants);
- use of intermediaries to translate defence counsel questions into age/culturally appropriate language (for child complainants, those with cognitive disabilities and those who will experience language and cultural barriers, such as Aboriginal complainants);
- specialist witness service (independent of the DPP) to prepare complainants and provide pre- and post-trial counselling (using the WA child witness service as a model);
- alternative models for the punishment of offenders, such as diversion of the offender into treatment where appropriate plus the attachment of mandatory treatment programs to all sentences (custodial and otherwise);

- continued monitoring of child sex offenders and high risk adult sex offenders after conviction using the NSW child protection register and NSW child protection prohibition orders as models;
- a data collection method for evaluating of the court's effectiveness;
- relevant reforms to rules of evidence and judicial directions to juries.

A few of the above features are already in existence in some jurisdictions, whilst many of the others in the list were canvassed at a NSW taskforce which looked at the issue of specialisation for sex offences in NSW. **[12 mins]**

One further aspect of specialisation to consider, especially where evidentiary problems are particularly difficult (for example, the sexual abuse of children in Aboriginal communities) would be a specialist court based on the inquisitorial system. This part of my talk is based on a study of a "less adversarial" pilot program for the resolution of custody cases in the Family Court of Australia.

The program is called the Children's Cases Program or the Less Adversarial Approach. The proceedings are considered to be "less adversarial" or more inquisitorial because they are controlled by the judge rather than the parties. Entry into the program is with the consent of the parties, although there is no restriction on the type of cases that enter the pilot program so that some may include the issue of sexual abuse. The parties must consent to a number of things such as waiver of the rules of evidence (the initiation of s 190 of the *Evidence Act* 1995 (Cth)) and consent to the judge making findings on issues during proceedings.

In this pilot, the judge takes charge in a more significant way compared to traditional adversarial proceedings:

- the judge identifies the contentious facts/issues that are to be determined between the parties;
- since the rules of evidence under the *Evidence Act* 1995 (Cth) are waived, all evidence is 'conditionally admitted' and the judge determines the weight to be given

to it and the manner in which it is presented. Objections to the admission of evidence can only be made on the grounds of privilege or on the grounds that it has been procured illegally or fraudulently;

- in consultation with the parties, the judge will determine which witnesses are to be called and the issues they will be called to evidence.

Although the parties' lawyers are present in the hearing and can assist in deciding the issues in dispute, their role is reduced because they do not control the proceedings.

In order to decide whether a "less adversarial" approach would be appropriate in the criminal trial context, it is necessary, first, to consider the scope and nature of judicial power exercised in State courts. In NSW, for example, when State courts are exercising State jurisdiction (as opposed to Federal jurisdiction), they are not required to exercise power according to Chapter III of the Commonwealth Constitution. This means that they may exercise non-judicial powers since the separation of powers doctrine does not operate in a constitutional sense in NSW (*Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577; *Baker v R* [2004] HCA 45; see also *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 on the powers of the Queensland Supreme Court). A state court based on a "less adversarial" model may therefore exercise powers that would not normally be considered to be judicial in nature, as long as it is not exercising Federal jurisdiction. **[15 mins]**

One of the key changes to the criminal trial in a "less adversarial" approach would involve allowing a waiver of the rules of evidence without the consent of the accused. This would be particularly necessary in relation to hearsay evidence, tendency evidence and similar fact evidence. Waiver of the rules of evidence[3] would still mean the judicial

[3] Section 190 allows for the dispensation of the rules of evidence as set out in sub-section (1) with the parties' consent. In a criminal trial, a defendant's consent is not effective unless the defendant has been advised by his/her lawyer or the court is satisfied the defendant understands the consequences of giving consent. The rules that may be dispensed with only include: general rules about giving evidence by witnesses (Division 3, Part 2.1); rules governing examination in chief and re-examination (Division 4, Part 2.1); rules governing cross-examination (Division 5, Part 2.1); rules governing the methods of adducing evidence of the contents of documents (Part 2.2); rules governing the adducing of other

powers exercised in relation to the admission of evidence and the weight to be given to that evidence by the trial judge were valid judicial powers. Under the Evidence Act, for example, only relevant evidence could be admitted (under Part 3.1 of the *Evidence Act*) and the trial judge would still be required to make binding decisions about the admissibility of evidence and to consider the reliability of particular evidence when determining the weight to be given to it as fact-finder.[4] Indeed, the accused's right to appeal would be unaffected and could include grounds such as the admission of irrelevant evidence and the attribution of too much weight to a particular item of evidence by the trial judge.

Many people will argue, however, that a "less adversarial approach" would infringe the accused's right to a fair trial. But before being able to analyse the validity of this claim, what does this right actually entail? My analysis of the case law shows that this right is somewhat limited:

- "the right to have adequate time and facilities for the preparation of his or her defence" (*Dietrich v R* (1992) 177 CLR 292 at 300, per Mason CJ and McHugh J);
- freedom from "excessive questioning or inappropriate comment" by the trial judge which, in the context of the whole trial, indicate that the accused has been denied a fair trial (*Galea v Galea* (1990) 10 NSWLR 263 at 281, per Kirby A-CJ);
- if required, the provision of free assistance of an interpreter for the accused and his/her witnesses (*Dietrich v R* (1992) 177 CLR 292 at 300, per Mason CJ and McHugh J; at 331, per Deane J);
- competent legal representation (*Dietrich v R* (1992) 177 CLR 292 at 317, per Brennan J; at 349, per Dawson J) such that a trial might be considered to have miscarried on the grounds of the incompetence of defence counsel;
- where a lack of legal representation (which is not the fault of the accused) may lead to an unfair trial, a trial judge has the power to grant a stay of proceedings upon

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evidence (Part 2.3); the hearsay rule (Part 3.2); the opinion rule (Part 3.3); rules governing the admissibility of admissions (Part 3.4); rules governing the evidence of judgments and convictions (Part 3.5); rules governing tendency and coincidence evidence (Part 3.6); the credibility rule (Part 3.7); and the rules governing character evidence (Part 3.8).

[4] Parts 3.10 (rules governing privileges) and 3.11 (discretions to exclude evidence) would still apply according to s 190, *Evidence Act* 1995 (NSW).

application of an adjournment or stay by the accused until representation is available (*Dietrich v R* (1992) 177 CLR 292 at 298, per Mason CJ and McHugh J; at 371, per Gaudron J). Such a situation is more likely where an accused has been charged with a serious offence. If such an application is refused and the trial is unfair by reason of lack of representation, any resultant conviction must be quashed on appeal;

- the requirement that an accused person receive a fair trial means that the trial be conducted in accordance with law (*Dietrich v R* (1992) 177 CLR 292 at 326, per Deane J; at 362, per Gaudron J);
- the right to procedural fairness which includes prevention by the court of abuse of process[5] through a stay of proceedings (*Barton v R* (1980) 147 CLR 75 at 96, per Gibbs ACJ and Mason J; *Dietrich v R* (1992) 177 CLR 292 at 300, per Mason CJ and McHugh J; at 327, per Deane J);
- exclusion of admissible and relevant evidence where its probative value is outweighed by its prejudicial effect (*Dietrich v R* (1992) 177 CLR 292 at 363, per Gaudron J);
- specific judicial warnings to be given in relation to unreliable evidence such as accomplice evidence (*Dietrich v R* (1992) 177 CLR 292 at 328, per Deane J) or prison informant evidence (*Pollitt v R* (1992) 174 CLR 558);
- the requirement that a trial be fair may include where and when a trial should be held ((*Dietrich v R* (1992) 177 CLR 292 at 363, per Gaudron J) because of, for example, pre-trial publicity.

Aspects of the right to a fair trial are usually expressed "in negative terms as a right not to be tried unfairly" rather than a positive right to a fair trial (*Dietrich v R* (1992) 177 CLR 292 at 299, per Mason CJ and McHugh J). The prosecution's burden of proof and the presumption of innocence ensure that fundamental trial processes are followed in any criminal trial which, in turn, ensures that the fact-finder determines the weight to be given to particular evidence and makes its findings in a context that is weighted in favour of fairness to the accused. This context would be preserved in "less adversarial"

[5] For a definition of abuse of process, see *Jago v District Court of NSW* (1989) 168 CLR 23 at 47 per Brennan J.

proceedings. Decisions about evidence and the calling of witnesses could be made by the trial judge in consultation with the parties and cross-examination would not necessarily be impeded if changes are made to the style of cross-examination, rather than its content. Even so, the NSW CCA has recently observed that controls over the content of cross-examination in the form of rape shield provisions cannot be successfully challenged by the defence (*MAK and MSK v R*, 6 September 2004).

Part of the content of the requirement that a criminal trial be fair are "'the interests of the Crown acting on behalf of the community as well as to the interests of the accused'" (*Dietrich v R* (1992) 177 CLR 292 at 335, per Deane J; quoting *Barton* v *R* (1980) 147 CLR 75 at 101, per Gibbs ACJ and Mason J). This means that the concept of fairness is not fixed and immutable and "may vary with changing social standards and circumstances" (*Dietrich v R* (1992) 177 CLR 292 at 328, per Deane J). It is inextricably "bound up with prevailing social values" (*Dietrich v R* (1992) 177 CLR 292 at 364, per Gaudron J) and can take into account the interests of the victim (*Dietrich v R* (1992) 177 CLR 292 at 357, per Toohey J), the "need to promote the accuracy and coherency of [a sexual assault] complainant's evidence" and the desire of encouraging victims to report sex offences to the police (Debus, 2003: 2957).

In the context of child sexual abuse, changing community standards also include recognition of the frequency (incidence) of such abuse, the difficulties of protecting vulnerable children from the sophisticated grooming processes of offenders and the high probative value of evidence that shows a defendant's previous involvement in sexual activities with the complainant or other children.

A useful test for determining whether a trial has been or will be unfair is whether it "involves the risk of the accused being improperly convicted" (*Dietrich v R* (1992) 177 CLR 292 at 365, per Gaudron J). Clearly, the aspect of the fair trial principle that could be affected by a "less adversarial" approach is the admissibility of prejudicial or unreliable evidence. In order for a "less adversarial" approach not to impinge upon the fair trial principle in relation to the admission of prejudicial evidence, it would be

necessary for such trials to be judge alone trials to overcome the possible prejudicial effect on a jury from admitting evidence such as tendency and similar fact evidence. The fact that some criminal trials involve non-jury trials at the election of the accused indicates that the absence of a jury does not, of itself, infringe the fair trial principle, nor is the accused deprived of his/her rights to meet the case against them (*Nicholas* (1998) 193 CLR 173 at 208-209, per Gaudron J). Similarly, when it comes to the exclusion of hearsay evidence, such as evidence of what the complainant said to her/his first confidant, on the grounds of unreliability there are few dangers from the admission of such evidence in a judge alone trial because of the ability of the judge to weigh the its reliability.

Constitutionally speaking, therefore, there appears to be no barrier to the establishment of a specialist court based on a "less adversarial" model since State courts may exercise non-judicial powers as long as they are not exercising Federal jurisidiction. In any case, the broader judicial powers that would be exercised within a "less adversarial" model *are* within the definition of judicial powers set out by the High Court in a number of cases. As such, it is possible to establish a "less adversarial" model for the prosecution of child sex offences by careful reference to the broader judicial powers that might be exercised and all aspects of the fair trial principle to ensure that the principle is not undermined. The principle is not likely to be undermined by conferring on a trial judge discretionary judicial powers that would enable him/her to exercise greater control over the trial process so that the focus of the trial becomes an inquiry into the guilt of the accused, rather than a battle between two adversarial parties. This greater control could include determining the issues in dispute and the witnesses to be called (in consultation with the parties), admitting all relevant evidence, determining the weight to be given to that evidence, the testing of the evidence of witnesses and, where cross-examination is permitted by counsel, strict control over the cross-examination process by the court. **[22 mins]**

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